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Domestic Relations—Divorce Law Changes

I Introduction

On April 1, 1969, the divorce, annulment and separate maintenance law¹ of West Virginia was partially rewritten and formally enacted by the Legislature. Aside from minor technical changes, major substantive modifications also were included in the enactment.

The revisors of the domestic relation statutes deleted the restriction on interracial marriage between whites and Negroes² and lifted a similar prohibition against the marriage of an epileptic.³ A 1967 decision of the United States Supreme Court, *Loving v. Virginia*,⁴ ruling Virginia's antimiscegenation statute unconstitutional, seems to have presaged the eradication of the racial restriction in the marriage law of West Virginia.⁵ The lifting of the ban on the marriage of epileptics appears to have been the result of the legislature's awareness of modern medicine.⁶

¹W. VA. CODE ch. 48, art. 2 (Michie Supp. 1969). This comment will be limited to the substantive changes to the divorce law enacted by the regular session of the 1969 West Virginia Legislature. It will not include discussion of possible procedural conflicts with the West Virginia Rules of Civil Procedure.

²W. VA. CODE ch. 48, art. 2, § 1 (Michie Supp. 1969). Under former W. VA. CODE ch. 48, art. 2 § 1 (Michie 1966), all marriages between a white person and a Negro were void from the time they were so declared by a decree of nullity.

³W. VA. CODE ch. 48, art. 2, § 1 (Michie Supp. 1969).

⁴388 U.S. 1, rev'g 206 Va. 824, 147 S.E.2d 78 (1967). In this landmark case, the United States Supreme Court rendered inoperable the antimiscegenation statutes of fifteen states, most of them in the South and including West Virginia. The Court, although recognizing the power of a state to establish marriage classifications to accomplish legitimate purposes, held that Virginia's antimiscegenation statute was an unreasonable racial classification and therefore violated the plaintiff's constitutional rights under the equal protection and due process clauses of the fourteenth amendment.

⁵See generally Colson, *Twenty Years of West Virginia Marriage and Divorce Law*, 58 W. VA. L. REV. 123 (1955). Dean Colson stated:

"[T]he West Virginia statutes prohibiting marriages between white persons and negroes [SIC] and providing for the annulment of such marriages are to say the least of doubtful constitutionality." *Id.* at 130.

⁶With the information available to medical authorities during the 1800's, it is possibly understandable that epileptics were forbidden to marry and states were within their police powers to enact such laws for the health and safety of their citizens. However, medical science has since departed its primitive state in this area and continued bans on the marriage of epileptics are untenable. See generally R. ALLEN E. FERSTER, H. WEIHOFEN, *MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY* (1968); R. BARROW AND H. FABRING, *EPILEPSY AND THE LAW* (1956).

II Alimony for Male Spouse

The revision in the divorce law affords the male spouse the right to seek alimony from the female spouse.⁷ Under the prior statute only the wife was entitled to sue for alimony. That view was consistent with case law which held the husband responsible for the support of his wife,⁸ even after termination of the marriage.⁹ With respect to alimony, the common law did not impose a duty on the wife to support her husband during the marriage,¹⁰ much less after its dissolution.¹¹ An obligation on the wife to support her husband during or after marriage, therefore, may only rest by statute.¹² In addition to becoming eligible for receipt of alimony, the husband is now eligible to receive separate maintenance *pendente lite* from his wife.¹³ This provision appears to serve the practical purpose of assuring access to joint assets to either spouse in the event that the other maintains complete control over such assets. However, a curious omission in the legislative revisions with respect to alimony and separate maintenance is that the husband was not afforded the equal opportunity to receive separate maintenance from the wife.¹⁴ If the Legislature saw fit to give the male spouse the right to alimony and separate maintenance *pendente lite*, then why did the Legislature not also extend to the male an equal right to separate maintenance? The legislative revisions appear inconsistent in that respect.

⁷W. VA. CODE ch. 48, art. 2, §§ 15, 16 (Michie Supp. 1969). Section 15 states that "[u]pon ordering a divorce the court may make such further order as it shall deem expedient, concerning the maintenance of the parties, or either of them . . ." (emphasis added). Section 16 states that in determining the amount of alimony the court "shall take into consideration . . . the financial needs of the parties, the earnings and earning ability of the husband and wife . . ." (emphasis added).

⁸See *Brady v. Brady*, 151 W. Va. 900, 158 S.E.2d 359 (1967); *In re Estate of Nicholas*, 144 W. Va. 116, 94 S.E.2d 452 (1959); *Snyder v. Lane*, 141 W. Va. 195, 65 S.E.2d 483 (1944); *Hinton Dep't Co. v. Lilly*, 105 W. Va. 126, 141 S.E.2d 629 (1928).

⁹See *State v. Knapp*, 143 W. Va. 896, 105 S.E.2d 569 (1958); *Games v. Games*, 111 W. Va. 327, 161 S.E. 560 (1931); *Burdette v. Burdette*, 109 W. Va. 95, 153 S.E. 150 (1930).

¹⁰See *In re Garrison*, 171 Misc. 983, 14 N.Y.S.2d 803 (Colum. Co. Ct. 1939); *Hodson v. Stapleton*, 248 App. Div. 524, 290 N.Y.S. 570 (1936); *Apostle v. Pappas*, 154 Misc. 497, 277 N.Y.S. 400 (Sup. Ct. 1935).

¹¹See *Lawering v. Lawering*, 21 S.W.2d 2 (Mo. Ct. App. 1929); *Bartunek v. Bartunek*, 109 Neb. 437, 191 N.W. 671 (1922); *Bristol v. Bristol*, 107 Neb. 321, 185 N.W. 972 (1921); *Clouse v. Clouse*, 185 Tenn. 666, 207 S.W.2d 576 (1948).

¹²See *Hopkins v. Detrick*, 97 Cal. App. 2d 50, 217 P.2d 78 (1950); *Hartnett v. Hartnett*, 93 N.H. 406, 43 A.2d 153 (1945); *Bennett v. Bennett*, 208 Ore. 524, 302 P.2d 1019 (1956); *Hedderick v. Hedderick*, 163 Pa. Super. 564, 63 A.2d 373 (1949).

¹³W. VA. CODE ch. 48, art. 2, § 13 (Michie Supp. 1969).

¹⁴W. VA. CODE ch. 48, art. 2, § 28 (Michie Supp. 1969).

III New Grounds for Divorce

The state Legislature liberalized the divorce law by creating new grounds for divorce. The Legislature provided that "[w]here the parties have lived separate and apart in separate places of abode without cohabitation and without interruption for two years, whether such separation was the voluntary act of one of the parties or by the mutual consent of the parties¹⁵ . . ." a divorce may be granted. In *Glendening v. Glendening*,¹⁶ the court held that the purpose of the "separate and apart" ground for divorce is to permit termination in law of marriages which have ceased to exist in fact.

In adopting this new ground for divorce, however, the Legislature failed to express whether the law is to act retrospectively. That is, whether the law will recognize time that couples have lived separate and apart prior to the enactment of the statute for the purpose of fulfilling the two-year separation requirement.

It has been stated that "[t]here can be no doubt that the legislature possesses the power to enact retrospective legislation."¹⁷ With respect to divorce laws, courts generally have held that statutes broadening grounds for divorce are not limited to prospective operation but operate retrospectively as well.¹⁸ However, there is some authority to the effect that a statute creating new grounds for divorce cannot be applied retrospectively.¹⁹ The courts in the majority of these cases appear to have based their findings on the contention that if the respective legislatures had intended a retrospective application, that intent would have been clearly manifest-

¹⁵W. VA. CODE ch. 48, art. 2, § 4 (Michie Supp. 1969). The Legislature also provided that a plea of recrimination or res adjudicata will not be a bar to a divorce under this section. *Id.*

It should also be noted that restrictions against the remarriage of the parties were removed by the deletion of a former statute, W. VA. CODE ch. 48, art. 2, § 22 (Michie 1966), from the new enactment. This provision placed a sixty day restriction on any remarriage of the parties, unless to each other, and gave the court discretion to prohibit the guilty party from remarrying anyone other than the former spouse up to one year.

¹⁶206 A.2d 824 (D.C. Ct. App. 1965).

¹⁷*Eaton v. Davis*, 176 Va. 330, 336, 10 S.E.2d 893, 896 (1940).

See, e.g., Sills v. Sills, 246 Ala. 165, 19 So. 2d 521 (1944); *Dodrer v. Dodrer*, 183 Md. 413, 37 A. 2d 919 (1944); *Campbell v. Campbell*, 174 Md. 299, 198 A. 414 (1938); *Schacht v. Schacht*, 301 N.Y.S.2d 151 (1969); *Packer v. Packer*, 55 Misc.2d 74, 284 N.Y.S.2d 300 (1967); *McGinley v. McGinley*, 295 S.W.2d 913 (Tex. Civ. App. 1956); *Canavos v. Canavos*, 205 Va. 744, 139 S.E.2d 825 (1965); *Hagen v. Hagen*, 205 Va. 791, 139 S.E.2d 821 (1965).

¹⁸*See, e.g., Barringer v. Barringer*, 200 Ala. 315, 70 So. 81 (1917); *Sherburne v. Sherburne*, 6 Me. 210 (1829); *Burt v. Burt*, 168 Mass. 204, 46 N.E. 622 (1897); *Greenlaw v. Greenlaw*, 12 N.H. 200 (1841); *Pierce v. Pierce*, 107 Wash. 125, 181 P. 24 (1919).

ed.²⁰ Another argument against retrospective application centers around the constitutional ban on ex post facto laws.²¹ Article 1, section 10 of the United States Constitution expressly forbids any state from passing an ex post facto law. However, it can be argued that since an ex post facto law relates to those laws criminal in nature, no application may be extended to divorce proceedings which are merely civil in nature.²² A retrospective divorce law may therefore be, in a sense, an ex post facto law but still comply with due process requirements²³ and not fall within the ambit of constitutional restrictions.²⁴

The West Virginia statute in question is very similar to the statute enacted by Virginia.²⁵ Whether or not the Virginia statute operated retroactively was decided by the Virginia Supreme Court of Appeals in 1965. In *Hagen v. Hagen*,²⁶ the court held that although the language of the statute²⁷ does not expressly state that it is to operate retroactively, it is unnecessary "that the statute so state."²⁸ The court further stated that "[t]his language clearly indicates that it is to apply to the past as well as to the future."²⁹ Likewise, a New York court, rendering its interpretation of a similar statute, held for a retrospective interpretation because "[a] literal, unstrained reading of [the statute] so indicates."³⁰

Provided the particular factual situation does not involve an impairment of obligations of contracts nor problems relating to vested property rights, the West Virginia Supreme Court of Appeals when presented with the question of the retrospective application of the separation statute, may well follow the weight of authority³¹ and rule in the affirmative.

The Legislature provided an additional new ground for divorce when a spouse is permanently and incurably insane and has been confined in a mental hospital "for three consecutive years next preceding the filing of the complaint."³² The statute provides that

²⁰See, e.g., *Pierce v. Pierce*, 107 Wash. 125, 181 P. 24 (1919).

²¹See *Schacht v. Schacht*, 301 N.Y.S.2d 151 (1969).

²²*Bannister v. Bannister*, 181 Md. 177, 181, 29 A.2d 287, 289 (1942); *Garret Freight Lines v. State Tax Comm'r*, 102 Utah 390, 397, 135 P.2d 523, 527 (1943).

²³U.S. CONST. amend. XIV, § 1.

²⁴*Bay v. Gage*, 36 N.Y. (Barb.) 447 (1862).

²⁵VA. CODE, § 20-91 (9) (Michie Supp. 1968).

²⁶205 Va. 791, 139 S.E.2d 821 (1965).

²⁷VA. CODE, § 20-91 (9) (Michie Supp. 1968).

²⁸*Hagen v. Hagen*, 205 Va. 791, 796, 139 S.E.2d 821, 824 (1965).

²⁹*Id.* at 796, 139 S.E.2d 821, 824 (1965).

³⁰*Schacht v. Schacht*, 301 N.Y.S.2d 151, 152 (1969).

³¹Cases cited note 19 *supra*.

³²W. VA. CODE ch. 48, art. 2, § 4(8) (Michie Supp. 1969).

the court granting the divorce may, at its discretion, order support and maintenance paid for the benefit of the permanently and incurably insane person.³³

IV Divisible Divorce Doctrine

In rewriting the divorce law, the Legislature provided revisions consistent with the majority of American jurisdictions. In one respect, however, the Legislature failed to adopt an arguably sound and just view—the divisible divorce doctrine.³⁴ In essence, the divisible divorce doctrine states that a foreign *ex parte* divorce does not nullify existing separate maintenance awards nor preclude an alimony suit by the other party. West Virginia does not recognize this doctrine;³⁵ instead a foreign *ex parte* divorce decree is considered as superseding existing separate maintenance decrees and precluding a subsequent suit for alimony by the divorced spouse. This point of view revolves around two primary rationales. Initially, West Virginia honors the foreign *ex parte* decree pursuant to the full faith and credit clause³⁶ and will comply with it.³⁷ Secondly, the West Virginia Supreme Court of Appeals, in recognizing the absolute divorce decree from another state, holds that the dissolution of marital status terminates the right of the wife to alimony unless provision for same was made in the foreign *ex parte* action. In other words, divorce and the settlement of alimony are viewed as indivisible, and West Virginia courts have seen no reason to split the cause of action.

There is, however, good reason to urge adoption of the divisible divorce doctrine. A primary reason is that insistence by the court on the indivisibility of divorce and alimony is giving full faith and credit to *in rem* foreign *ex parte* divorce actions at the expense of the *in personam* rights of the spouse to alimony. Judge Calhoun stated in his dissent in *Brady v. Brady*³⁸ that “[t]he mere jurisdiction of the *res*, of the marital status, [gives] no jurisdiction to

³³This maintenance provision can be construed as a companion provision to W. VA. CODE ch. 27, art. 8, § 1 (Michie 1966) which provides for the maintenance of mentally ill persons in state hospitals and the right of reimbursement to the hospital from relatives of the patient for the maintenance of said patients.

³⁴See generally, 58 W. VA. L. REV. 193 (1955).

³⁵*Brady v. Brady*, 151 W. Va. 900, 158 S.E.2d 359 (1967).

³⁶U.S. CONST. art. IV, § 1.

³⁷W. VA. CODE ch. 57, art. 1, § 12 (Michie 1966).

³⁸*Brady v. Brady*, 151 W. Va. 900, 914 158 S.E.2d 359, 367 (1967).

[foreign] courts to interfere with, to modify or to nullify the *in personam* rights of the wife . . .”³⁹ Justice Douglas, speaking for the Supreme Court in *Estin v. Estin*⁴⁰ stated that “[a] judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statutes of the United States demand.”⁴¹ The wife’s right to alimony is an intangible property interest in which she has personal rights and which is not subject to adjudication in *ex parte* proceedings.⁴² Giving full faith and credit to a foreign state’s *ex parte* proceeding which affects a wife’s interest in alimony would seem to be contrary to a sound sense of justice. In other words, the spouse may be arbitrarily excluded from receiving alimony on the basis of a questionable doctrine, and the Legislature failed to respond to a present inequity in our divorce laws in its failure to deal with the issue of the divisible divorce doctrine.

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³⁹*Id.* at 914, 158 S.E.2d at 367.

⁴⁰334 U.S. 541 (1948); *cf.* *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Armstrong v. Armstrong*, 350 U.S. 568 (1955); *Krieger v. Krieger*, 334 U.S. 555 (1948); *Bassett v. Bassett*, 141 F.2d 954 (9th Cir. 1944).

⁴¹*Estin v. Estin*, 334 U.S. 541, 549 (1948).

⁴²*Meredith v. Meredith*, 226 F.2d 257 (D.C. Cir. 1955); *cf.* *May v. Anderson*, 345 U.S. 528 (1953).