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Divorce—Wife's Right to Obtain Alimony After Valid Ex Parte Divorce

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Divorce—Wife’s Right to Obtain Alimony after Valid Ex Parte Divorce.—D sued P in an ex parte proceeding in Florida. Later, P sued D in Washington, D.C., for alimony and maintenance. D was personally served, and he appeared to contest the suit. Held, that the Florida proceeding was invalid and therefore P and D are still man and wife and she is entitled to separate maintenance for herself and child. On appeal, the court held that the lower court should not have questioned the validity of the Florida decree but should have allowed P’s claim by using the court’s general equity powers and recognizing that the right to maintenance is a right of the wife which survives an ex parte divorce. In the event that D could defeat P by interposing equitable defenses, then, and only then, could the lower court question the validity of the Florida decree. Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955).

Where the husband has obtained a valid ex parte divorce (one based on constructive or substituted service on the wife and the wife does not appear to contest the suit) there is a split of authority as to the wife’s right to sue for alimony in a subsequent proceeding. Based on a numerical count of states which have litigated this question, the majority view precludes the wife from obtaining alimony in a subsequent action.

Of major importance in these cases is the effect to be given to the full faith and credit doctrine under the Federal Constitution, U.S. Const. art. IV, § 1, Williams v. North Carolina, 317 U.S. 287 (1942); the concept of divisible divorce, Estin v. Estin, 334 U.S. 541 (1948); and the principle of res judicata. A consideration of these points should lead a court to recognize that there is a distinction between claims based upon statute or rules allowing alimony after divorce, and ordinary claims for alimony based upon the marital relation.

The principal case says that the full faith and credit clause does not require the court to recognize the foreign decree in so far as it cut off the wife’s rights to maintenance under local law, and “the question of recognition or non-recognition, even as to the issue of maintenance is left squarely up to each individual forum to be solved there in conformity with its public policy and in the light of the many conflicting interests and considerations patently involved”. In Pawley v. Pawley, 46 So.2d 464 (1950), the court said that the Federal Constitution did not compel recognition of an ex parte divorce granted in a foreign country as terminating the wife’s right to alimony. And, even though the court can recognize the decree under the rules of comity as dissolving the marital status,
the court can disregard any part of the decree which concerns alimony, and apply local rules of law in determining a wife's right to alimony.

It follows that local rules of law could allow a court to recognize an ex parte divorce awarded in a sister state under the rules of comity even though such decree is not entitled to full faith and credit under the Federal Constitution.

In *Estin v. Estin*, supra, the court said “the fact that the marital capacity has been changed does not mean that every legal incident of the marriage was necessarily affected”. The court held that a sister state court in an ex parte divorce action could not terminate a wife's right to maintenance adjudicated in another state prior to the divorce. From the broad language of the case has arisen the basis of the “divisible divorce doctrine” which courts can use in holding the ex parte divorce valid as to marital status termination but of no validity in regard to the wife's right to alimony. See Morris, *Divisible Divorce*, 64 Harv. L. Rev. 1287 (1951).

Obviously a court having no personal jurisdiction of the wife can not decide her right to alimony as alimony involves an in personam proceeding. Therefore, there is no basis for saying that an ex parte divorce is res judicata as to the question of alimony unless the right to alimony terminates with the dissolution of the marital relation.

What is the effect of an argument that an ex parte divorce raises a presumption that the wife was at fault and therefore barred from alimony? It has been held that there is no such presumption due to the fact that the wife did not contest the suit. *Thurston v. Thurston*, 58 Minn. 279, 59 N.W. 1017 (1894).

Does it matter that the wife had no actual notice of the ex parte proceeding? *Kenna v. Kenna*, 222 Mo. App. 825, 10 S.W.2d 844 (1928), held that such lack of notice was of no help to the wife as she was precluded from subsequent alimony even though she had no actual notice. However, *Toncray v. Toncray*, 123 Tenn. 476, 31 S.W. 977 (1910), gave weight to the fact that the wife had no actual notice.

In 1869, an Ohio court said that a statute granting the right of alimony to a “wife” entitled her to sue for alimony after her husband divorced her because the term “wife” designates a person and not an actual existing marital relation. *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415 (1869). It has been held that a statute forbidding alimony to a wife after her husband has secured a divorce has no application where the husband's divorce was ob-

Those courts allowing a wife's claim for alimony after her husband obtains an ex parte divorce do so for various reasons. Some of these reasons are: (1) a wife can not get alimony if she gets an ex parte divorce so she can not be barred from alimony after her husband obtains an ex parte divorce, *Davis v. Davis*, 70 Colo. 37, 197 Pac. 241 (1921); (2) it is a duty of the state to protect its citizens and “no obligations of comity are paramount to this duty”, *Turner v. Turner*, 44 Ala. 437 (1870); (3) an ex parte divorce does not relieve a husband from all responsibilities incidental to the contract of marriage, *Pawley v. Pawley*, *supra*; *Gray v. Gray*, 61 F. Supp. 367 (D.C. Mich. 1945); *Davis v. Davis*, 165 Wash. 172, 8 P.2d 286 (1931); (4) an ex parte divorce is res judicata as to the marital relation, but “all other questions are res nova”, *Thurston v. Thurston*, *supra*; (5) Oregon court has inherent jurisdiction to award alimony upon an independent suit after divorce, *Rooda v. Rooda*, 185 Ore. 140, 202 P.2d 638 (1948) (this was dissenting view of three judges); (6) court found no connection between divorce and alimony in the Tennessee statutes and therefore held that the court could decree one without the other. *Toncray v. Toncray*, *supra*; (7) an ex parte divorce denying alimony is not entitled to full faith and credit as regards the alimony question, *Armstrong v. Armstrong*, 162 Ohio St. 406, 123 N.E.2d 267 (1954).

Some of the reasons given by courts who refuse such claims of the wife are: (1) a decree of divorce terminates the husband's obligation to support a former spouse, *Com. ex rel. McVay v. McVay*, 177 Pa. Super. 623, 112 A.2d 649 (1955); *Staub v. Staub*, 170 Md. 202, 183 Atl. 605 (1936) (here the wife obtained the ex parte divorce and later sued for alimony); *McCoy v. McCoy*, 191 Iowa 973, 183 N.W. 377 (1921); *Anglin v. Anglin*, 211 Miss. 405, 51 So.2d 781 (1951); (2) parties must be married before the court will entertain a suit for separate maintenance, *Shain v. Shain*, 324 Mass. 603, 88 N.E.2d 143 (1949); right to sue for alimony or support is limited to the period when the parties are married, *Dimon v. Dimon*, 111 Adv. Col. App. 329, 244 P.2d 972 (1952); (3) statute allowing wife to sue for alimony without divorce will not cover case where wife is no longer a wife due to an ex parte divorce, *Bond v. Bond*, 235 N.C. 754, 71 S.E.2d 53 (1952); *Atkins v. Atkins*, 386 Ill. 345, 54
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N.E.2d 488 (1944); Joyner v. Joyner, 131 Ga. 217, 62 S.E. 182 (1908); (4) the law of Kansas says that the court granting the divorce is the only court which can award alimony and this also is the law where an out of state court grants the divorce, Roe v. Roe, 52 Kan. 724, 35 Pac. 808 (1894).

The problem involved in the principal case has never been decided in West Virginia. It is obvious that excellent arguments can be made both pro and con in regard to the wife's attempt to obtain alimony after her husband has received an ex parte divorce. By statute, West Virginia has gone no further than to allow an action for separate maintenance brought by the wife while the marriage relation exists. W. VA. CODE c. 48, art. 2, § 29 (Michie 1955). As pointed out in the Revisers' Note, this statute is just a codification of existing West Virginia law. The rationale which allowed such claims before any statute authorized them seems to be that the common law imposed a duty on a husband to support his wife and such duty continues as long as the parties remain married. See, e.g., Huff v. Huff, 73 W. Va. 330, 80 S.E. 846 (1918). There is no authority saying that the common law imposed such duty on a husband after he ceased being a husband due to a valid divorce. Therefore, our courts may feel that before they can award alimony after a divorce there must be a statute authorizing such action. And in the absence of such a statute, it is plausible to argue that a wife can not secure alimony in West Virginia unless she asks for it before the marital relation is terminated. "Maintenance of the wife by the husband is alone incident to the marriage relation. There is no duty to furnish maintenance when that relation does not exist." Chapman v. Parsons, 66 W. Va. 307, 66 S.E. 641 (1909).

But, it does not follow that the same argument would be sound as against a wife seeking alimony after her husband secures an ex parte divorce, until, at least, all of the equities in the wife's favor have been weighed. It seems harsh to arbitrarily exclude a wife from alimony merely because she did not contest the ex parte divorce action. She should not lose her right to alimony merely because her husband travels to some distant state and divorces her. It should take more facts to show a waiver of alimony in an ex parte divorce of a sister state than it would to show a waiver of alimony in a West Virginia divorce action.

It is submitted that if the balance of equities shows the wife to have been wronged she should have a legal remedy.

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