

3 V.R.C.P. 74. 69

STATE OF VERMONT
WINDSOR COUNTY, SS.

CHERYL R. PREVOST,
Appellant

WINDSOR SUPERIOR COURT

v.

DOCKET NO. S389-96 Wrca

STATE OF VERMONT,
DEPARTMENT OF TAXES,
Appellee

DECISION AND ORDER

This action is an appeal by taxpayer Cheryl R. Prevost of a Determination by the Vermont Commissioner of Taxes that she owes Vermont income taxes for the years 1987, 1988, 1989, 1990, 1991, 1992, and 1993. *See* Determination, In re: Cheryl R. Prevost Personal Income Tax, ATC-96-04 (August 5, 1996). *Also see* 32 V.S.A. § 5885(b) (appeal to Superior Court); V.R.C.P. 74 (appeals from decisions of governmental agencies).

The only issue presented by the appeal is whether or not Appellant was a domiciliary of Vermont during the pertinent years. The parties agree that the Department's assessment of taxes is valid if the Commissioner's determination of Appellant's domicile in Vermont is upheld on appeal. *See Piche v. Department of Taxes*, 152 Vt. 229 (1989).

Vermont imposes a tax on income earned or received by Vermont residents. 32 V.S.A. §§ 5822, 5823. Residents for purposes of this tax include "individual[s] . . . qualifying for residency in this state during the entirety of that taxable year." 32 V.S.A. § 5811(13). An individual qualifies for residency if he [or she] is "domiciled" within the state. 32 V.S.A. § 5811(11)(A)(i).

Id. at 231-32.

There is no significant dispute about the standard of review on appeal. The findings by an administrative agency must be upheld on appeal unless they are clearly erroneous. The appellate court must view the evidence in the light most favorable to the prevailing party and exclude any modifying evidence. This court will not disturb the findings if they are supported by credible evidence.

CONFIRMED COPY

FILED

SEP 10 1997

GAIL P. BRADY
WINDSOR COUNTY CLERK

Bigelow v. Vermont Department of Taxes, 163 Vt. 33, 35 (1994). Also, an appellate court must uphold the agency's decision if the findings "fairly and reasonably" support the agency's conclusions of law. In re New England Telephone and Telegraph Co., 159 Vt. 459, 461-62 (1993). Appellant emphasizes that there is no reason for this court to grant any special deference to the agency, given that the concept of "domicile" appears in many areas of the law and not just in the area of taxation. Appellant notes, for example, that the Vermont Supreme Court has cited a divorce case as part of its explanation for "domicile" in the context of a taxation case. Piche v. Department of Taxes, 152 Vt. 229, 232 (1989) (citing Tower v. Tower, 120 Vt. 213, 221 (1958)). Nevertheless, even the "normal" standard of review on appeal involves a substantial degree of deference. For example, in Piche, the Supreme Court noted that the appeals statute does not contemplate *de novo* review by the superior court. Id. at 233. In Piche, the Court upheld the agency's conclusions of law where they were fairly and reasonably supported by the findings of fact. Id. at 232.

The decision before the court for review is the Commissioner's determination that the Appellant was domiciled in Vermont during the pertinent years. Following an evidentiary hearing on March 26, 1996, Hearing Officer Robert A. Gross issued a Determination on July 31, 1996, and Commissioner of Taxes Edward W. Haase approved the Determination on August 5, 1996.

The Commissioner's Findings of Fact are well supported by the evidence. Indeed, most of the findings are based on provisions from the parties' written Stipulation of Facts (March 26, 1996), or on Appellant's own testimony, as indicated by the transcript of the hearing. Appellant's original domicile was in Vermont, and she resided in Vermont through the end of high school. She moved to Hartford, Connecticut to attend college in the fall of 1962, and she has continued to reside in Connecticut. Since her graduation from college, she has worked in Connecticut as a teacher. However, she has always maintained ties to Vermont. Throughout the pertinent time period she maintained a Vermont driver's license, a Vermont automobile registration, and a Vermont voter registration. She also has used her Vermont address on numerous documents, including federal income tax returns, non-resident or part-year resident Connecticut income tax returns, W-2

FILED

SEP 10 1997

GAIL P. BRADY
WINDSOR COUNTY CLERK

employment forms, and Connecticut banking forms. Although she works in Connecticut, she has consistently spent most of her leisure time in Vermont, and she has taken steps to acquire and maintain a share of ownership in her old family home in Springfield, Vermont.

At the hearing, Appellant also testified that when she was in college she arranged for her mother to remove her name from the Springfield, Vermont poll tax rolls. According to the transcript, she testified that she made that request because she was not a resident. (Transcript at 12). The Department of Taxes has not disputed Appellant's testimony, although the Commissioner's decision did not include any findings concerning the poll tax rolls.

The Commissioner concluded that Appellant's permanent home is in Vermont, and that she has been a domiciliary of Vermont since birth. In reaching this conclusion, the Commissioner relied upon appropriate statements of the law of "domicile" from Black's Law Dictionary, and from Vermont cases such as Piche v. Department of Taxes, 152 Vt. 229 (1989), and Anderson v. Anderson's Estate, 42 Vt. 350 (1869). The Commissioner's reasoning included the following paragraph:

The Taxpayer has kept strong family ties to Vermont. Her permanent home is located in Vermont while she rents a place to stay in Connecticut. That home is her historical family home, and she treats that as such, having all her permanent records addressed to Springfield, Vermont. She has voted in Vermont local elections, wanting and exercising a say in home town issues.

Commissioner's Determination of August 5, 1996, at 3.

Appellant disputes the Commissioner's conclusion that she has maintained her domicile in Vermont. In effect she argues that, as a matter of law, she changed her domicile to Connecticut when she changed her residence to Connecticut in 1962. She emphasizes that she has maintained her residence and employment in Connecticut, and that she took steps to sever her ties to Vermont when she removed her name from the Springfield, Vermont poll tax rolls. The Department responds that the Commissioner's conclusion is well supported by the evidence and by the findings, even though the record contains some countervailing support for Appellant's position.

FILED

SEP 10 1997

GAIL P. BRADY
WINDSOR COUNTY CLERK

The Vermont Supreme Court provided the following explanation of "domicile" in Piche v. Department of Taxes, 152 Vt. 229 (1989):

We have defined "domicile in the past to mean "a place where a person lives or has [her] home, to which, when absent, [she] intends to return and from which [she] has no present purpose to depart." Tower v. Tower, 120 Vt. 213, 221 (1958) . . . Domicile is essentially comprised of two elements: residence and intention. Walker v. Walker, 124 Vt. 172, 174 (1964); In re Hanrahan's Will, 109 Vt. 108, 116 (1937). "To make a change in domicile effective there must be a move to the new residence and dwelling there, coupled with an intention of remaining there indefinitely." Walker, 124 Vt. at 174; Town of Georgia v. Town of Waterville, 107 Vt. 347, 352 (1935); Dailey v. Town of Ludlow, 102 Vt. 312, 317 (1929). An essential ingredient of the intention requirement is the intent to give up the old domicile. Walker, 124 Vt. at 174; Town of Georgia, 107 Vt. at 352.

Piche at 232.

In the instant case it is clear that Appellant moved to Connecticut and resided in Connecticut. The disputed issue is whether or not she intended to remain there indefinitely. "The necessary intention to effect a change of domicile is, at least, an intention not to return to the old [state]." Bonneau v. Russell, 117 Vt. 134, 137 (1952). This element of intent may present a "troublesome aspect" of domicile because it deals with states of mind. Duval v. Duval, 149 Vt. 506, 509 (1988); Walker v. Walker, 124 Vt. 172, 174-75 (1964). However, the necessary intent may be proved by the acts as well as the words of the person involved. Bonneau v. Russell at 137. Furthermore, evidence of subsequent conduct may be relevant to a determination of domiciliary intent. Walker v. Walker at 175. The issue is considered to be an issue of fact, to be determined by the finder of fact. Bonneau v. Russell at 137.

The Commissioner concluded that Appellant never formed the necessary intent to remain in Connecticut indefinitely, based on her continuing ties with Vermont. The record supports this conclusion, in a way that a similar record supported a similar conclusion in Godino v. Cleanthes, 163 Vt. 237 (1995). In both cases, the person arguing against domicile in Vermont had maintained a Vermont driver's license, a Vermont automobile registration, and an ownership interest in a residence in Vermont. These facts, viewed in a light favorable to the Department, suffice to show that Appellant had her home in Vermont and was only temporarily absent. Id. at 240 (context of

FILED

SEP 10 1997

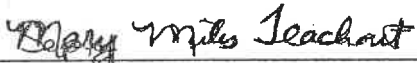
GAIL P. BRADY
WINN

demonstrating *prima facie* case of personal jurisdiction). See also Miller v. Miller, 88 Vt. 134, 136 (1914) (to make a change of domicile effective, libellant must have not only gone to Chicago and lived there, but must have also had the intention of remaining there and making that city her home). Thus the record "fairly and reasonably" supports the Commissioner's conclusions of law favoring the Department, even though the record also contains evidence in favor of the Appellant. Appellant's testimony that she took steps to take her name off the Springfield poll tax rolls is not so strong that it requires the Commissioner to conclude that she abandoned her domicile in Vermont *as a matter of law*. This court cannot conclude that the Commissioner's Determination is erroneous.

ORDER

The Determination by the Vermont Commissioner of Taxes is AFFIRMED.

Dated this 5th day of September, 1997.



Hon. Mary Miles Teachout,
Presiding Superior Court Judge

FILED

SEP 10 1997

GAIL P. BRADY
WINDSOR COUNTY CLERK