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DOMESTIC RELATIONS-DIVORCE-EX Parte DECREE, HELD, NOT TO TERMINATE OBLIGATION OF SUPPORT UNDER "DIVISIBLE DIVORCE" DOCTRINE

NOTE

DOMESTIC RELATIONS—DIVORCE—*Ex Parte* DECREE, HELD, NOT TO TERMINATE OBLIGATION OF SUPPORT UNDER "DIVISIBLE DIVORCE" DOCTRINE.—In a recent decision[1] affirming a judgment of the New York Court of Appeals,[2] the United States Supreme Court upheld the constitutionality of section 1170-b of the New York Civil Practice Act.[3] The holding established that the full faith and credit clause of the Federal Constitution[4] and its implementing statute[5] do not require the state of a wife's domicile to recognize, as determinative of her right to alimony, an otherwise valid *ex parte* divorce decree rendered by another state. It now seems clear that each state is free to apply local law in determining the support rights of its domiciliaries whether or not such rights were reduced to judgment prior to the divorce.

Section 1170-b was enacted by chapter 663 of the laws of 1953, upon the recommendation of the New York Law Revision Commission.[6] It permits the New York

[1] Vanderbilt v. Vanderbilt, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456 (1957).

[2] Vanderbilt v. Vanderbilt, 1 N. Y. 2d 342, 135 N. E. 2d 553 (1956).

[3] N. Y. CIV. PRAC. ACT § 1170-b:

"Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction.

In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installments accrued prior to the application as well as sums or installments to become due thereafter."

[4] U. S. CONST., Art. 4, § 1:

"Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

[5] Act of May 26, 1790, 1 STAT. 122, as amended, 28 U. S. C. § 1738 (1948):

"Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[6] REPORT OF NEW YORK LAW REVISION COMMISSION (1953) at 463-80:

"A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an ex parte foreign divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States (Estin v. Estin, 334 U. S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1561 (1948)). The husband's divorce must be recognized as altering the marital status of the parties under the second *Williams* case . . . , but since the New York law was interpreted to permit a maintenance order in a separation action to survive a divorce, the prior maintenance order still prevails as far as the economic relations of the parties are concerned.

The *Estin* case called attention to the injustice to a New York wife whose husband has obtained a divorce in another state in an ex parte proceeding. Unless she had been able to get a separation order with maintenance prior to the foreign divorce, she has no remedy. Under the Civil Practice Act maintenance of the wife may be granted only as an incident to relief in a matrimonial action. Since 1883 it has been accepted law, moreover, that there is no inherent power in the Supreme Court to grant maintenance to a wife independent of statutory authority. Ramsden v. Ramsden, 91 N. Y. 281 (1883)."

courts to grant discretionary maintenance to a wife in cases where it is not possible to grant a divorce, separation, or annulment because the marriage has already been dissolved by the courts of another state, at the instance of the husband, in an action in which personal jurisdiction over the wife was not obtained.

The parties to the instant action were Patricia and Cornelius Vanderbilt, Jr. who were married in Connecticut in 1948. At the time of the marriage the husband was domiciled in Nevada. His wife was a domiciliary of California. Shortly after the marriage the couple moved to California where they maintained their marital domicile until their separation in September, 1952. Following the separation Mrs. Vanderbilt came to New York, and in October, 1952, she sued for a separation. The suit was dismissed, for failure to satisfy the one-year residence requirement of section 1165-a, Subd. 3, of the New York Civil Practice Act.[7]

Just prior to dismissal of her suit Mrs. Vanderbilt went to California, but she returned to New York in February, 1953, and remained here until commencement of the present action. In March, 1953, Mr. Vanderbilt filed suit for divorce in Nevada. Mrs. Vanderbilt was not personally served with process, nor did she appear in that action. A final divorce decree was rendered by the Nevada court in June, 1953, stating that both husband and wife were ". . . freed and released from the bonds of matrimony and all the duties and obligations thereof. . . ." Under the law of Nevada such a decree ends a husband's duty to support his wife.[8]

In April, 1954, Mrs. Vanderbilt again instituted a separation action. On the ground that the Nevada decree had effectively terminated the marriage, the court denied the plea for a separation. However, it awarded alimony under section 1170-b, the judgment to be satisfied out of the husband's New York assets which had been sequestered at the commencement of the suit.[9] The court found Mrs. Vanderbilt entitled to the relief granted both by reason of having resided in New York continuously for more than one year prior to commencement of her suit and by having been a resident of the state at the time section 1170-b became effective.[10] The decision of the trial court was twice affirmed,[11] and the United States Supreme Court granted certiorari[12] upon petition of the husband.

Mr. Justice Black delivered the opinion of the Court. It declared the Nevada decree to be void for lack of jurisdiction insofar as it purported to affect the wife's right to support in New York. New York, therefore, had not violated the full faith and credit clause by awarding alimony.

In a nation where each state has the constitutional right to determine and enforce its own policy respecting the institution of marriage, decisions of the United States Supreme Court defining the extent to which divorces granted by one state must be

[7] N. Y. CIV. PRAC. ACT § 1165-a:

"Conditions attached to maintenance of action for annulment or separation.

An action to annul a marriage or for separation may be maintained in either of the following cases:

. . .

3. Where the parties were married without the state and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action."

[8] See note 1, *supra,* at 417, 77 S. Ct. at 1361, 1 L. Ed. 2d at 1458.

[9] Vanderbilt v. Vanderbilt, 207 Misc. 294, 138 N. Y. S. 2d 222 (Sup. Ct. N. Y. Co. 1955).

[10] *Id.* at 305, 138 N. Y. S. 2d at 236.

[11] See note 9, *supra, aff'd,* 1 A. D. 2d 3, 147 N. Y. S. 2d 125 (1955), *aff'd,* 1 N. Y. 2d 342, 135 N. E. 2d 553 (1956).

[12] Vanderbilt v. Vanderbilt, 352 U. S. 820, 77 S. Ct. 67, 1 L. Ed. 2d 45 (1957).

recognized by the others necessarily assume great importance.[13] Each state has a rightful and legitimate concern in the marital status of persons domiciled within its borders.[14] On the other hand, the social effects of the marital relation are so far-reaching that lack of certainty as to the existence of the status is highly undesirable. It is this consideration which, in our highly mobile society, has made it imperative that the divorces of one state be respected by the others.[15]

It was early recognized that the unique characteristics of the marital status were such that a wronged party should be permitted to terminate the relation in the state of the matrimonial domicile, in an in rem proceeding, without personal service upon the non-resident spouse.[16] Eventually it became necessary to decide what effect such *ex parte* divorces should have outside the state where granted. It had early been thought that the Act of Congress which defined the scope of the full faith and credit clause[17] required that all state judgments be given the same effect in other states that they had by law in the state where rendered. This view was afterward qualified, however, by making it clear that the Act did not apply to judgments rendered by a court without the requisite jurisdiction of the parties and of the subject-matter.[18] Were *ex parte* divorce decrees entitled to be excepted from this rule? Development of the answer to this question has taken many years and more than one ruling by the United States Supreme Court.

In 1901 the Court ruled[19] that a state must give full faith and credit to a divorce granted to a deserted husband by the state of the matrimonial domicile on the basis of constructive service of process. In that case New York was held barred from subsequently granting the wife's petition for a divorce. Later, for the same reason, an *ex parte* divorce granted the husband by the state of the matrimonial domicile was held to preclude a subsequent award of alimony to the wife.[20] No such full faith and credit had to be given, however, to decrees of a state other than that of the matrimonial domicile, for, in *Haddock* v. *Haddock*,[21] New York was permitted to grant a separation and alimony to a wife following an *ex parte* divorce granted the husband in Connecticut, the state to which he had gone after leaving his wife. New York had been the state of the matrimonial domicile, and there the wife had remained.

Haddock v. Haddock was overruled in what has come to be called the first *Williams* case.[22] There it was held that the full faith and credit clause required that recognition be given to an *ex parte* divorce granted by any state in which one spouse was domiciled. The second *Williams* case[23] made it clear, however, that the finding

[13] Annot., 93 L. Ed. 962, at 962.

[14] Williams v. North Carolina, 317 U. S. 287, 298, 63 S. Ct. 207, 213, 87 L. Ed. 279, 286 (1942).

[15] *Id.* at 304-06, 63 S. Ct. at 216-17, 87 L. Ed. at 289-90 (concurring opinion).

[16] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877) (dictum).

[17] See note 5, *supra.*

[18] See note 16, *supra,* at 729, 24 L. Ed. at 571; D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648 (1850); Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897 (1873); Baker v. Baker, Eccles & Co., Ky., 242 U. S. 394, 37 S. Ct. 152, 61 L. Ed. 386 (1917); Nevin v. Martin, 22 F. Supp. 836, *aff'd,* 307 U. S. 615, 59 S. Ct. 1046, 83 L. Ed. 1497 (1938).

[19] Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794 (1901).

[20] Thompson v. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347 (1912).

[21] 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867 (1906).

[22] See note 14, *supra.*

[23] Williams v. North Carolina, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945).

of the original state on the question of domicile could later be readjudicated by a second state.

Having established that *ex parte* divorces were entitled to full faith and credit so long as rendered by the courts of a state in which one of the parties was domiciled, it remained for the United States Supreme Court to define the scope of full faith and credit. State authorities were in conflict as to whether the requirement necessarily terminated a wife's right to support in a second state even though the decree would have had that effect in the state where rendered.[24]

Mr. Justice Douglas expressed his view on this point in *Esenwein* v. *Commonwealth*.[25] On the basis of *Williams* II,[26] the majority in the *Esenwein* case held that a court was justified in refusing to revoke a support order upon its finding that the petitioner had not had a bona fide domicile in Nevada when he obtained his divorce. Mr. Justice Douglas concurred in the result but reached his decision on the basis that full faith and credit did not necessarily require Pennsylvania to recognize the Nevada decree insofar as it affected the wife's right to support. In a concurring opinion in which he was joined by Mr. Justice Black, he said:

"I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support."

"We held in *Williams* v. *North Carolina,* 317 U. S. 287, that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada divorce was being prosecuted in North Carolina for living with the one woman whom Nevada recognized as his lawful wife."

". . .

"But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. . . . The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two states. . . . The question of marital capacity will often raise an irreconcilable conflict between the policies of the two states. . . . One must give way in the larger interest of the Federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The state where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offsprings of his second marriage are not bastardized."[27]

Thus, was expressed the idea which in the instant case the United States Supreme Court has given its most extended application to date, *i.e.* that a divorce decree may effectively terminate the marital status without affecting related property rights. While the designation has been criticized as a misnomer,[28] the term, "divisible divorce," has come to be applied to the concept.[29]

In *Estin* v. *Estin*[30] the United States Supreme Court applied the divisible concept to hold that a valid *ex parte* divorce had no effect upon the wife's rights under a previous decree for separate maintenance granted by the state of the matrimonial domicile. The instant case is important in that it establishes that the wife's right

[24] Annot., 28 A. L. R. 2d 1378 at 1383 (1953), and cases there cited.

[25] Esenwein v. Commonwealth *ex rel.* Esenwein 325 U. S. 279, 65 S. Ct. 1118, 89 L. Ed. 1608 (1945).

[26] See note 23, *supra.*

[27] See note 25, *supra,* at 281, 65 S. Ct. at 1120, 89 L. Ed. at 1610.

[28] See Mr. Justice Frankfurter's dissenting opinion in this case, 354 U. S. at 424, 77 S. Ct. at 1360, 1 L. Ed. 2d at 1463; J. Fuld's dissenting opinion in this case, 1 N. Y. 2d 342, at 356, 135 N. E. 2d 553, at 559.

[29] 17 AM. JUR. *Divorce and Separation,* § 947 (1957).

[30] 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 A. L. R. 2d 1412 (1948).

to support or maintenance need not be supported by a prior judgment in order to survive an *ex parte* divorce which effectively terminates the marital relation. The Court now holds that the right exists separate and apart from any judgment, and the wife cannot be deprived of it by any court acting without jurisdiction over her person.

Actually the present ruling was foreshadowed by Mr. Justice Black's concurring opinion in the *Armstrong* case.[31] There the majority upheld Ohio's award of alimony to a wife after her husband had obtained a divorce in Florida in an *ex parte* proceeding, but it did so on the theory that Florida had left open the question of alimony. Mr. Justice Black, on the other hand, considered that Florida had adjudicated the question of alimony. He based his concurrence on the *Estin* case:

"The fact that Mrs. Estin's claim to support had been reduced to judgment prior to divorce while Mrs. Armstrong's had not is not a meaningful distinction. Mrs. Armstrong's right to support before judgment, like Mrs. Estin's right to support after judgment, is the kind of personal right which cannot be adjudicated without personal service."[32]

The reasoning of the concurring opinion in the *Armstrong* case has become the reasoning of the Court in the instant case.

Whether or not one approves of the term, "divisible divorce," does not seem particularly important. To hold, as the Court did here, that a wife's right to be supported by her husband is entitled to survive unless or until she is deprived of it in an action in which she appears or is personally served with process, does not seem an unwarranted extension of the rule that personal rights cannot be adjudicated without personal jurisdiction over the parties affected.[33] As further stated by Mr. Justice Black in the *Armstrong* case,[34] older authorities indicate the possibility of property rights surviving termination of the marital status itself. The present decision does not say that an individual's interest in his or her marital status itself is less a personal right than the economic rights and obligations attached to that status. It merely indicates that the former is a right in which absolute certainty is so desirable as to warrant an exception to the general rule, while the latter rights are not so favored.[35]

By grounding its decision, as it did, on the invalidity of the Nevada decree insofar as it purported to affect property rights, the Court makes it unnecessary any longer to weigh the conflicting interests of two states when the question is whether a wife's support rights have been affected by an *ex parte* divorce. Had the Court instead ruled that the Nevada decree was entitled to full faith and credit in its entirety, but that New York might be relieved from granting such recognition by an overriding policy of her own,[36] it seems possible that Nevada's interest in the welfare of the husband who had lived in that state for some years prior to his marriage might well have been given greater weight than any interest New York could have had in such

[31] Armstrong v. Armstrong, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705 (1956).

[32] *Id.* at 577, 76 S. Ct. at 634, 100 L. Ed. at 713.

[33] See note 16, *supra*.

[34] See note 31, *supra*, at 578, 76 S. Ct. at 634, 100 L. Ed. at 714, and authorities there cited, especially, Pennoyer v. Neff, note 16 *supra* at 734:

". . . we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident which would be binding within the State, though made without service of process or personal notice to the non-resident . . ."

[35] See the related remarks of Mr. Justice Harlan in his dissenting opinion in this case, 354 U. S. at 433, 77 S. Ct. at 1370, 1 L. Ed. 2d at 1467.

[36] Mr. Justice Harlan favored such a ruling. See his dissenting opinion, 354 U. S. at 430, 77 S. Ct. at 1369, 1 L. Ed. 2d at 1466.

a short-term resident as the wife in this case. Certainly now we are freed from any such speculation.

Seen as a refusal to extend an exception to the rule that a state cannot adjudicate the personal rights of a non-resident except upon personal service, and as a refusal to extend the full faith and credit clause to cover extended exceptions to the former rule, when an overriding Federal interest does not demand it, the present decision seems conservative. While it would perhaps be desirable to view a divorce decree as a unit, valid for all purposes or void for all purposes, there is much to be said for a divisible concept. Such a concept achieves a maximum of balance between conflicting state interests while at the same time respecting the overriding federal interest in certainty of the marital status, particularly when the concept can be so well supported on fundamental legal principles.

The decision leaves it squarely up to the Courts of New York to interpret wisely the phrase, "as justice may require," contained in section 1170-b, in order that New York shall not become a litigation ground for matrimonial issues properly triable elsewhere.