

IN THE COURT OF APPEALS OF IOWA

No. 8-666 / 07-1894
Filed October 1, 2008

Upon the Petition of

ERIN DAHER,
Petitioner-Appellant,

And Concerning

ANDREA DAHER,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County and Sioux County,
Artis I. Reis, Judge.

The petitioner appeals from the denial of his petition to vacate the consent decree dissolving his marriage to the respondent. **AFFIRMED.**

Brent Rosenberg of Rosenberg, Stowers & Morse, Des Moines, for appellant.

Bradley De Jong of Klay, Veldhuizen, Bindner, De Jong, De Jong & Halverson, Orange City, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

POTTERFIELD, J.

The petitioner, Erin Daher, appeals from the denial of his petition to vacate the consent decree dissolving his marriage to the respondent, Andrea Daher. We affirm.

Background Facts and Proceedings.

Erin and Andrea were married in 2000. One child was born during the marriage. Andrea had been a lifelong Iowa resident until, after graduating from beauty school, she moved to Michigan in 1998. It was during that time in Michigan that she met and began dating Erin. In 1999, however, she moved back to Iowa and resided here for approximately one-and-a-half years prior to the marriage.

After the marriage Andrea again moved to Michigan to live with Erin, staying there for approximately nine months until late August or early September of 2001 when Erin left for his military basic training. Per the parties' agreement, Andrea moved back to Iowa, where they had decided to live following the completion of Erin's basic training. Upon returning to Iowa, Andrea resumed the same job she had held prior to the marriage.

After Erin finished basic training in April or May of 2002, the parties again moved to Michigan. However, in approximately December of that year, Andrea moved back to Iowa. She was pregnant, and claimed she was fearful of Erin's verbal and physical abuse.

On May 8, 2003, Andrea filed a petition in Sioux County, Iowa, seeking to dissolve the parties' marriage. Erin was served with the petition, and signed a written agreement settling all of the issues involved. In December, 2003,

according to the decree, Erin appeared and consented to the dissolution. He did not contest subject matter jurisdiction over the case.

On March 27, 2006, Erin filed a petition seeking vacation of the decree, claiming a lack of jurisdiction. In the alternative, Erin requested a modification of the decree. Trial was held on the jurisdiction claim on September 6, 2007. On October 18, 2007, the court entered a ruling denying the petition to vacate. Erin appeals from this ruling.

Scope of Review.

We review actions seeking to vacate or set aside for lack of jurisdiction de novo. *In re Marriage of Thrailkill*, 438 N.W.2d 845, 848 (Iowa Ct. App. 1989). This court must ascertain the facts from the record in the case that was before the trial court. *Id.* However, we give weight to the trial court's findings. *Id.*

Analysis.

Iowa Code section 598.6 (2003) requires that, when a respondent is not a resident of this state, a dissolution petition “must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence therein after deducting all absences from the state” Iowa Code § 598.6. If this one-year residency requirement is not satisfied, the trial court lacks jurisdiction. *In re Marriage of Bouska*, 256 N.W.2d 196, 197 (Iowa 1977). While the district court has general jurisdiction over dissolution actions, the court must have jurisdiction over the specific marriage involved through the residence of one of the parties to the action. *Id.* at 198. Subject matter jurisdiction cannot be conferred by waiver, estoppel, or consent. *Id.*

The term “residence” as used in section 598.6 has the same meaning as domicile. *In re Marriage of Kimura*, 471 N.W.2d 869, 877 (Iowa 1991). To have a residence or domicile within the meaning of section 598.6, one must have a fixed habitation with no intent to leave it. *Id.* Once a domicile is established, it continues until a new one is established. *Id.* A new domicile is established if (1) the former domicile is abandoned, (2) there is actual removal to and physical presence in the new domicile, and (3) there is a bona fide intention to change and remain in the new domicile permanently or indefinitely. *Id.* This intention must be a present and fixed intention and not dependent on some future or contingent event. *Id.*

The district court reviewed a timeline provided by Andrea that detailed her living arrangements. It found that

Andrea was a resident of the State of Iowa during September-December, 2001; during January-April, 2002; and during January-May, 2003. Further, any absences from the State of Iowa between September 2001 and May of 2003 were temporary such that Andrea did live in the State of Iowa for a period of 12 months, in fact, approximately 12 months and one week, not counting temporary absences from the State.

The court further noted that its ruling was based on the credibility of the witnesses presented at the hearing.¹ After making these findings, it concluded the dissolution court did have jurisdiction over the matter.

Erin now claims the evidence, even when viewed in a light most favorable to Andrea, indicates the parties were residents of and domiciled in Michigan for virtually their entire marriage, from November 2000 through May 2003. While

¹ In fact, at one point, the court informed Erin it was going to refer him to the county attorney for an instance of perjury it believed Erin had committed during his testimony.

this—domicile in Michigan—may be true for Erin, regardless of the parties' marital status, we still believe the ultimate question is that of *Andrea's* residency. Hers is not necessarily inextricably tied to Erin's. We thus proceed to address that issue.

Upon our de novo review of the record, we conclude the court properly found the court had jurisdiction of this case under section 598.6. As is clear from the foregoing discussion, the concept of domicile is largely one of intent. *Swanson v. Iowa Dep't of Revenue*, 414 N.W.2d 670 (Iowa Ct. App. 1987) ("The requisite element of intent to change one's domicile necessarily includes an intention to abandon the former domicile, and to do so permanently."). Moreover, our supreme court has stated that

the question of acquiring a residence is to a large extent a question of intention on the part of the alleged resident. But such intention must be bona fide. Only the plaintiff himself can testify directly to such intention.

Messenger v. Messenger, 176 N.W. 260, 262 (Iowa 1920).

We thus look to the evidence of *Andrea's* residence and related intentions as shown in the record. *Andrea* testified that *Erin* had always told her they would move to Iowa following their marriage because he knew she did not want to live far from her parents. Later, she and *Erin* had agreed to a move to Iowa once *Erin's* basic training obligation was complete, and in fact, *Andrea* moved back while *Erin* was at training. While in Iowa during this time, *Andrea* started looking for housing and she represented to her employer that she would be living in Iowa long-term.

However, when Erin returned from basic training, Andrea claimed he informed her they would have to live in Michigan for one or two years “at most” while he fulfilled his National Guard obligation in Traverse City, Michigan. She viewed this living arrangement as “temporary” and consented to moving back to Michigan.

In December of 2002, Andrea returned to Iowa for the final time, and moved in with her parents. From that point on, the only time she returned to Michigan was in January and April of 2003. In January she loaded her belongings in a trailer to take them back to Iowa. While there, she informed Erin she intended to file for dissolution of their marriage. They also discussed and met with someone regarding filing for bankruptcy. In April, she attended a creditor’s meeting in conjunction with that bankruptcy.

Andrea never registered to vote in Michigan; instead, she maintained her Iowa registration. In addition, she denied ever having been issued a Michigan driver’s license. While Erin did attempt to introduce a document purporting to show that Andrea had a Michigan driver’s license, this evidence was not admitted by the court and remained in the record only as an offer of proof. Because Erin makes no argument on appeal that the court erred in denying the offer of this evidence, it is not properly part of the record we may consider on appeal.

Accordingly, our de novo review leads us to conclude that at all material times during the year leading up to the filing of the dissolution petition, Andrea maintained residency in the State of Iowa. Her intention to remain domiciled in Iowa never wavered and any short-term absence from the State was, as the district court found, nothing more than temporary. While some evidence certainly

does detract from this finding, including Andrea's signature on a bankruptcy filing affirming a Michigan residency, we believe the greater weight of the evidence supports the district court's position. We therefore affirm the ruling that the dissolution court properly held subject matter jurisdiction over the case.

Finally, we address Erin's contention that the district court abused its discretion by awarding Andrea attorney fees. An award of attorney fees is not a matter of right, but rests within the court's sound discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). In deciding whether attorney fees should be awarded, the court considers the needs of the party making the request, the ability of the other party to pay and whether the party making the request is obligated to defend the trial court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We find no abuse of discretion in the court's attorney fees award.

AFFIRMED.