

SUPREME COURT OF GEORGIA

Midkiff v. Midkiff, 275 Ga. 136

562 S.E.2d 177 (2002) · No. S02A0619 · Decided April 15, 2002

SUMMARY

The Supreme Court of Georgia held that the trial court lacked jurisdiction to grant a divorce because the husband did not establish a Georgia domicile through actual residence and intent to remain. The court reversed the divorce decree and related custody, child-support, and modification orders because those remedies depended on a valid divorce and the court lacked personal jurisdiction over the wife for child support.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Carley, Justice
JURISDICTION	Georgia
DECIDED	April 15, 2002
DOCKET	S02A0619
DISPOSITION	reversed
PROCEDURAL POSTURE	Wife appealed, pursuant to the Supreme Court of Georgia's grant of a discretionary appeal, from the trial court's denial of her motion to set aside a final divorce decree and a subsequent child-custody and child-support modification order.
STANDARD OF REVIEW	Review of the trial court's denial of a motion to set aside the divorce decree and modification order; jurisdictional issues reviewed as questions of law.
PRECEDENTIAL VALUE	Published opinion of the Supreme Court of Georgia; binding state precedent.
PARTIES	Wife v. Husband

TOPICS

- divorce
- family law procedure
- subject matter jurisdiction
- child custody
- child support

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Husband established the Georgia domicile required for the trial court to exercise jurisdiction over the marital relationship and grant a divorce.
2. Whether the trial court had authority to award custody and child support when no valid divorce had been granted.
3. Whether the trial court could order Wife to pay support for the children without personal jurisdiction over her.

HOLDINGS

1. A military service member does not establish a Georgia domicile merely by changing his military home of record to a Georgia county; Georgia divorce jurisdiction requires the same actual change of residence and intent to remain applicable to other citizens, unless the statutory military-post exception applies. Because Husband was not stationed at a military facility in Georgia and had not established actual physical residence in the state, the trial court lacked jurisdiction over the marital res and erred in failing to set aside the divorce decree.
2. Because no valid divorce was granted, the trial court lacked power in the divorce proceeding to make a final disposition of the children's custody and control or to award child support. The subsequent modification order therefore also had to be set aside.
3. The trial court was not authorized to order Wife to pay support for the children because it did not have personal jurisdiction over her.

KEY QUOTATIONS

"It requires both act and intent to establish a residence, and either without the other is insufficient." (275 Ga. at 137)

"He did not establish actual, physical residence in this state merely by effectuating an administrative change of his designated home state on his military records to the location where his parents had moved." (275 Ga. at 138)

"That exception does not include members of the military, such as Husband, who have not been stationed in a United States military facility located in this state." (275 Ga. at 138)

"In this case, since no valid divorce was granted for the reason previously stated, the court was without power to fix custody and control of the minor children of the parties." (275 Ga. at 139)

FACTUAL BACKGROUND

The parties married in 1993 outside Georgia, lived in Florida, had three children, and later moved to Germany while Husband was stationed there with the military. Wife returned to the United States and never lived in Georgia; Husband had lived in Georgia only for brief periods as a minor and was stationed in Germany for more than six months before filing for divorce. Husband changed his military home of record to Spalding County,

where his parents lived, but did not reside in or visit that county during the marriage and had not filed a Georgia tax return or registered to vote there.

PROCEDURAL HISTORY

Husband filed for divorce in Spalding County, Georgia, claiming that the county was his military home of record. After service by publication and Wife's failure to answer, the trial court entered a divorce decree awarding Husband custody and child support. On petition of Husband's parents, apparently with Husband's consent, the court modified the awards to grant custody to the parents and order Husband to pay child support. The trial court denied Wife's motion to set aside both orders, and the Supreme Court of Georgia reversed.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The trial court must set aside the final divorce decree and the subsequent modification order.

CASES CITED

- *Abernathy v. Abernathy*, 267 Ga. 815, 482 S.E.2d 265 (1997)
- *Kendrick v. Parker*, 258 Ga. 210(1), 367 S.E.2d 544 (1987)
- *Bufford v. Bufford*, 223 Ga. 133, 153 S.E.2d 718 (1967)
- *Williams v. Williams*, 226 Ga. 734, 177 S.E.2d 481 (1970)
- *Hostler v. Hostler*, 151 So.2d 672 (Fla.App.1963)
- *Darbie v. Darbie*, 195 Ga. 769, 25 S.E.2d 685 (1943)
- *Griffis v. Griffis*, 229 Ga. 587, 193 S.E.2d 620 (1972)
- *Rowe v. Rowe*, 195 Ga. App. 493, 393 S.E.2d 750 (1990)
- *Harmon v. Harmon*, 209 Ga. 474, 74 S.E.2d 75 (1953)
- *Leitzke v. Leitzke*, 239 Ga. 17, 235 S.E.2d 500 (1977)
- *Hicks v. Hicks*, 193 Ga. 446(1), 18 S.E.2d 754 (1942)

OPINION

CARLEY, J.

562 S.E.2d 177 (2002) 275 Ga. 136 MIDKIFF v. MIDKIFF. No. S02A0619. Supreme Court of Georgia. April 15, 2002. Richard L. Collier, Griffin, for appellant. Don H. Taliaferro, Griffin, for appellee. CARLEY, Justice. The parties in this divorce case were married in 1993, but not in Georgia. They lived in Florida, had three children, and moved to Germany where Husband was stationed with the military.

Wife later returned to the United States alone. She has never lived in Georgia, and Husband has not lived in this state since brief periods when he was a minor. However, he brought suit for divorce in Spalding County, alleging that that county is his home of record while he is serving in the armed forces.

After service by publication, Wife did not answer. The trial court entered a final judgment granting a divorce and awarding custody of the children and child support to Husband. On petition of Husband's parents, apparently with his consent, the trial court modified its previous awards by granting custody to them and ordering Husband to pay child support. Wife thereafter filed a motion to set aside both the final judgment and the modification order, which the trial court denied.

She appeals from this order pursuant to our grant of a discretionary appeal. *178 1. Wife contends that the trial court never had jurisdiction over the parties' marital relationship. As the party seeking a divorce, Husband had to show "that the trial court has jurisdiction over the res of the marriage which results from his or her domicile in this state for the six-month period preceding the filing of the action."

Abernathy v. Abernathy, 267 Ga. 815, 816, 482 S.E.2d 265 (1997). See also OCGA § 19-5-2. It is undisputed that Wife's domicile has never been in Georgia. Husband showed that, prior to the time he filed this action, he changed his military "home of record" to Spalding County where his parents had moved.

However, he did not live in or even visit Spalding County at any time during the marriage, but was stationed in Germany for more than six months prior to filing this action. He has never filed a tax return or registered to vote in Georgia. A member of the military may abandon his former domicile and establish a new domicile in this state by meeting the same statutory requirements that apply to any other citizen.

See *Kendrick v. Parker*, 258 Ga. 210(1), 367 S.E.2d 544 (1988). However, Husband did not do so. The jurisdictional rules applicable to a divorce action in Georgia provide that "[t]he domicile of a person sui juris may be changed by an actual change of residence with the avowed intention of remaining at the new residence." (Emphasis supplied.) OCGA § 19-2-1(b). "It requires both act and intent to establish a residence, and either without the other is insufficient."

[Cit.]" *Bufford v. Bufford*, 223 Ga. 133, 134(2), 153 S.E.2d 718 (1967). "There must be a concurrence of actual residence and the intention to remain, to acquire a domicile. [Cits.] If a person actually removes to another place, with the intention of remaining there for an indefinite time as a place of fixed domicile, such place becomes his domicile." (Emphasis supplied.)

Williams v. Williams, 226 Ga. 734, 736(2), 177 S.E.2d 481 (1970) (holding that it is not required that the plaintiff in a divorce case actually reside in the state during the six months preceding the

filing of the action, so long as he has previously established the necessary actual residence and has not subsequently changed his domicile).

Although Husband may have manifested some intent for Georgia to become his legal residence, he did not establish actual, physical residence in this state merely by effectuating an administrative change of his designated home state on his military records to the location where his parents had moved. See *Hostler v. Hostler*, 151 So.2d 672 (Fla.App.1963). OCGA § 19-5-2 authorizes a divorce action by any person who has not resided in Georgia for six months, but who has been a resident on a United States army post or military reservation within this state for one year preceding the filing of the petition.

However, this statutory exception to the six-month residency requirement has its basis in, and cannot be extended beyond, the identical constitutional exception contained in Art. VI, Sec. II, Par. I of the Georgia Constitution of 1983. See *Darbie v. Darbie*, 195 Ga. 769, 770(6), 25 S.E.2d 685 (1943). That exception does not include members of the military, such as Husband, who have not been stationed in a United States military facility located in this state.

Accordingly, the trial court erred in failing to set aside the final divorce decree. 2. Under OCGA § 19-9-1, the trial court can order "a final disposition of the minor children of the parties only when a divorce is granted. (Cit.) This power is incident to the divorce proceeding, and is exercisable only when a valid divorce is granted between the parties.

(Cits.)...` [Cit.]" *Griffis v. Griffis*, 229 Ga. 587, 591-592(2), 193 S.E.2d 620 (1972). See also *Rowe v. Rowe*, 195 Ga.App. 493, 495(5), 393 S.E.2d 750 (1990). "In this case, since no valid divorce was granted for the reason previously stated, the court was without power to fix custody and control of the minor children of the parties...." *Harmon v. Harmon*, 209 Ga. 474, 475(4), 74 S.E.2d 75 (1953).

Likewise, the award of child support "is without legal force and effect." *Harmon v. Harmon*, supra at 475(3), 74 S.E.2d 75. Compare *Leitzke v. Leitzke*, 239 Ga. 17, 18(2), 235 S.E.2d 500 (1977) (a claim for child support *179 in a divorce complaint was valid under the Civil Practice Act where the parties had previously been divorced and the latter divorce action was dismissed simply because the parties' purported remarriage was void).

Moreover, as Husband concedes, the trial court was not authorized to order Wife to pay alimony for support of the children, as it did not have personal jurisdiction over her. *Abernathy v. Abernathy*, supra at 817, 482 S.E.2d 265; *Hicks v. Hicks*, 193 Ga. 446(1), 18 S.E.2d 754 (1942).

Therefore, the trial court should have granted the motion to set aside the subsequent modification order as well as the final divorce decree. Judgment reversed. All the Justices concur.

