HELEN DI STEFANO, Appellant

v.

SILVIO DI STEFANO, Appellee

Civil Action No. 44-73

Trial Division of the High Court

Mariana Islands District

August 27, 1973

Appeal from District Court dismissal of complaint for divorce of parties who had resided in the territory only 15 of the 24 months required by statute to obtain a divorce. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, noting the conflict among recent Trust Territory decisions, and the conflict among recent federal district court decisions, referred the question of the statute's constitutionality to the Appellate Division.

1. **Constitutional Law—Right to Travel**

   The right of interstate travel applied under the Equal Protection Clause is not applicable in the Trust Territory.

2. **Constitutional Law—Residency Requirements—Ripeness of Issue**

   The Trust Territory's need to resolve conflicting decisions in the Trial Division of the High Court and in the Mariana Islands District Court on constitutionality of two-year residency requirement for divorce is urgently compelling; therefore, although a conclusive federal court

decision resolving conflicts on the residency requirement issue among the United States District Courts could be accepted as persuasively compelling in the Trust Territory, the High Court should not be compelled to await for such a conclusive decision, and Trial Division would refer to Appellate Division the question, raised by instant case, whether the two-year residency requirement denies due process, equal protection or any other right guaranteed residents by the Trust Territory Code Bill of Rights.

3. Constitutional Law—Due Process

The interpretation and meaning of the due process and equal protection clauses of the United States Constitution are the same as the interpretation and meaning of the Trust Territory Code Bill of Rights due process and equal protection clauses. (1 TTC §§ 4, 7)

TURNER, *Associate Justice*

This case came before the Court on an appeal from an order of the Mariana Islands District Court dismissing appellant's complaint for divorce for the reason the parties have not been residents of the Trust Territory for two years immediately preceding the filing of the complaint. Title 39, Section 202, of the Trust Territory Code, provides, "no divorce shall be granted unless one of the parties have resided in the Trust Territory for two years next preceding the filing of the complaint."

The complaint and motion for default decree of divorce show the parties were residents of the Trust Territory fifteen months at the time the complaint was filed. The record also shows the appellant-wife is a citizen of Australia who is employed by the Trust Territory Government and who avows she has established her domicile in Saipan. Because of the dismissal, appellant has not been afforded an opportunity to offer proof of her domicile.

Because of the conflict in Trust Territory High Court decisions and the irreconcilable conflicts in decisions in the United States Courts in which the question of the validity of durations residency statutes has been raised, I am un-

willing to "join sides" with or against either of my Brothers Brown or Burnett by deciding this appeal until there is a binding decision on this Court and the District Courts by the Appellate Division. Accordingly, this appeal shall be held in abeyance, with jurisdiction retained, until the Appellate Division answers the equal protection question I will certify at the conclusion of this opinion.

To say the law is in a state of flux is an understatement. An examination of the several persuasive decisions illustrates the problem.

The first Trust Territory case to tackle the question was *Yang v. Yang*, 5 T.T.R. 427 which held the parties were denied equal protection of the laws, guaranteed by 1 TTC § 7, by the two-year residency statute, 39 TTC § 202. The Court entered a decree of divorce. The opinion relied in part for the result reached upon the Hawaiian family court decision in *Whitehead v. Whitehead*, 38 L.W. 2577, and *Shapiro v. Thompson*, 394 U.S. 618.

The contrary result was reached when this court held "39 TTC § 202 is not a denial of equal protection and that the Court has no jurisdiction over this action" in *Hamrick v. Hamrick*, 6 T.T.R. 252. The opinion pointed out that the Hawaiian decision relied upon in *Yang* had been reversed by the Hawaii Supreme Court in *Whitehead v. Whitehead*, 40 L.W. 2493 (January 19, 1971). The Court said in Hamrick:—

> "The second *Whitehead* opinion declared that residency requirements are a means of insuring a good faith intention to remain; in other words, a way of determining that a 'domicile' and, hence, jurisdiction exists."

To compound confusion there is a new Hawaiian decision, *Heung Au v. Lum* (June 19, 1973), 42 L.W. 2033, entered by Judge King in the U.S. District Court for that state, which holds that the one-year domiciliary statute as a condition of filing for and obtaining a divorce is a denial

of equal protection guaranteed by the 14th Amendment to the U.S. Constitution. The federal court held:—

"Absolute durational residence requirements on divorce are, nevertheless, constitutionally flawed in that their efficacy in isolating those non-domiciliaries, most likely to assault divorce courts, is accompanied by an inability to segregate bona fide domiciliaries from those so isolated."

The court is saying residency does not prevent perjury as to domicile. As distinguished from residence, domicile is a matter of intent and intent is subject to proof by "outward manifestations" since it is a subjective condition.

As pointed out in the appellant's brief, the Mariana Islands District Court appears to be in the same conflict as the High Court. Whether the same condition prevails in other District Courts we are unable to say without the records before us. However, the Marianas Court granted a divorce to parties who had resided in Saipan only 13 months at the time the decree was entered. *Cousins v. Cousins*, District Court Civil Action No. 5-73. In contrast is the order in this appeal dismissing the petition because of 15-month residency of the parties at the time the petition was filed.

Since the challenge to residency statutes first arose in the United States there have been many decisions on a variety of questions. There remain some conflicts even though the U.S. Supreme Court has resolved the issue by striking down residency (for more than brief duration) for such privileges as entitlement to welfare payments, *Shapiro*, supra, and right to register and vote, *Dunn v. Blumatein*, 405 U.S. 330 (1972). In *Doe v. Bolton*, 41 L.W. 4233 (1973), the Court found the residency requirement of a Georgia abortion statute to be unconstitutional, citing the right to travel concept, as well as the privileges and immunities clause.

In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, the Supreme Court held that in view of the basic position of the marriage relationship in society and the state monopolization of means for dissolving that relationship, due process of law prohibits a state from denying, solely because of inability to pay court fees and costs, access to its courts to indigents. The Court said:—

". . . due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

[1] The due process right to access to court strikes me as a much more compelling reason than has been employed in the United States to either strike down or uphold durational residency statutes on grounds of equal protection of the laws. The right to interstate travel applied under the equal protection clause is not applicable in the Trust Territory. Interdistrict travel is not involved because the residency statute applies to all districts. The only travel affected by 39 TTC § 202 is into the Trust Territory and is thus not similar to travel between states.

It would serve no purpose to analyze the recent lower court decisions on durational residence for divorce. A three-judge Federal Court held the Rhode Island two-year residency was unconstitutional in *Larsen v. Gallogly* (July 16, 1973), 42 L.W. 2087. The U.S. District Court for Iowa reached an opposite conclusion as to the Iowa residency statute in *Sosna v. Iowa* (July 16, 1973), 42 L.W. 2086. A Florida U.S. District Court held the six-month Florida residency law was constitutional in *Shiffman v. Askew* (June 1, 1973), 41 L.W. 2688. These decisions with the Hawaii District Court opinion in *Heung Au*, supra, leads to the conclusion the U.S. Supreme Court eventually will undertake to resolve the conflicts.

[2, 3] Because the Trust Territory need is urgently compelling, this Court should not be required to wait for the conclusive Federal decision, even though such decision could be accepted as persuasively compelling in the Trust Territory. Whether it be due process or equal protection, the interpretation and meaning of those phrases in the United States Constitution are the same as in the Trust Territory Bill of Rights and the decisions from the United States are applicable to the Trust Territory. *Tolhurst v. M.O.C., et al.*, 6 T.T.R. 296. *Ichiro v. Bismark*, 1 T.T.R. 57. In order to resolve the conflict between the two High Court decisions, the two District Court actions, and the questions raised on this appeal, the following question is referred to the Appellate Division:—

Does the two-year residency statute, 39 TTC § 202, which prohibits access to the courts for relief in divorce petitions, deny due process, equal protection or any of the other rights guaranteed to residents of the Trust Territory by Title 1, Chapter 1, Trust Territory Code?

Order, the above entitled appeal shall be held in abeyance, with jurisdiction retained, until the foregoing question referred to the Appellate Division has been answered.