

**IN THE COURT OF APPEALS 12/29/95**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00763 COA**

**LARRY ROBERT GOODE**

**APPELLANT**

**v.**

**STEPHANIE ANN L. (GOODE) LANDRY**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HOWARD L. PATTERSON, JR.

COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CHANCERY

ATTORNEY FOR APPELLANT:

DAVID P. OLIVER

ATTORNEY FOR APPELLEE:

DELOS H. BURKS

NATURE OF THE CASE: CIVIL ACTION - MOTION TO SET ASIDE JUDGMENT OF  
DIVORCE

TRIAL COURT DISPOSITION: MOTION TO SET ASIDE JUDGMENT DENIED

BEFORE FRAISER, C.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure, Larry Robert Goode filed a petition in the Chancery Court of Pearl River County Mississippi requesting that a judgment of divorce be set aside. The court denied the petition. On appeal, Goode argues that the petition should have been granted because: (1) the court lacked in personam and subject matter jurisdiction and (2) the court action should have been stayed pursuant to the Soldier and Sailor's Relief Act. Because Goode's suggestions of error lack merit, we affirm the judgment.

## FACTS

Larry Robert Goode and Stephanie Ann (Goode) Landry were married on May 3, 1988, in Pearl River County, Mississippi. On September 24, 1991, the parties separated. On the date of separation, the parties were residing in Goose Creek, South Carolina because Goode was serving in the military aboard the U.S.S. Sturgeon at the Charleston, South Carolina Naval Base. Goode-Landry returned to Pearl River County, Mississippi soon after the separation and thereafter, on October 29, 1991, petitioned the Chancery Court of Pearl River County Mississippi for dissolution of the marriage. Goode-Landry's petition charged Goode with adultery, habitual cruel and inhuman treatment, and irreconcilable differences. On November 14, 1991, the Sheriff of Berkeley County, South Carolina, served Goode with process regarding the Pearl River County action.

No responsive pleading was filed by Goode; however, Goode did file an application for stay of the proceedings pursuant to the Soldiers and Sailors Civil Relief Act. Goode's application also requested that the action be stayed because a complaint for divorce had previously been filed in South Carolina. The court denied Goode's request for a stay because he failed to show that military service prevented him from defending the action; however, the court ordered several continuances so that Goode could personally appear or in the alternative, retain counsel in Mississippi. Goode-Landry's counsel notified Goode of each scheduled hearing.

Despite adequate notice and opportunity, Goode failed to enter an appearance or appear at any of the hearings. On April 21, 1992, the court entered a final judgment, which severed the parties' marital union and awarded Goode-Landry the custody of the parties minor children. In the final divorce decree, the court acknowledged that a divorce action was currently pending in South Carolina, but concluded that the pending South Carolina divorce action was no bar or obstacle to the Pearl River County divorce action. Approximately two years later, Goode filed a petition with the Chancery Court of Pearl River County Mississippi requesting that the judgment be set aside. The court denied the petition, and Goode appealed.

## I.

### DID THE TRIAL COURT ERR IN DENYING THE PETITION TO SET ASIDE JUDGMENT FOR LACK OF PERSONAL OR SUBJECT MATTER JURISDICTION?

Goode first raised the defenses of lack of personal and subject matter jurisdiction in the Petition To Set Aside Judgment. The defense of lack of jurisdiction over the person must be raised in a

responsive pleading or by motion. M.R.C.P. 12(b). If a party fails to raise lack of personal jurisdiction as a defense in a responsive pleading or by motion, the defense is waived. M.R.C.P. 12(h) (1). Goode failed to raise the lack of personal jurisdiction defense in a responsive pleading or motion; therefore, the defense is deemed waived and will not be considered on appeal.

Goode contends that the court lacked subject matter jurisdiction to grant the divorce. Subject matter jurisdiction refers to a court's authority and power to entertain and proceed with a case. *W.T. Bullock v. Roadway Express, Inc.*, 548 So. 2d 1306, 1308 (Miss. 1989). Unlike the lack of personal jurisdiction defense, the lack of subject matter jurisdiction defense is not waived and may be asserted at any stage of a proceeding or even collaterally. *Matter of Adoption of R.M.P.C.* 512 So. 2d 702, 706 (Miss. 1987). Therefore, Goode was not estopped from raising the lack of subject matter jurisdiction defense in the Petition To Set Aside Judgment. However, we do not find that the court lacked subject matter jurisdiction.

In reviewing a subject matter jurisdiction challenge, we look at the type of case by examining the nature of the controversy and the relief sought, assuming the allegations in the well-pleaded complaint are true. *Collins v. State*, 594 So. 2d 29, 32 (Miss. 1992) (citing *Hood v. Department of Wildlife Conservation*, 571 So. 2d 263, 266 (Miss. 1990)). Goode-Landry's well-pleaded complaint requested that the court award unto her an absolute divorce from the defendant, custody of the party's minor children, support for the party's minor children, reasonable alimony, and attorney's fees. The Mississippi Constitution provides that the Chancery Courts of the state shall have exclusive jurisdiction in matters of divorce and alimony. Miss. Const. art. VI, § 159. In addition to the authority to address divorce and alimony issues, the Chancery Courts are empowered by statute to determine the custody and support of minor children. Miss. Code Ann. § 93-5-23 (1972). It is readily apparent that the laws and constitution of our state conferred upon the court the authority to dissolve the marriage and determine the related issues of child custody, support, and alimony. Therefore, we find that the court had subject matter jurisdiction.

Goode argues that the court lacked jurisdiction because Goode-Landry was not an actual bona fide resident of the state for six (6) months preceding the commencement of the suit. Goode recognizes that the Chancery Courts of Mississippi may not acquire subject matter jurisdiction in a divorce action unless one of the parties to the marriage has been an actual bona fide resident of the State of Mississippi for six months preceding the commencement of the action. Miss. Code. Ann. § 93-5-5 (1972).

However, Goode is unmindful that the residence of a married woman is that of her husband during the time that they live together as husband and wife. *O'Neill v. O'Neill*, 515 So. 2d 1208, 1213 (Miss. 1987) (citation omitted). At the divorce hearing, Goode-Landry introduced a copy of Goode's Last Will and Testament. In the Last Will and Testament, Goode stated that he was "a legal resident of and domiciled in the State of Mississippi."

Moreover, Goode-Landry's sworn complaint for divorce stated that Mississippi was listed as the state of domicile on Goode's military personnel records because Goode's parents were residents of Pearl River County, Mississippi. In *Bannan v. Bannan*, similar facts were held sufficient to establish domicile. *Bannan v. Bannan*, 188 So. 2d 253, 255 (Miss. 1966). Assuming the allegations in Goode's complaint are true, Goode's domicile is Mississippi. Because a married woman shares the

domicile of her husband, Goode-Landry is also domiciled in Mississippi. Therefore, the court acquired subject matter jurisdiction.

## II.

### DID THE TRIAL COURT ERR IN DENYING THE APPLICATION FOR STAY PURSUANT TO THE SOLDIER AND SAILORS RELIEF ACT?

Finally, Goode argues that the judgment should be set aside because the court erred when it denied the application for stay pursuant to the Soldiers' and Sailors' Civil Relief Act. The Soldiers' and Sailors' Civil Relief Act provides:

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as a plaintiff or defendant, during the period of service or within sixty days thereafter may, in the *discretion of the court* in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

50 U.S.C.S. app. § 521 (Law. Co-op. 1981).

When a soldier invokes the provisions of the Soldiers' and Sailors' Civil Relief Act, the trial judge must make a specific finding that "the serviceman's ability to conduct his defense is not materially affected by reason of his military service, if such petition is denied." *Wilson v. Butler*, 584 So. 2d 414, 416 (Miss. 1991) (citations omitted). A soldier, however, is not entitled to relief under the Soldiers' and Sailors' Civil Relief Act as a consequence of his membership in the armed services but, rather, because his defense is materially affected by his military service. *Butler*, 584 So. 2d at 416.

On the day of the hearing, the court observed that the record was void of documentation showing that Goode's military service prevented defense of the divorce action. It is incumbent upon the defendant to show that his defense of an action is materially affected because of military service. *Id.* Because the record is void of documentation or evidence indicating that Goode's military service materially affected his defense of the action, we are not at liberty to determine that the court abused its discretion by denying the application for stay.

In conclusion, we find that Goode's assignments of error lack merit, and the court correctly denied the Petition To Set Aside Judgment.

**THE JUDGMENT OF DIVORCE OF THE CHANCERY COURT OF PEARL RIVER COUNTY, MISSISSIPPI, IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE**

**APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ,  
McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**