

JO ANN EIGELSBACH, PLAINTIFF vs. ERIC V. VANBUSKIRK, DEFENDANT, Franklin County Branch, Civil Action-Law No. F.R. 1996 - 330 Divorce

Eigelsbach v. VanBuskirk

Divorce - Subject Matter Jurisdiction - Domicile - In Personam Jurisdiction - Minimum Contacts - Determination of Economic Rights - Compliance With Pennsylvania Rule of Civil Procedure 1920.72(a)

1. In order for a Pennsylvania court to have jurisdiction over a divorce, at least one of the parties must have been a resident for at least six months prior to the commencement of the action.
2. To establish domicile, a party must have a residence within Pennsylvania as well as an intent to remain in that location.
3. Where the defendant in a divorce action disputes the plaintiff's assertion of domicile, and where the record merely contains contradictory statements from both parties, there is no basis for the court to determine whether the plaintiff has established domiciliary intent. Accordingly, the record must be developed sufficiently by means such as an evidentiary hearing on the matter.
4. Where the defendant, who is a Maryland resident, asserts that a Pennsylvania court does not have personal jurisdiction over him, the plaintiff has the burden of showing that the exercise of jurisdiction is permissible and all bases for establishing jurisdiction that are not raised in the response to the objection are waived.
5. A party does not automatically subject himself to jurisdiction in a Pennsylvania court by accepting properly executed service at his home in Maryland.
6. Pursuant to Pennsylvania's Long Arm Statute, a party may be subject to a Pennsylvania court's jurisdiction if, *inter alia*, he has had minimum contacts with Pennsylvania.
7. Although a Pennsylvania court may enter a divorce decree if one of the parties is a domiciliary of Pennsylvania, the court cannot determine the economic rights of a party who is not subject to the jurisdiction of a Pennsylvania court.
8. Although strict compliance with Pa.R.C.P. 1920.72(a) is not required, it is necessary to include the actual commencement date of a party's residence within Pennsylvania since it is crucial to the determination of subject matter jurisdiction. Substantial compliance with this Rule does not permit the omission of averments of fact mandated by the Rule.

Rosemary A. McDermott, Esquire, Counsel for Plaintiff
Carol L. Van Horn, Esquire, Counsel for Defendant

OPINION AND ORDER

Kaye, J., November 22, 1996:

OPINION SUR DEFENDANT'S PRELIMINARY
OBJECTIONS

On May 28, 1996, Jo Ann Eigelsbach ("plaintiff") filed a complaint in divorce against Eric V. VanBuskirk ("defendant"). On June 27, 1996, defendant filed preliminary objections to the complaint raising jurisdictional questions and the issue of whether the Complaint conformed to the Rules of Civil Procedure in that it failed to allege the length of plaintiff's residence in the Commonwealth of Pennsylvania. Plaintiff filed an answer to the preliminary objections on July 11, 1996. The matter was then placed on the argument list. Both parties submitted briefs, and the matter was orally argued, this making it ripe for disposition. The issues raised in the preliminary objections will be addressed as presented therein.

I. *Subject matter jurisdiction*

In order for this Court to have subject matter jurisdiction I an action for divorce in Pennsylvania, certain requirements must be met. More specifically, the relevant statute requires the following:

No spouse is entitled to commence an action for divorce or annulment unless at least one of the parties has been a *bona fide* resident in this Commonwealth for at least six months immediately previous to the commencement of the action. Both parties shall be competent witnesses to prove their respective residence, and proof of actual residence within this Commonwealth for six months shall create a presumption of domicile within this Commonwealth.

23 Pa.C.S.A. §3104(b)
[emphasis added].

A *bona fide* domicile has been defined by Pennsylvania Courts as a "residence in the place where domicile is claimed and an intent to reside permanently in the location." *McCloskey v. McCloskey*, 461 Pa. 267, 269, 336 A.2d 279, 280 (1975). See also *Zinn v. Zinn*, 327 Pa.Super. 128, 475 A.2d 132 (1984); *McKenna v. McKenna*, 282 Pa.Super. 45, 422 A.2d 668 (1980). Further, once a *bona fide* domicile has been established, it continues until a person makes a voluntary change by a physical move to a new location coupled with an intent to remain in the new domicile.

See *Zinn*, 327 Pa.Super. At 130 - 131, 475 A.2d at 133. See also *Bell v. Bell*, 326 Pa. Super. 237, 473 A.2d 1069 (1984).

Defendant alleges that the above statutory requirements for this Court to exercise its authority in this proceeding have not been met in that plaintiff was not a bona fide resident of the Commonwealth of Pennsylvania for the requisite six month period prior to instituting the instant action. In this regard, we note that the complaint recites, *inter al*:

The Plaintiff has been a bona fide resident of the commonwealth of Pennsylvania for at six (6) months immediately previous to the filing of this Complaint.

[Complaint ¶ 3].

While defendant disputes the accuracy of this statement, he has done so only by raising certain factual issues in his preliminary objections to the Complaint which question whether plaintiff had the required domiciliary intent when she moved to Pennsylvania and, further avers that she "...has returned to her marital home, which continues to be occupied by the Defendant and the parties' two minor children, in Columbia, Maryland for three days and two nights each week" [¶4, Preliminary Objection].

The remainder of the Preliminary Objections is to the effect that the parties were married for twenty-four years, and resided in Maryland throughout that entire period of time.

Plaintiff's Answer to the Preliminary Objections asserts that she moved to Pennsylvania with the intent of separating from her spouse and that she made substantial expenditures of funds to furnish her rented Pennsylvania residence, "...although she was unaware of the future at that time..." [¶2 Answer to Preliminary Objections]. The Answer goes on to aver that she subsequently obtained a Pennsylvania driver's license, opened a Pennsylvania bank account, registered her car in Pennsylvania, got a Pennsylvania library card, and registered to vote in Pennsylvania.

The Answer further avers that her return to Maryland was to permit her to discharge her parenting duties only.

Based on the foregoing entirely paper record,¹ we conclude that it is not possible to determine that plaintiff did not possess domiciliary intent when she moved to Pennsylvania. The record, limited as it is, is contradictory and provides us with no basis upon which we can ascertain plaintiff's domiciliary intent. All that we have before us are bald averments of facts which the parties either disagree on, or which they would have us accept as tending to support, or rebut, the theory each has with respect to the issue not under consideration.

None of the averments provide us with a basis to determine the facts. As noted previously, the record in this case is limited to written statements in the pleadings which set forth the parties' viewpoints, but nothing upon which to resolve those concerns in which the parties disagree, and these are substantial matters which are crucial to a determination of this issue. As we currently have no evidence whatever upon which we can resolve these matters which are so fundamentally in dispute, we think the record is insufficiently developed to make the ultimate determination of this issue at this juncture. Since defendant has raised the issue, and has not met his burden in this regard, we will DENY relief.

II. *In Personam Jurisdiction*

Defendant's second preliminary objection asserts that this Court lacks personal jurisdiction over defendant who resided in Maryland. Since defendant has raised the issue of personal jurisdiction, plaintiff in this case has the burden of showing that exercise of jurisdiction over defendant is permissible. *Bergere v Bergere*, 364 Pa.Super. 100, 103 n.2, 527 A.2d 171, 173 n.2 (1987), citing *Temtex Products, Inc. v. Kramer*, 330 Pa.Super. 183, 479 A.2d 500 (1984). See also *Crompton v. Park Ward Motors*, 299 Pa.Super. 40, 446 A.2d 137 (1982). Since plaintiff has this burden, she waives all bases for establishing jurisdiction that she did not raise in her response to defendant's objection to jurisdiction. *Bergere*, 364 Pa.Super. At 103 n.2, 527 A.2d at 173 n.2.

¹ Neither party requested an evidentiary hearing.

In light of the foregoing, it is necessary to examine whether or not plaintiff has established that this Court has jurisdiction over defendant for the reasons advanced in her response to defendant's objections. First, plaintiff asserts that by accepting properly executed service at his home in Maryland, defendant has subjected himself to the jurisdiction of this Court. We disagree. It is well settled that acceptance of service outside the limits of the Commonwealth of Pennsylvania does not automatically confer upon a Pennsylvania Court in personam jurisdiction over the person accepting service. *Garzone v. Kelly*, 406 Pa.Super. 176, 184-185, 593 A.2d 1292, 1296-1297 (1991). In the instant case, defendant accepted service at his home in Maryland. Since defendant was not domiciled in Pennsylvania, was not present in Pennsylvania when process was served and did not consent to Pennsylvania's jurisdiction, this Court cannot exercise personal jurisdiction over defendant. See 42 Pa.C.S.A. §5301 (a) (1).

However, Pennsylvania's long arm statute could confer jurisdiction on this Court if defendant had minimum contacts in Pennsylvania. See *Ditzler v. Kamerman*, 384 Pa.Super. 184, 186-187, 557 A.2d 1107, 1108 (1989). The Uniform Interstate and International Procedure Act ("UIIPA") sets forth bases for jurisdiction over persons outside the Commonwealth of Pennsylvania. 42 Pa. C.S.A. §5321 et sq. In particular, §5322 (a) of the UIIPA enumerates specific types of contact with Pennsylvania that would satisfy the jurisdictional requirements. However, we do not see the need to set forth and analyze each of these provisions since plaintiff has not alleged that defendant falls within the scope of any of them. Therefore, of more relevance is §5322 (b) of the UIIPA which states the following:

(b) Exercise of full constitutional power over non-residents. - In addition to the provisions of subsection (2) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

We have already determined that defendant's presence in Maryland at the time of service and his non-consent to jurisdiction takes him outside the scope of §5301. Therefore, plaintiff had the burden of showing that the minimum contacts requirement sets forth above was met by defendant. since plaintiff has not established that defendant had any contact with Pennsylvania whatsoever, we have no basis to assume personal jurisdiction over him. See *Engle v. Engle*, 412 Pa.Super, 425, 430-32, 603 A.2d 654, 657-58 (1992).

Alternatively, plaintiff asserts that personal jurisdiction over defendant is not even necessary in this instance. In support of this, she cites the case of *Stambaugh v. Stambaugh*, 458 Pa. 147, 329 A.2d 483 (1974) for the proposition that the jurisdiction of this Court to enter the requested divorce decree is based upon the domicile of one spouse. While it is true that a Court in Pennsylvania may enter a divorce decree as long as one of the parties is a bond fide domiciliary pursuant to 23 Pa.C.S.A. parties is a bond fide domiciliary pursuant to 23 Pa.C.S.A. §3104 (b), that rule does not apply to the economic issues involved with resolving the marital status of the parties. In *Stambaugh*, the issue was whether an *ex parte* divorce decree entered in Florida was valid against the wife who was domiciled in Pennsylvania. The Court said that

although the Florida decree is entitled to full faith and credit, and is effective as to the marital status of the parties because the husband was a domiciliary of Florida, it is not controlling on the alimony issue since Florida did not have in personam jurisdiction over the wife.

Stambaugh, 458 Pa. 147 at 155,
329 A.2d at 487.

Because the Court had no jurisdiction over the wife in the divorce action, it made the divorce divisible; that is, it gave effect to the decree as far as the marital status of the parties was concerned but made it ineffective with respect to the economic issues associated with the divorce. *Id.* In so doing, the Court was following precedent established by the United States Supreme

Court in *Estin v. Estin*, 334 U.S. 541, 92 L.Ed. 1561, 68 S.Ct. 1213 (1948).

The present case differs from *Stambaugh* in that we are not asked to give full faith and credit to a divorce decree from another state. However, we find the reasoning sufficiently analogous to warrant a similar holding. We have no doubt that we have jurisdiction to enter a decree with respect to the marital status of the parties if it is determined that plaintiff had been a Pennsylvania domiciliary for six months prior to the filing of the complaint. Nevertheless, we cannot determine the economic rights of a party who is not subject to the jurisdiction of the Court. Although the Divorce Code does not give specific guidance on the question of personal jurisdiction over a non-resident defendant, we believe that the Code must be construed as conferring jurisdiction only to the extent permitted by the United State Constitution. Since plaintiff has not established that defendant had any contact whatsoever with Pennsylvania, we find that she has not met her burden of showing that the constitutional requirements of due process have been met. Accordingly, we find that we do not have in personam jurisdiction over defendant which is a prerequisite for the determination of the economic issues associated with plaintiff's complaint.

III. Conformance to Rule of Court

Defendant's third objection concerns plaintiff's alleged violation of Pa.R.C.P. 1920.72 (a) for her failure to include the actual beginning date of plaintiff's residence within the Commonwealth of Pennsylvania. This objection, while recognizing that strict compliance with the cited rule is not necessary, asserts that in this case the missing information is crucial to the determination of subject matter jurisdiction.

Pa.R.C.P. No. 1920.72 (a) provides, in relevant part, as follows:

The complaint in an action of divorce under section 3301 (c) or 3301 (d) shall begin with the Notice to Defend and Claim Rights required by Rule 1920.71 and shall be substantially in the following form.

(Caption)

COMPLAINT UNDER SECTION 3301 (c) OR 3301 (d) OF THE DIVORCE CODE

1. Plaintiff is _____,
(name)
who currently resides at _____,
(address) _____ (City)
_____, since _____,
(County) _____ (State)
_____,
(date)
2. Defendant is _____,
(name)
who currently resides at _____,
(address) _____ (City)
_____, since _____,
(County) _____ (State)
_____,
(date)

*
*
*

The Complaint filed herein omits the length of residence of the parties at the address set forth in the Complaint. While, as previously noted, the Rule requires *substantial* and not *strict* compliance with this format, we do not construe the concept of substantial compliance as permitting the omission of averments of fact mandated by the Rule. "Substantial" compliance in this context would permit a party, e.g., to alter the order in which the required averments are pleaded, but not to avoid pleading those facts set forth in the Rule. We find that plaintiff has failed to comply with this Rule of Civil Procedure and will sustain defendant's preliminary objections with leave to amend.

ORDER OF COURT

NOW, November 22, 1996, the court having considered defendant's preliminary objections, plaintiff's answer thereto, the parties' briefs and oral arguments, determines as follows:

1/ Count 1 is DENIED.

2/ As to Count 2, the preliminary objection is SUSTAINED with respect to the economic issues arising from the parties' divorce proceeding, and a ruling is deferred on the issue of the Court's jurisdiction to grant the divorce pending further development of the record.

3/ Count 3 is SUSTAINED, with leave granted to file an amended complaint within twenty (20) days of this order or suffer non pros.

COMPULSIVE GAMBLING

**Compulsive gambling is...
a progressive behavior disorder
in which an individual has a
psychologically uncontrollable
preoccupation and urge to
gamble.**

**This results in excessive
gambling, the outcome of
which is the loss of time and
money.**

**The gambling reaches the point
at which it compromises,
disrupts or destroys the
gambler's personal life, family
relationships or vocational
pursuits.**

**If you are concerned that you, a
colleague or a family member
may be a problem gambler,**

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