SUPREME COURT OF FLORIDA

Case No. 85,384
District Court of Appeal
First District No. 94-1047
Circuit Court No. 93-12860

FILED
SID J. WHITE
JUN 5 1995
CLERK, SUPREME COURT
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Chief Deputy Clerk

NANCY GALE GARRETT,

Petitioner,

vs.

LARRY ALLEN GARRETT,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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EXPLANATORY STATEMENT

The Petitioner will be referred to as Petitioner, the Wife, or Mrs. Garrett. The Respondent will be referred to as Respondent, the Husband, or Mr. Garrett. The Respondent's Answer Brief will be referred to by the abbreviation "AB". References to the Appendix to Petitioner's Brief on the Merits will continue to be referred to by the abbreviation "App". The Appendix attached to Respondent's Answer Brief will be referred to by the abbreviation "AB App.". All underlining was added by the scrivener unless otherwise indicated.

ARGUMENT

ISSUE I: WHEN IS THE RESPONDENT'S PRIOR RESIDENCE IN FLORIDA SUFFICIENT TO CREATE PERSONAL JURISDICTION IN AN ACTION CONCERNING ALIMONY, CHILD SUPPORT, OR DIVISION OF PROPERTY?

In his Answer Brief, Respondent advanced a theory that if married persons leave Florida and the marriage is not reestablished by both parties in Florida, the proximity has been ended and §48.193(1)(e), Fla. Stat. is inapplicable (AB-8)

Before responding to that argument, a brief review of the facts regarding the parties' residence history in this case is appropriate. The parties moved to Texas in 1986. The parties separated in 1991 and in that year the Wife initiated her action for dissolution of marriage in Texas (App-15). In Respondent's Motion for Reinstatement, filed in the District Court of Tarrant County, Texas, Respondent's Texas attorney alleged that Mr. Garrett had been negotiating in good faith for over a year (AB App-30). Respondent alleged that the dismissal of the Texas divorce prejudiced Respondent in that

> ...Respondent wishes to finalize this divorce. Petitioner has been negotiating with the Respondent for the past year and the parties are very close to a final settlement. To terminate negotiations at this point will prejudice Petitioner as well as Respondent. Additionally, Petitioner has availed herself of the Texas forum for over a year now and should be required to complete the divorce in Texas (AB App-31).

The Texas divorce was dismissed in November of 1993. The Respondent had been living in Indiana since August of 1992 (App-18). Petitioner and the minor child had been living in Florida since August of 1992 also (App-6). The Respondent was

served by Petitioner with Florida divorce papers approximately 15 months after both parties had left Texas. Respondent alleged: "...Judicial economy would have been advanced had Petitioner concluded her divorce action in the State of Texas, her and her Husband's then State of residence." (AB-3). However, Texas had not been the parties State of residence for over a year in November of 1993. Presumably, if the parties had been able to settle, they would have done so. Since neither party was residing in Texas, it would have been inconvenient and expensive for both to proceed to a contested final hearing in Texas.

Respondent's "logical" connection argument derives from Soule v. Rosasco-Soule, 386 So.2d 862 (Fla. 1st DCA 1980). In that decision the Court quoted §48.193(1)(e) Fla. Stats. (1977) and 48.193(3), Fla. Stats. (1977):

> Only causes of action arising from acts or omissions enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section... Soule at 863.

As Petitioner asserted in her initial brief, the quoted section of Section 48.193(3) has been deleted from the current statute. This certainly undermines Respondent's argument that there is a requirement under Florida law that there be a logical nexus between the time of the prior residence in Florida and the commencement of a Florida divorce action. Respondent's definition of logical nexus seems to be that the cause of filing the divorce must have occurred in Florida.

The language of Section 48.193(1)(e) is not ambiguous. The Statute indicates that if the defendant "resided in this state preceding the commencement of the action," he has submitted himself to personal jurisdiction in the State of Florida. This extremely broad language, enacted by the legislature, has been interpreted by Florida Courts, beginning with Shammay v. Shammay, 491 So.2d 284 (Fla. 3d DCA 1986) to mean that the prior residence must proximately proceed the commencement of an action and that proximity is to be determined in light of the totality of the circumstances. Shammay at 285. Totality of the circumstances is the proper test. Petitioner's allegation, that there must be a logical, factual relationship between the prior residence and the filing of the action (AB-7) is much narrower than the Shammay test.

Shammay, supra, does not stand as precedent for Respondent's contention that both parties leaving the state destroys all effect of a prior residency. In Shammay, the Court indicated that the parties were "entirely free to change their residence as indeed their conduct indicates they have". Shammay at 286. The Court also quoted Khourib v. Khourib, 444 So.2d 69 (Fla. 4th DCA 1984) as support for that contention. Khourib stands for the proposition that if a party resides in Florida for six months prior to the filing of a Petition for Dissolution, then renounces any intent to reside in Florida and resumes residency in Canada, that party is unable to establish residency for six months next proceeding filling of the petition. Khourib at 70. These cases provide no support for the theory that a voluntary change of residence

eliminates all prior residence in Florida for purposes of determining proximity.

Clearly, the words of the statute do not indicate that in order to establish personal jurisdiction over prior residents, the party filing the action must have been a continuous resident of Florida throughout the marriage, or that the parties must both reside in Florida at the time of their "break-up". Respondent did not refer to the Statute in making this claim. At the present time, the entire society is very mobile and it is not at all unusual for people to change their State of residence several times during the marriage. It surely cannot be the policy of this State to discourage residents who move from ever returning to Florida.

In his Answer Brief, Respondent several times alleges that Petitioner is improperly seeking to have issues which were finally determined below reconsidered in this Court (AB-1-3). The U.S. Supreme Court cases previously cited by Petitioner in her Initial brief establish that in these personal jurisdiction of nonresident cases, each case must be decided on it own particular facts. The U.S. Supreme Court has never suggested that a simple quantitative test can be applied to every factual situation. This court could not decide the question without reference to the facts.

Petitioner, in the Summary of Argument, seems to be claiming that only a quantitative time analysis is needed in order to interpret the statute but later in the brief develops the "logical proximity" argument (AB 8). Florida is a "no fault" divorce State. In the instant case the parties separated in Texas.

Respondent seems to be arguing that whatever happened in Texas leading up the separation and filing for divorce are the only facts to consider in determining jurisdiction and that all of the circumstances of the parties' prior 12 years in Florida are not relevant. Petitioner alleges that there is no basis for Respondent's interpretation. This is particularly true for the facts considered relevant for a Court's equitable distribution of assets and determination of entitlement to alimony. The whole span of the marriage must be considered, not just the ending.

The Respondent ignored the Petitioner's argument that the Respondent's continuing business contacts in Florida were an important aspect of the totality of the circumstances and such continuing contact was sufficient in itself to subject Respondent to personal jurisdiction in Florida.

Respondent also had no answer to the United States Supreme Court cases cited in the Initial Brief which indicate that when personal jurisdiction of a non-resident is sought, due process requires that the Respondent have certain minimum contacts with the State such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. International Shoe Company v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945). Considering Mr. Garrett's historical personal contacts and continuing business contacts with the State of Florida, it does not offend traditional notions of fair play and justice that he should have to litigate a divorce in Florida. Such an outcome makes sense in this case. It would be needlessly

expensive for both parties to have a contested divorce in Texas. The Wife has no contact with the State of Indiana and since she is relatively impecunious, her ability to pursue her rights regarding alimony and equitable distribution in Indiana is questionable. Mr. Garrett is frequently in Florida on business and it would not be unreasonably inconvenient for him to litigate in Florida.

Respondent concludes his argument by suggesting that Petitioner's citation to Section 48.193(1)(h) Fla. Stats. (1993) is wholly without merit. Petitioner disagrees. Section 61.1302, the Uniform Child Custody Jurisdiction Act, does indicate that child custody matters should be determined in the home state, which is defined as the child's place of residence with a parent for at least six months prior to the filing of the action. However, this Uniform Act refers to custody only. No one has ever disputed that Florida has jurisdiction to determine child custody. The statute does not authorize the home state to determine the non-resident parent's obligation to pay child support if he/she is a nonresident. However, Chapter 742 Fla.Stats. (1993) Determination of Paternity, provides for awards of child support, attorney's fees, suit money and costs. These financial remedies are not available under the Uniform Child Custody Jurisdiction Act in Chapter 61 to Florida former spouses who are suing nonresident spouses, but they are available to Florida unmarried mothers who are suing a nonresident for paternity and can establish personal jurisdiction over the nonresident by reference to §49.193(1)(h).

A review of the totality of the circumstances in this case leads to the conclusion that Respondent has sufficient historical contacts and continuing contacts with the State of Florida such that personal jurisdiction of Respondent in Florida is appropriate.

CONCLUSION

For the foregoing reasons of law and fact the Petitioner respectfully requests that this Honorable Court would answer the certified question by reference to a totality of the circumstances test such that application to the facts in the instant case would result in reversal of the First District Court's opinion and affirmance of the trial Court's corrected Order denying Motion to Dismiss and Quash Service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Gary A. Benson, Esquire**, 2955 Hartley Road, Suite 101, Jacksonville, Florida 32257, by United States mail this 2nd day of June, 1995.

ZISSER, ROBISON, BROWN, & NOWLIS, P.A.

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