CECILIA F. YANG, Plaintiff
v.
REGINALD YANG, Defendant
Civil Action No. 467
Trial Division of the High Court
Ponape District
August 31, 1971

Action for divorce. The Trial Division of the High Court, Arvin H. Brown, Jr., Associate Justice, held that the provisions of the Code which establish a residency requirement prior to bringing a divorce action were invalid.

1. Trusteeship—Administering Authority—Obligations
Administering authority of trust territory is expected to show at least as careful consideration for the rights of inhabitants of Trust Territory as it would for those of its own citizens in same situation.

2. Constitutional Law—Equal Protection

The equal protection of laws clause in the Bill of Rights imposes an obligation on all officials not to interfere with the freedom of individuals anymore than is reasonably necessary. 1 T.T.C. § 7.

3. Domestic Relations—Divorce—Jurisdiction

The two year residency requirement for granting a divorce in the Trust Territory denies a party of equal protection of the laws and is thus invalid. 39 T.T.C. § 202; 1 T.T.C. § 7.

BROWN, *Associate Justice*

In this case, plaintiff, Cecilia F. Yang, a citizen and resident of the Trust Territory of the Pacific Islands, filed an action for divorce against the defendant, Reginald Yang. Before undertaking to decide the case on its merits, this Court is faced with the necessity of considering the validity of Title 39, Trust Territory Code, Section 202, which provides as follows:—

"Residence requirements. No divorce shall be granted unless one of the parties shall have resided in the Trust Territory for two years next preceding the filing of the complaint."

Although plaintiff and defendant were married in Ponape District, Trust Territory of the Pacific Islands, in 1967, they resided for some time in Taiwan, Republic of China, and thereafter plaintiff returned to Ponape District but has maintained her residence in that district for less than two years preceding the filing of her complaint.

This Court must determine whether or not it lacks jurisdiction because of plaintiff's failure to aver residency for the two year period required by Title 39, Trust Territory Code, Section 202.

Section 7 of the Bill of Rights (Title I, Trust Territory Code, Section 7) provides, in part, that no person subject to the laws of the Trust Territory of the Pacific Islands shall be denied the equal protection of the laws.

[1, 2] The administering authority of a trust territory is expected to show at least as careful consideration for

the rights of inhabitants of the trust territory as it would for those of its own citizens in the same situation. *Ngodrii v. Trust Territory of the Pacific Islands, et al.*, 2 T.T.R. 142, 147. There can be no doubt that the citizens of the administering authority enjoy the benefits of the equal protection of the laws. The established American theory behind the Bill of Rights found in the amendments to the U.S. Constitution, in most state constitutions, and in the Trust Territory Code, is that of majority rule, subject to certain rights of individuals who are in the minority—even a minor one—which majority may not properly disregard, no matter how large that majority may be. The "equal protection of laws" clauses in the Bill of Rights imposes an obligation on all officials not to interfere with the freedom of individuals anymore than is reasonably necessary. *Mesechol v. Trust Territory of the Pacific Islands*, 2 T.T.R. 84, 89–90.

To determine whether or not plaintiff has been deprived of the equal protection of the laws, it is necessary to consider the more modern interpretations of the "equal protection of the laws" clauses. In doing so, it becomes readily apparent that the more recent decisions tend toward invalidating, as unconstitutional, laws requiring a given period of residency before one is entitled to the full protection of those laws or to the receipt of governmental benefits. Of particular importance is the case of *Shapiro v. Thompson*, 394 U.S. 618 (1969), which invalidated minimum residence requirements for welfare payments.

Other cases have followed the guidelines set forth therein. Of particular significance is the case of *Whitehead v. Whitehead*, (38 LW 2577) (Hawaii Family Ct. 3rd Cir. (1970)). In that case

"The plaintiff wife filed her complaint for divorce on October 21, 1969, and alleged domicile in Hawaii for at least three months. Service by mail was made on her Utah husband, who did not file an answer. On January 6, 1970, the court filed an order allowing

the State of Hawaii to enter the case as defendant-intervenor and to file its answer. The answer asserted that the court lacked jurisdiction because of the wife's failure to aver residency for a continuous period of one year prior to the filing of the complaint as required by Hawaii Revised Statutes, Section 580-1.

The authority of the state is very great over the marital status of its citizens. It may regulate marriages and enact laws to preserve them. But the one-year residency requirement challenged here does not seek either to regulate or preserve marriages in a rational, nondiscriminatory manner. The requirement is not that both residents and nonresidents, after there are grounds for divorce, must wait for one year before filing. Likewise, the requirement is not that both residents and nonresidents must submit to a program of marriage conciliation for a fixed period before filing for divorce. The requirement is that nonresidents must wait until they have been Hawaiian residents for one year before filing for divorce, even though residents may file at any time.

This court finds it difficult to understand and appreciate the thought that marriage can be preserved in the state by allowing those with more than one year of residence to file for divorce in a matter of days after marriage and by requiring those with less than one year to wait before filing. The relationship between the requirement of the waiting period for only residents of less than one year and the preservation of all marriages in the state is hard to see.

The wife has been a Hawaiian resident for three months, and thus has established domicile. Domicile can be established by the concurrence of act and intent, physical presence and intent to remain, and an intent to abandon the old domicile. 'No definite period of time is necessary . . ., one day is sufficient.' *Powell v. Powell,* 40 Haw. 625.

Access to the courts is protected by the Equal Protection Clause, and under the traditional standards, equal protection is denied if the classification is invidious (i.e., has no reasonable relation to a legitimate governmental objective). In *Shapiro v. Thompson,* 394 U.S. 618, 37 LW 4333 (1969), the Supreme Court went beyond the traditional standard, stating: 'Since the classification here touches on the fundamental right of interstate movement its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause.'

There is no dispute that the effect of the waiting period requirement (Sec. 580-1, H.R.S.) has created two classes of persons —both of them have grounds and do want to apply to the courts for a divorce. One is composed of residents who have resided a year or more, and the other of residents who have resided less than a year, in the jurisdiction.

What standard do we apply? Even applying the traditional standard, and not the stricter *Shapiro* standard, the waiting period requirement clearly violates the Equal Protection Clause.

Hawaii was not forced to pass divorce laws, but when it chose to do so, it could not practice invidious discrimination. The argument that the requirement is reasonably related to the attainment of the governmental objective of protecting the welfare of the children, by giving the court a one-year period to make a more accurate evaluation of the family, is without merit. In annulment and separation petitions, a different waiting period is not required of the nonresident; if the concern for evidence prompted the requirement, it should have been also required in these two situations. Protection of the children's welfare is even less served by the requirement, since parties who have grounds for divorce and desire to apply for one must wait out the time period. Children are thus forced to endure an environment where two hostile and incompatible parents live together. Often during this time the parties determine the custody of the children. Since they are emotionally and mentally embroiled in their differences, the children's welfare would be better served by having the court exercise immediate jurisdiction over the children. State statutes appear to express this policy by giving courts immediate jurisdiction to award custody during the pendency of divorce and separation suits, and in adoption cases. Petitions for appointment of guardians for both resident and nonresident minors have no waiting period requirements. The law of this state has shown that it is the continuing responsibility of the court to serve the best interests of the children, and this can be done better by having the court take jurisdiction at the earliest possible moment. Thus, the residency requirement cannot be justified on the basis of serving the children's welfare."

This Court is persuaded that the reasoning of the courts in both *Shapiro* and *Whitehead* is sound and correct; and those cases point unerringly to the fact that if this Court were not to assume jurisdiction in this case,

plaintiff would be deprived of the equal protection of the laws. To hold otherwise would be to condone the maintenance of two classes of persons, one of which would be able to obtain a divorce almost immediately after grounds therefor had arisen while the other class, with equally meritorious grounds, would be required to reside in the jurisdiction until two years of residency had been completed.

[3] Since Section 7 of the Bill of Rights clearly grants plaintiff the right to the equal protection of the laws and since Title 39, T.T.C., Section 202, would deny her that right, this Court must, and does, hold that Title 39, T.T.C., Section 202, is invalid and that jurisdiction to hear this case on its merits lies with this Court.