

Smith v. Jones

QUESTIONS FROM THE BENCH

(APPEALABILITY)

The Record contains an order issued in December of 1999 but the Notice of Appeal was not filed until July 20, 2001. How is the appeal timely?

Explain the relevant rulings and the timing of this appeal.

(JURISDICTION TO MODIFY A NEW MEXICO ORDER – DOMICILE v. RESIDENCE)

The Superior Court's order says that the father, mother, and child were all residing in California. How can a California court not have jurisdiction in such a situation?

The Uniform Interstate Family Support Act uses the terms "residence" and "reside" in determining whether a California court has jurisdiction to modify or enforce a decree entered in another state. Why should we say "residence" actually means "domicile?"

What are the policy implications of such a ruling?

Is there any authority for the proposition that Appellant is not a California resident?

How have other state courts addressed these issues?

Black's Law Dictionary recognizes that residence and domicile are two separate concepts, noting that a person may have more than one residence but only one domicile. (Black's Law Dictionary at 1310 (7th Ed.)) How do you reconcile the ordinary meaning of "residence" with your interpretation of the statute?

What authority do you have supporting the proposition that when the drafters of the Uniform Act used "residence," they meant "domicile" instead?

Section 4905 gives a court jurisdiction over a nonresident for purposes of modifying a support order simply because the nonresident is personally served in California. Why does the court need anything else to exercise jurisdiction?

(WAIVER)

Appellant did not contest registration of the order in California. Hasn't he therefore waived any challenge to the Superior Court exercising jurisdiction and modifying the order?

The New Mexico order was registered in California, and Appellant did not contest this. Was there something more that needed to be done before the Superior Court could modify the Order?

Family Code Section 4958 only requires a party to register the order in the same manner otherwise provided in the statutes. Where is there any indication that a party must indicate an intent to seek modification?

(PERSONAL JURISDICTION)

Didn't Appellant enter a general appearance by filing a responsive declaration?

Wasn't Appellant required to bring a motion to quash if he wanted to challenge personal jurisdiction?

July 5, 2002

Page 3

What is the basis for your challenge to personal jurisdiction? Was the service improper somehow? There does not appear to be anything in the record supporting such a contention.

Smith v. Jones

**ANALYSIS AND SUGGESTED RESPONSES TO
QUESTIONS FROM THE BENCH**

(APPEALABILITY)

The Record contains an order issued in December of 1999 but the Notice of Appeal was not filed until July 20, 2001. How is the appeal timely?

Because the court's ruling directed counsel for the mother to prepare a formal order, the time for filing a notice of appeal did not begin to run until that formal order was entered.

The date of "entry" of an appealable order depends on whether the order is entered in the superior court's minutes and, if so, whether the minute order requires preparation of a written order. If the order is entered in the minutes and the minute order expressly directs that a written order be prepared, signed, and filed, the order is "entered" on the date the signed order is filed. (CRC 2(C)(2); *County of Alameda v. Johnson* (1994) 28 Cal.App.4th 259, 261 at fn. 1 [33 Cal.Rptr.2d 483]); *Herrscher v. Herrscher* (1953) 41 Cal.2d 300, 304 [259 P.2d 901]. ("it is a matter of trial court procedure whether the court chooses to make its final decision by the entry in the minutes of an order without a direction that a written order be prepared, signed and filed, or elects to enter a direction that a formal order be prepared."). In *Herrscher*, the court held that where a formal order is required, the appeal does not lie from the minute order. (Id.)

Explain the relevant rulings and the timing of this appeal.

- 12/15/99 Intended Ruling (CT 75)
- 1/31/00 Ruling on Submitted Matter (CT 79) Confirms intended ruling of 12/15/99. “Counsel for Mother to submit the formal order after hearing along with a Dissomaster printout computing the appropriate amount for child support consistent with the findings in the court’s intended ruling at item 7.” (CT 82)
- 9/7/00 Letter from mother confirming that no formal order has been entered and that the state will not enforce the ruling without a formal order. (CT 86)
- 6/18/01 Letter from mother’s counsel confirming no order entered yet. (CT 93)
- 6/29/01 Finding and Order after Hearing

(JURISDICTION TO MODIFY A NEW MEXICO ORDER – DOMICILE v. RESIDENCE)

The Superior Court’s order says that the father, mother, and child were all residing in California. How can a California court not have jurisdiction in such a situation?

Under section 4962, all individuals involved must reside in California before a California court can modify an order entered in another jurisdiction.

Appellant contends that because he is a domiciliary of New Mexico, section 4962 does not apply in this case.

The Uniform Interstate Family Support Act uses the terms “residence” and “reside” in determining whether a California court has jurisdiction to modify or enforce a decree entered in another state. Why should we say “residence” actually means “domicile?”

The Superior Court itself recognized that in marriage dissolution cases, “residence” is synonymous with “domicile,” but distinguished such cases because this matter does not involve a dissolution. (CT 80.)

California courts have recognized that “for purposes of Civil Code section 4530, subdivision (a), residency is synonymous with domicile, the latter term meaning " 'both the *act* of residence and an *intention* to remain...! " (Original italics.) (*In re Marriage of Thornton*, (1982) 135 Cal.App.3d 500, 507 [185 Cal.Rptr. 388], quoting *Smith v. Smith* (1955) 45 Cal.2d 235, 239 [288 P.2d 497.]

What are the policy implications of such a ruling?

Any other ruling creates the potential for multiple orders in different jurisdictions. The court in *Kilroy v. Superior Court* (1997) 54 Cal.App.4th 793 [63 Cal.Rptr.2d 390], was specifically concerned with these issues. In *Kilroy*, the mother sought to modify a child support decree entered by a Georgia court under the Full Faith and Credit for Child Support Orders Act 28 U.S.C. § 1738B. The Court held that California had no jurisdiction to modify the Georgia order and noted the difficulties presented by allowing modification in other jurisdictions. The court referenced public policy concerns regarding multiple orders and the importance of the original court maintaining jurisdiction for modification purposes.

The Superior Court itself pointed out that a party may have multiple residences and only one domicile. If “residence” is actually the test, that would create the potential for multiple modifications in different jurisdictions as a party’s residence changed. The situation does not arise when the issue is simply

enforcement of a support order, while it presents great concerns when modification may result in multiple orders, something the Uniform Act is designed to avoid.

The rationale for equating residence with domicile found in the dissolution cases applies with equal force here.

As the New York Court of Appeals appellate court recognized in *Reis v. Zimmer* (N.Y. App. 2000) 700 N.Y.S.2d 609, “the goal of the UIFSA is to eliminate the problems arising from multiple support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction to establish or modify a child support order.” *Reis, supra*, 700 N.Y.S.2d at p. 613.

Child Support Enforcement Div. of Alaska v. Brenckle (1997) 675 N.E.2d 309, 392 (once a court enters a support order, no court may modify it as long as the obligee, obligor, or child for whose benefit the order was issued continues to reside within the jurisdiction of the court unless each party consents in writing to the other jurisdiction).

The obligor’s residence is the key – “these provisions require that an action to modify child support be initiated in the state of the obligor’s residence unless the obligor consents . . .” *Phillips v. Fallen* (Mo. 1999) 6 S.W.3d 862, 865.

Is there any authority for the proposition that Appellant is not a California resident?

In re Marriage of Hattis (1987) 196 Cal.App.3d 1162, 1175-1177 (conc. opn. of Benke, J.), the concurring justice noted, citing the Federal Uniformed Services Former Spouses Protection Act, that a military service person retains the domicile or residence in the state from which he or she entered the service.

A person who enters the armed forces of the United States retains the same residency throughout the term of service unless

the person voluntarily selections a new residence, for example by buying a home off base. *Glassman v. Glassman* (1944) 60 N.E.2d 716 (1944).

Unpublished decision that ultimately determined that a serviceman who was serving in Germany was still a California resident. While the court did not directly address the issue, the court noted that other decisions indicated that military service did not change a person's residence or domicile. *In re Marriage of Holder* (Cal. App. March 20, 2002) 2002 WL 443397.

How have other state courts addressed these issues?

It does not appear that any other courts have directly addressed the "residence v. domicile" issues.

The New Mexico Court of Appeals rejected an effort to modify an order where one of the parents did not reside in New Mexico. In *Harbison v. Johnson* (N.M. App. 2001) 29 P.3d 1136, the mother sought modification of a visitation and support order entered by a Texas court. She and the child lived in New Mexico while the father lived in Texas. The father sought enforcement of the order in New Mexico, and the mother filed a counterclaim for modification of the child support order. The court concluded that because "the father continues to reside in Texas," Texas has continuing exclusive jurisdiction to modify the order. *Harbison, supra*, 29 P.3d at p. 1141. The court noted that modification was different from enforcement – the order could be enforced by the mother after registration, but modification was beyond the court's jurisdiction. *Id.* at 1142.

Louisiana courts have recognized the issues that arise from multiple orders and have noted that the Uniform law is designed to avoid such situations. "The UIFSA attempts to limit modification jurisdiction to just one state at a time, once there is an existing child support award issued. Because the UIFSA embodies a 'one order, one time, one place' policy, there can be only one controlling order." *State Support Enforcement Servs. v. Beasley* (La. App. 2001) 801 So.2d 515, 518.

Black's Law Dictionary recognizes that residence and domicile are two separate concepts, noting that a person may have more than one residence but only one domicile. (Black's Law Dictionary at 1310 (7th Ed.)) How do you reconcile the ordinary meaning of "residence" with your interpretation of the statute?

Black's also recognizes that the terms may sometimes be used synonymously. (Black's Law Dictionary at 1310 (7th Ed.)) Indeed, "domicile" is defined as "the residence of a person or corporation for legal purposes." (Black's Law Dictionary at 500, def. 2 (7th Ed.))

What authority do you have supporting the proposition that when the drafters of the Uniform Act used "residence," they meant "domicile" instead?

Uniform Commissioners comments, stating that residence is terminated only when an individual permanently left the issuing state."

To divest the issuing state of jurisdiction so that modification may take place elsewhere, it must be shown that all the parties have permanently left the issuing state. To hold otherwise would create the possibility of conflicting decisions and modifications of the same order anytime another state could acquire personal jurisdiction over a party.

Section 4905 gives a court jurisdiction over a nonresident for purposes of modifying a support order simply because the nonresident is personally served in California. Why does the court need anything else to exercise jurisdiction?

Section 4905 deals with the personal jurisdiction issue. The court still has to consider whether, under section 4960, the court has the authority to modify the order. The test under section 4960 is different. The order has to be registered, all the parties must reside somewhere other than the issuing state, and personal jurisdiction must have been established (Section 4960(a).)

(WAIVER)

Appellant did not contest registration of the order in California. Hasn't he therefore waived any challenge to the Superior Court exercising jurisdiction and modifying the order?

When registered, the order was only registered for enforcement purposes. Under Section 4958, to seek modification, a pleading must also be filed indicating an intent to seek modification. The parties conceded that registration was only for enforcement purposes. Appellants' failure to contest registration did not waive his right to contest modification.

The New Mexico order was registered in California, and Appellant did not contest this. Was there something more that needed to be done before the Superior Court could modify the Order?

Family Code Section 4958 requires that, when an order is registered, a party must file a pleading specifying grounds for modification.

Family Code Section 4958 only requires a party to register the order in the same manner otherwise provided in the statutes. Where is there any indication that a party must indicate an intent to seek modification?

A pleading seeking modification must be filed contemporaneously with registration or later and specify the grounds for modification. Appellant is not contending that there must be anything specific in the registration indicating an intent to seek modification.

(PERSONAL JURISDICTION)

Didn't Appellant enter a general appearance by filing a responsive declaration?

Under these circumstances, no. Appellant's Responsive Declaration was an effort to seek appointed counsel before a default was entered, and he was entitled to a reasonable continuance in which to seek counsel under 50 U.S.C. App. § 520 as well as a stay of proceedings under 50 U.S.C. App. § 521 because he is a member of the armed forces. The Superior Court never made any determination that Appellant's military service would not affect his ability to conduct his defense as required under section 521.

Wasn't Appellant required to bring a motion to quash if he wanted to challenge personal jurisdiction?

In *Goodwine v. Superior Court* (1965) 3 Cal.2d 481 [47 Cal.Rptr. 201], the California Supreme Court noted that a challenge to subject matter jurisdiction could be combined with a challenge to personal jurisdiction without conceding either point.

What is the basis for your challenge to personal jurisdiction? Was the service improper somehow? There does not appear to be anything in the record supporting such a contention.

In this case, service was made at military housing. Appellant was under orders requiring to live in California and did not voluntarily live in the state.

While the Soldiers & Sailors Civil Relief Act does not include any specific provisions protecting a member of the armed forces from service of civil process, one New York case involving family law issues held that an arrest may not be executed against a serviceman. In *Jaworski v McCloskey* (Sup. Ct. 1944) 47 N.Y.S.2d 26, *aff'd* 48 N.Y.S.2d 799, the court held that a sheriff could not be compelled to execute a warrant providing for the

arrest of a husband in military service for failure to make alimony payments because it was within the intent of the Act that persons in military service be immune from civil process during the period of service.

In re Marriage of Hattis (1987) 196 Cal.App.3d 1162 [242 Cal.Rptr. 410], cited by the Superior Court, did not directly address this issue.

LAWFINDERS ASSOCIATES, INC.
2200 ROSS AVE., SUITE 5350E
DALLAS, TEXAS 75201
(800) 249-5297