IN THE COURT OF APPEALS OF IOWA

No. 8-945 / 08-0837
Filed December 17, 2008

IN RE THE MARRIAGE OF SARAH J. UNTRAUER AND JASON B. UNTRAUER

Upon the Petition of
SARAH J. UNTRAUER,
Petitioner-Appellant,

And Concerning
JASON B. UNTRAUER,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Edward A. Jacobson, Judge.

A wife appeals the dismissal of her dissolution of marriage petition for lack of jurisdiction. **AFFIRMED.**

Robert Deck, Sioux City, for appellant.

Bradford Kollars, Sioux City, for appellee.

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

VAITHESWARAN, J.

Sarah Untrauer appeals the dismissal of her dissolution of marriage petition for lack of jurisdiction. We affirm.

I. Background Facts and Proceedings

Jason and Sarah Untrauer married in Iowa. In 2003, they moved to Connecticut so that Jason could pursue post-graduate studies. Sarah also attended college in Connecticut. Both paid in-state tuition, both obtained Connecticut drivers' licenses, both registered their vehicles in Connecticut, both registered to vote in Connecticut, both voted in Connecticut, and both filed Connecticut income tax returns.

Sarah returned to Iowa in January 2008. The following month, she filed a dissolution petition in Iowa.

Jason moved to dismiss the petition on the ground that neither party was a resident of Iowa. The parties filed multiple affidavits and submitted briefs on the issue.[1] After considering the affidavits and arguments, the district court granted Jason's motion. This appealed followed.

Our review of the district court's ruling is for errors of law, with the court's fact findings binding us if supported by substantial evidence. *In re Marriage of Kimura*, 471 N.W.2d 869, 877 (Iowa 1991) (stating pre-answer motion to dismiss replaces special appearance, which is no longer available under the Iowa Rules

[1] Citing Iowa Code section 598.9 (2007), Sarah now contends she should have been afforded an evidentiary hearing on the residency issue. That provision states, "If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the court." Sarah did not request an evidentiary hearing or object to the absence of an evidentiary hearing. Accordingly, this argument is waived. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

of Civil Procedure); *Morris v. Morris*, 197 N.W.2d 357, 359 (Iowa 1972) (stating review of adjudication on special appearance confined to "errors assigned" with court's findings binding if supported by substantial evidence).

II. Analysis

Where the respondent in a dissolution action is not a resident of Iowa and has not been personally served, the 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 in the state 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 dissolution of marriage only.

Iowa Code §598.5(1)(k) (2007). This residency requirement is jurisdictional. *In re Marriage of Vogel*, 271 N.W.2d 709, 713 (Iowa 1978) (stating court was "without jurisdiction to entertain" petition for dissolution where petitioner failed to meet residence requirements of prior version of section 598.5(1)(k)).

"To be a resident within the meaning of these provisions one must have a fixed habitation with no intention of removing therefrom." *Id.* at 711 (quoting *Korsrud v. Korsrud*, 242 Iowa 178, 45 N.W.2d 848, 850 (1951)). Sarah asserts her "fixed habitation" was always in Iowa. The facts disclosed above belie this assertion. Sarah left Iowa five years before the dissolution action was filed, maintained no home in the state, did not pay property taxes in the state, had no bank accounts in the state, and did not assert that she stored her belongings in the state. *See id.* at 710 (concluding district court was without jurisdiction despite the existence of all these factors).

Sarah's reliance on *Harris v. Harris*, 205 Iowa 108, 109, 215 N.W. 661, 662 (1927), is misplaced, as the finding of residence in that case was based on the husband's military service. Specifically, the court wrote, "A naval officer cannot acquire a domicile at his station or on his vessel for the same reason that his going and staying at his post, when so ordered, are not a matter of his choice." *Id.* at 109, 215 N.W. 662. The court noted that the naval officer always claimed Des Moines as his home.[2] *Id.* at 112, 215 N.W. 663.

Nor are we persuaded by Sarah's contention that, as students, their residence could not have been Connecticut. The secondary authority she cites for this proposition simply reaffirms that the intent of the student is controlling. It provides that "a student who attends a school with the intention of remaining there only as a student and until the course of education is completed does not acquire a domicil there." 25 Am. Jur. 2d Domicil § 32 (2004). But it continues,

> An adult student or an emancipated minor may acquire a domicil at the place where his or her school is situated, if the student intends to make the place a permanent home and has no intention of resuming the former domicil.

The record contains substantial evidence to support the district court's finding that Sarah and Jason "established residence and domicile in Connecticut." Accordingly, the district court did not err in granting Jason's motion to dismiss.

AFFIRMED.

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[2] We recognize this court reached a different result in *Daher v. Daher*, No. 8-666 (Iowa Ct. App. Oct. 1, 2008). In that case, a wife whose husband was a member of the National Guard was determined not to have abandoned her residency in Iowa where she spent considerable time residing in Iowa while her husband engaged in his military training. She had not registered to vote in Michigan and denied having been issued a Michigan driver's license. Finally, the district court and this court found the wife's testimony that she never abandoned her intent to remain an Iowa resident more credible than the testimony to the contrary.