Washington Law Review

Volume 28 | Issue 2

5-1-1953

Divorce—Domicile of Choice—Military Personnel

Hugh McGough

P's claim of right, based on her position as a stockholder, by reasoning that when improper and hostile motives are shown the conclusion necessarily follows that the purposes are not reasonable within the meaning of the statute. The holding accords with prior Washington cases: *State* ex rel. *Weinberg v. Pacific Brewing and Malting Co.*, supra; *State* ex rel. *Lee v. Goldsmith Dredging Co.*, 150 Wash. 366, 273 Pac. 196 (1928), and with the majority holdings in other jurisdictions. BALLANTINE, CORPORATIONS § 160.

ROBERT F. BRACHTENBACH.

Divorce—Domicile of Choice—Military Personnel. *P* was stationed at Fairchild Air Force Base near Spokane. When his wife joined him in April, 1950, he took quarters outside the base. He told his friends that he intended to make Spokane his permanent home. In July, 1950, he was sent overseas. His wife returned to Philadelphia, their domicile of origin. In November, 1950, *P* returned to Spokane, and, except for two trips to Philadelphia to visit his wife who refused to join him, remained in Spokane. He found work there after his discharge in November, 1951. In July, 1951, *P* commenced this action for a divorce. *D* claims that *P* has not been a "resident of the state for one year" under RCW 26.08.030 [REM. SUPP. 1949, § 997-3]. The trial court found that it had jurisdiction. *Held*: Affirmed. *Sasse v. Sasse*, 141 Wash. Dec. 338, 249 P. 2d 380 (1952).

"Residence" is an elastic term. Its interpretation is governed by the purpose of the statute in which it is employed. *McGrath v. Stevenson*, 194 Wash. 160, 77 P. 2d 608 (1938); *De Meli v. De Meli*, 120 N.Y. 485, 24 N.E. 996 (1890). To establish "residence" under divorce statutes, courts uniformly require newcomers to their jurisdictions to prove not only physical presence within the jurisdiction, but also a *concurrent* intent to abandon the prior domicile and remain indefinitely. In other words, residence is read as domicile. The Supreme Court of the United States has indicated that if divorce jurisdiction is not based on domicile, it will be subject to collateral attack outside the jurisdiction. *Williams v. North Carolina*, 325 U.S. 226, 157 A.L.R. 1366 (1945).

While the elements of domicile are clear, ". . . physical presence at a dwelling place and the intention to make it a home . . .," 141 Wash. Dec. 338, 340, 249 P. 2d 380, 382, the results of their application to military personnel assigned to a claimed domicile of choice vary substantially. See Note, 21 A.L.R. 2d 1163 (1952). It is settled law that a person may change his domicile while in the military service. *Kankelborg v. Kankelborg*, 199 Wash. 259, 90 P. 2d 1018 (1939); *Ames v. Duryea*, 6 Lans. 155 (N.Y., 1871). The question is one of intent. If the serviceman lives on the military post, courts seldom find the domiciliary intent. *E.g., Zimmerman v. Zimmerman*, 175 Ore. 585 155 P. 2d 293 (1945). Some courts state that a soldier, when stationed on a military post, *cannot* acquire domicile since he has no free choice. *E.g., Wallace v. Wallace*, 371 Pa. 404, 89 A. 2d 769 (1952); *Wilson v. Wilson*, 10 Alaska 616 (1945). *Accord*, RESTATEMENT, CONFLICTS, § 21, comment c. (1934). These cases seem to have crystallized a presumption into an inflexible rule of law. Courts have found domiciliary intent in spite of residence only on the post. *Walsh v. Walsh*, 215 La. 1099, 42 So. 2d 860, *cert. den.* 339 U.S. 914 (1949); *Walcup v. Honish*, 210 La. 843, 28 So. 2d 452 (1946). Residence on or off the post has been ignored entirely in finding jurisdiction. *Gipson v. Gipson*, 151 Fla. 587, 10 So. 2d 82 (1942).

When the soldier establishes a residence away from the post, the courts are more inclined to find domiciliary intent. But, decisions are by no means uniform. In *Allen v. Allen*, 52 N.M. 174, 194 P. 2d 270 (1948), a finding of domicile by the trial court was reversed, though a home had been established for *P* and his family outside the post and there were uncontradicted statements that *P* intended to make the jurisdiction his

permanent home and go into business there after the war. An exhaustive dissent points out that the rigid requirements set up in this decision in effect deny a military man the right to change his domicile. *Wilson v. Wilson,* Tex. Civ. App., 189 S.W. 2d 212 (1945), overruled a finding of domicile by the trial court on similar facts, pointing out that final intent as to domicile will actually be determined by opportunities yet to be offered. To the same effect, see the interesting dissent to *Hawkins v. Winstead,* 65 Idaho 12, 138 P. 2d 972, 975 (1943). On the same facts, other courts will find domiciliary intent as readily as the *Sasse* case. *E.g., Clark v. Clark,* 71 Ariz. 194, 225 P. 2d 486 (1950); *St. John v. St. John,* 291 Ky. 363, 163 S.W. 2d 820 (1942). Often, there are other factors showing the intent. *E.g., Kankelborg v. Kankelborg, supra* (registration and voting); *West v. West,* 35 Haw. 461 (1940) (change of home address on service records); *Burgan v. Burgan,* 207 La. 1057, 22 So. 2d 649 (1945) (marriage within the jurisdiction). Even contributions to the community chest have been considered. *Strubble v. Strubble,* Tex. Civ. App., 177 S.W. 2d 279 (1943).

Unless otherwise provided by statute, *cf. Blouin v. Blouin,* 67 Nev. 314, 218 P. 2d 937 (1950), bodily presence in the jurisdiction for the entire statutory period is not essential to divorce jurisdiction, provided the domiciliary intent remains constant. *Summerville v. Summerville,* 31 Wash. 411, 72 Pac. 84 (1903). In the *Summerville* case, *P* left her child in the state while gone. The rule has been stated that if, when a person leaves a jurisdiction, no vestige of residence remains—as in the *Sasse* case—"intention alone cannot retain a residence." *Turner v. Turner,* 87 Vt. 65, 88 Atl. 3, 4 (1913). This proposition is inconsistent with the general rule that a domicile, once established, remains the same until a contrary intention is shown. *Spielman v. Spielman,* 144 Wash. 421, 258 Pac. 37 (1927); *Polk v. Polk,* 158 Wash. 242, 290 Pac. 861 (1930); *Kankelborg v. Kankelborg, supra.* Continued actual residence is not an element of domicile, and is relevant only in the determination of intent. The misleading proposition of the *Turner* case, as preserved in 17 AM. JUR, DIVORCE AND SEPARATION, § 251 (1938), has nominally survived to confuse the decisions. *E.g., Campbell v. Campbell,* .. Fla. .. .., 57 So. 2d 34 (1952). The *Sasse* case, as have practically all decisions, ignores it.

HUGH MCGOUGH

Personal Injuries: Unemancipated Child Given Cause of Action Against Parent Negligent in Non-parental Act. A partner in a common carrier partnership, while driving a partnership vehicle on business, negligently injured his minor son who was playing in the street. The child, *P,* through his guardian *ad litem* sues the partnership for personal injuries. *D*'s demurrer sustained. *Held:* reversed (7 to 2), *Borst v. Borst,* 141 Wash. Dec. 598, 251 P. 2d 149 (1952).

The point brought to issue was whether an unemancipated minor has a cause of action against his parent for personal injuries negligently caused. The court reviews the traditional reasons for denying a cause of action and demonstrates their inadequacy. The reasons (which suffer an uninspired repetition in the cases and the authorities) and the court's comments thereon may be summarized. (1) *The maintenance of family tranquillity.* The possibility of such a disturbance is a matter of fact, not law. "In the comparatively rare cases where a child brings such an action, the likelihood is that the peace of the home has already been disturbed beyond repair, or that, because of the existing circumstances, the suit will not disturb existing tranquillity." (2) *The desire not to undermine parental authority and discipline.* The scope of parental discipline is subject to delineation in civil suits as it is in criminal actions. (3) *The maintenance of an equitable distribution of the family exchequer.* The appor-