IN THE COURT OF APPEALS OF IOWA

No. 6-647 / 96-0106

REBECCA D. BIRD n/k/a
REBECCA D. VOLLMER,

Petitioner-Appellant,

vs.

BARRY H. BIRD,

Respondent-Appellee.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Rebecca Bird appeals the district court's denial of her petition to vacate the parties' default dissolution decree. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Robert A. Wright, Jr. of Wright & Wright, Des Moines, for appellant.

Ronald A. Baybayan, Des Moines, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

SACKETT, P.J.

Respondent-appellee Barry H. Bird obtained a dissolution in Polk County, Iowa district court. The decree dissolved his marriage to petitioner-appellant Rebecca Bird, who was served pursuant to court order by mailing to her at an address in California. The decree gave Barry custody of three children born during the marriage who did not, at the time the decree was entered, live in Iowa and provided Rebecca pay Barry child support. Rebecca challenged the jurisdiction of the Iowa court to enter the decree by the filing of both a petition to vacate a void judgment and a motion to dismiss.

The trial court found the issue was governed by Iowa Rule of Civil Procedure 56.2 and the Iowa court had jurisdiction of the parties and the subject matter of the marriage and no fraud was practiced on the court. The trial court refused to vacate or set aside the judgment.

Rebecca appeals.contending the Iowa court does not have subject matter jurisdiction. We affirm in part, reverse in part, and remand.

Review of jurisdictional issues raised on appeal is de novo. *In re Marriage of Thrailkill*, 438 N.W.2d 845, 846 (Iowa App. 1989). The questions this allegation raises are whether the Iowa courts had subject matter jurisdiction to (1) dissolve the marriage, (2) determine custody, and (3) fix child support. A court may have jurisdiction to grant a dissolution to one domiciled in a state, but no jurisdiction to adjudicate incidents of the marriage. *In re Marriage of Kimura*, 471 N.W.2d 869,

875 (Iowa 1991).

In August 1991, Rebecca and Barry moved to Des Moines, Iowa. When they moved to Iowa there was a dissolution action concerning their marriage pending in Oklahoma. In March 1992, Rebecca moved with the children to Texas. On September 24, 1992, with the Oklahoma action still pending, Barry filed his petition for dissolution in Polk County. Barry subsequently received an order for service.

Barry had lived in Iowa one year when he filed for dissolution. Iowa Code section 598.6 governs the power or jurisdiction of the district court to grant a dissolution of marriage. *See In re Marriage of Bouska*, 256 N.W.2d 196 (Iowa 1977). It provides:

> Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage . . . 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; and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only.

Id. at 198.

Domicile or residence, which for purposes of section 598.6 have the same meaning, is the basis for a court's jurisdiction. *Kimura*, 471 N.W.2d at 872; *In re Marriage of Vogel*, 271 N.W.2d 709, 711 (Iowa 1978); *Cooper v. Cooper*, 217 N.W.2d 584, 586 (Iowa 1974). An essential element to the judicial power to grant a dissolution is domicile. *Kimura*, 471 N.W.2d at 874. A court has jurisdiction of the res or the marriage status in order that it may grant a dissolution. *Id.*

There is no evidence Barry's residence in Iowa was in bad faith or for the purpose of a dissolution. In order that courts have jurisdiction to dissolve a marriage, one spouse must have a domicile in the state. *Id.* at 875. The Iowa court had jurisdiction to dissolve the marriage. That part of the decree dissolving the marriage is affirmed.

The fact a court has jurisdiction to grant a dissolution where the court has no personal jurisdiction over the absent spouse does not mean the court also has jurisdiction to adjudicate the incidents of the marriage. *See id.* at 875. The next question, then, is whether the Iowa court had subject matter jurisdiction under Iowa Code chapter 598A to address the issue of child custody. Our review of jurisdictional issues raised under chapter 598A is de novo. *In re Marriage of Hubbard*, 315 N.W.2d 75, 77 (Iowa 1982); *St. Claire v. Faulkner*, 305 N.W.2d 441, 445 (Iowa 1981).

The children were not living in Iowa when the petition for dissolution was filed. They had left the state about March 28, 1992, with their mother. They had lived in Iowa about six months before they left. At the time the decree was entered, the children had not been in Iowa for nearly one year.

The trial court failed to address whether under the provisions of chapter 598A the Iowa court had jurisdiction over the children. Rebecca filed a rule 179(b) motion asking the trial court to consider the issue. The motion was denied.

Jurisdiction of this state to decide custody is governed by Iowa Code section 598A.3. There was no personal service on the parent who controlled the children. The children were outside of Iowa when the action was filed. By the time service was attempted, they had been absent from Iowa for over six months. There was a dissolution action pending in Oklahoma concerning their custody.[1] The court failed to follow the directives of chapter 598A, finding instead jurisdiction under Iowa Rule of Civil Procedure 56.2 based on minimum contacts. Jurisdiction of a marriage action is not tested by minimum contact standards. *Kimura*, 471 N.W.2d at 821. Notice of a custody action and the reasonableness of the notice are governed by sections 598A.4 and 598A.5. We remand to the trial court to follow the directives of Iowa Code section 598A.3 to determine if the Iowa courts have jurisdiction. If the court determines Iowa has jurisdiction, then the court shall address the provisions of sections 598A.6 and 598A.7 to determine whether jurisdiction should be withheld and whether Iowa is an inconvenient forum.

Rebecca contends there was not jurisdiction to order her to pay child support. Absent personam jurisdiction over Rebecca or compliance with Iowa Code chapter 252A, the Iowa court had no jurisdiction to order she pay child support. *See id.* at 875. We reverse the judgment for child support.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[1] The Oklahoma action was not dismissed until April 7, 1995.