Conflict of Laws Relating to Divorce

Charles R. Huddleson

SEMINAR

CONFLICT OF LAWS RELATING TO DIVORCE

"Draw up the papers, lawyer, and make 'em good and stout,
For things are running crossways, and Betsey and I are out."

Will Carleton: **Betsey and I Are Out,** (1873)

The highly industrialized complex of our social structure has created many perplexing enigmas in which conflict of laws problems arise. The field of divorce is certainly not immune to the problems created. Very frequently the disgruntled and impatient partner of a marriage contract has not hesitated to take advantage of more accommodating divorce requirements to be found in the readily accessible "tourist divorce" states.[1] Of course the problem is not ameliorated by the distaste her home state may have towards her departure from that sovereign's boundaries to another state's courts for the sole purpose of obtaining a divorce.

The conflicting interests of the states and the parties themselves have resulted in new concepts of interstate recognition of divorce, which, along with marriage, was a matter of local concern just a few decades ago. Federal infringement was inevitable because of the Full Faith and Credit Clause of the Constitution.[2]

The discussion of this article will point out the United States Supreme Court's attempts towards unification of divorce recognition policy and how the states have reacted to their own residents and other non-resident's attempts to discharge obligations created by the marital bond via proceedings in sister states.

The subject matter of this article will start out with a general chronological account of Supreme Court decisions on extra-territorial effect of divorces. The following section will deal with the question of whether the "home" state may still later prosecute the disenchanted pair for violations of penal

---

1. **E.g.,** Florida's 90 days residence requirement and Nevada's six week requirement make not only a short wait but also relaxing and attractive divorce havens.

2. Art. IV § 1 of U.S. CONST. provides, "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State. And Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress has performed this function by 62 State. L. 947 (1948), 28 U.S.C. (Supp.III. 1960) § 1738.

laws arising after a spurious claim of divorce. The two following sections will involve the reactions of the states towards participation of the parties in the divorce action and the nebulous term domicile, each one being an ingredient which will affect the solidity of a divorce obtained in a foreign divorce jurisdiction.

The last section will deal with both federal and state decisions and reasoning on not only recognition of an out-of-state divorce but also the word that always brings an ambivalent reaction—alimony.

FULL FAITH AND CREDIT IN THE SUPREME COURT FROM WILLIAMS TO COOK

The present day recognition of a divorce will primarily depend upon whether it is an *ex parte* decree or not. The *ex parte* decrees obtained in foreign states did not receive full faith and credit in the matrimonial domicile of the parties prior to 1942. Before this date, the interest of the matrimonial domicile was protected and *ex parte* divorce proceedings were not recognized unless conducted in the matrimonial domicile.[3] Therefore, migratory divorce seekers were being discouraged until *Williams v. North Carolina,*[4] popularly termed *Williams I,* in which the Supreme Court initially decided the present day concept of out-of-state divorces. It was held that a decree of divorce containing a finding that one of the parties to the proceeding had acquired domicile in the rendering state was sufficient to meet the jurisdictional prerequisite to intitle the decree, although founded upon an *ex parte* proceeding, to full faith and credit. The "something else" required in *Haddock v. Haddock*[5] before a foreign divorce decree would be given credence was expressly overruled.[6] Also, the uncertainty of whether a man and women were married in one state and divorced in another or the children legitimate in one state while illigitimate in another were regarded as constituting a "pure fiction, and fiction is always a poor ground for changing substantial rights."[7]

---

3. Haddock v. Haddock, 201 U.S. 562 (1906) **overruled in** Williams v. North Carolina, 317 U.S. 287 (1942); Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901).

4. 317 U.S. 287 (1942).

5. **Supra** note 3; This "something else" or extra contact was the domicile of the other party, or the matrimonial domicile, or the presence of the other party, or personal service in the divorcing state.

6. Williams v. North Carolina, 317 U.S. 287, 304 (1942).

The Supreme Court then remanded the case so the North Carolina court could relitigate the question of domicile. It was brought back to the Supreme Court because the North Carolina Court decided that domicile had not been acquired in Nevada by the defendants and affirmed the conviction of bigamy. The Supreme Court then affirmed the North Carolina decision in *Williams II*[8] on the basis that although full faith and credit demanded conclusiveness of a foreign decree, the jurisdictional facts upon which the decree was founded was open to examination; and domicile is a jurisdictional fact.[9]

The principle allowing the domicile of one party to suffice for the jurisdictional hurdle of a foreign *ex parte* proceeding was thereby reinforced by the second *Williams* decision, but also the court being mindful of the "home" state's interest in its own domiciliaries, allowed conflicting opinions of domicile. Although leaving the question of domicile open, there is also an established rule that the courts of the forum are required to give a foreign divorce decree prima facie validity and the burden of proof rests heavily upon the assailant.[10]

Since the *Williams* decisions dealt with a divorce decree obtained by constructive service on the absent defendant in deciding the propriety of a collateral attack on alleged domicile, they seemed to naturally beg the question of whether reexamination of domicile would be permitted when the defendant had answered and appeared in the foreign court rendering the decree. This exact issue was decided in *Sherrer v. Sherrer*.[11] A defendant to a prior divorce proceeding in another state in which he had been served by mail, appeared and answered all of the allegations of the complaint including those of residency, then attempted to later attack the decree on the basis of lack of jurisdiction of the rendering state because the plaintiff to the divorce proceeding had lacked domicile in that state. The court answered his contentions by saying:

> "It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional facts where such findings have been made by a court of a sister state which has entered a divorce decree in *ex parte* proceedings. It is quite another thing to hold that the vital rights

7. **Id.** at 300.
8. Williams v. North Carolina, 325 U.S. 226 (1945).
9. **Id.** at 232.
10. Esenwein v. Commonwealth, 325 U.S. 279 (1945).
11. 334 U.S. 343 (1948).

> and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant participated."[12]

Even though the defendant hadn't actually contested the issue of jurisdiction, the decree was *res judicata* as to him if the decree was not susceptible to attack in the rendering state because of his participation. A companion case[13] held the same where a defendant was served by mail, personally appeared and admitted the residence of the plaintiff spouse in the divorcing state.

The *Sherrer* and *Coe* cases were merely extensions of the principal earlier laid down in *Davis v. Davis*[14] where a defendant was estopped in a second forum from raising the issue of jurisdiction when he had contested it in the first forum. The extension was that if there was an opportunity accorded the defendant to raise the issue by his participation or personal appearance, he would be precluded from the subsequent attack in another state if the rendering state would not allow such an attack.[15]

Thus deciding that an *ex parte* proceeding would allow collateral attack and a proceeding in which the defendant was a participant precluded collateral attack, would the court allow third parties not involved in the proceedings to collaterally assail the finding of the divorce court? *Johnson v. Muelberger*[16] was the case of first impression involving the availability of collateral attack to third parties. The case involved a daughter legatee of the deceased's first marriage who attacked in New York his Florida divorce from his second wife. The deceased had married the second wife after the demise of his first wife. The second wife then obtained a divorce in Florida.

---

12. **Id.** at 356.
13. Coe v. Coe, 334 U.S. 378 (1948).
14. 305 U.S. 32 (1938).
15. Sherrer v. Sherrer, 334 U.S. 343, 351-352 (1948) "We believe that the decision of this Court in the Davis case and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."
16. 340 U.S. 581 (1951).

She had not fulfilled the Florida residency requirement; but the deceased appeared and contested the merits although not the residency. The deceased then married the petitioner in the present case. She had elected to take her statutory share since the respondent, daughter legatee, was the only one provided for in the deceased's will. The Supreme Court reiterated the previous decisions which precluded collateral attack of either party who had been personally served or appeared if such attack would be prohibited in the rendering state. The court then set out the rule regarding the ability of third parties, whether they be mere strangers or in privity with the original parties, to collaterally attack the same type of decree.

> "If the laws of Florida should be that a surviving child is in privity with its parent as to the parent's estate, surely the Florida doctrine of *res judicata* would apply to the child's collateral attack as it would to the father's. If, on the other hand, Florida holds, as New York does in this case, that the child of a former marriage is a stranger to the divorce proceedings, late opinions of Florida indicate that the child would not be permitted to attack the divorce, since the child had a mere expectancy at the time of divorce."[17]

The court then concluded:

> "When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union. Full Faith and Credit forbids."[18]

Later in *Cook v. Cook*[19] the court was faced with a situation where a couple, discovering that the wife was still married, agreed that the wife go to Florida and obtain a divorce from her first husband. She did so and she and her second husband then remarried. Due to marital difficulties, husband number two obtained an annulment of both marriages. The Supreme Court, presuming that husband number one had appeared in the Florida divorce action, reaffirmed its *res judicata* doctrine as to third parties laid down in the *Sherrer* case. The case was remanded to Vermont, where the annulment proceedings were brought, for decision on the first husband's participation in the Florida divorce proceedings.

The Supreme Court has then answered some of the questions

17. **Id.** at 588.
18. **Id.** at 589.
19. 342 U.S. 126 (1951).

that were plaguing lawyers for many years and these answers can be summarized as follows:

1. Jurisdiction to entertain a suit for divorce is allowed if one of the parties is domiciled in the rendering state.[20]

2. Domicile being a jurisdictional fact can be reexamined when a divorce is granted *ex parte*.[21]

3. If the defendant spouse appears in the proceedings and contests the jurisdictional issue,[22] or has an opportunity to do so,[23] or admits the domicil,[24] or was personally served in the divorce state[25] then both parties will be barred from collaterally attacking the decree on the grounds of lack of jurisdiction if that attack is not allowed in the rendering state.

4. If the defendent spouse conducts himself in any of the ways mentioned in 3 above, third parties, whether they be in privity or merely strangers to the proceedings, will also be barred if that third party is precluded from attacking the decree in the state granting the decree.[26]

However, the court has left open some questions of full faith and credit in other situations which will be discussed in the following sections.

ESTOPPEL OF THE STATE

Have the *Johnson* and *Cook* decisions precluded the states from prosecuting the spouse that remarries for bigamy on the basis that the divorcing court lacked jurisdiction? Although not directly decided by the Supreme Court, a negative answer has been indicated by the following exerpt:

> "Those not parties to a litigation ought not to be foreclosed by interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its border. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another state."[27]

---

20. Williams v. North Carolina, 317 U.S. 287 (1942).
21. Williams v. North Carolina, 325 U.S. 226 (1945).
22. Davis v. Davis, 305 U.S. 32 (1938).
23. Sherrer v. Sherrer, 334 U.S. 343 (1948).
24. Coe v. Coe, 334 U.S. 378 (1948).
25. Johnson v. Muelberger, 340 U.S. 581 (1951).
26. Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951).
27. Williams v. North Carolina, 325 U.S. 226, 230 (1945).

The *Johnson* and *Cook* cases have delighted the private parties to the litigation but not the State. The strength and fervor of the court would indicate the State's ability to reopen the domicile question. It would seem highly unlikely that a sovereign would be classified on the same footing as a daughter or putative husband because of the State's vested interest and right to regulate the social and moral behavior of its own citizenry.

However, there is an uncertainty that is eventually going to force the court to decide the question by weighing the concept of compulsory comity it has imposed on the states and the litigants right to have divorces final and not subject to future harassment against the ability of a sovereign, which has created the right to marry and divorce, to determine whether actions of persons it decides are still their domiciliaries deprecate the morals and welfare of that state's citizenry.

PARTICIPATION—WHAT CONSTITUTES—FRAUD'S EFFECT THEREON

The two poles of participation either allowing or disallowing collateral attack as laid down by the *Williams* case on the one hand and the *Sherrer* case on the other can be dispensed with summarily. The states have followed the Supreme Court in allowing collateral attack if the proceeding was *ex parte*,[28] and have held the divorce impeccable when the defendant appeared and contested.[29] It is in the situations to be posed that the courts are not consistent in following what has been espoused by the Supreme Court.

One technical deviation from the Supreme Court's decisions can be found in *Davis v. Davis*,[30] wherein a defendant spouse who had made a special appearance in a prior foreign divorce proceeding and actually contested the issue of jurisdiction, which was decided adversely to him, was allowed to impeach the divorce because he hadn't actually appeared in person under the *Sherrer* and *Coe* decisions.[31] This case by making

28. See, **e.g.**, Wolf v. Wolf, 162 A.2d 776 (D.C. 1960) (Husband precluded from attacking a foreign decree where he fully and personally participated and was accorded every opportunity).

29. See, **e.g.**, Colby v. Colby, 217 Md. 35, 141 A.2d 506 (1958) (Although the defendant husband had been to Nevada on two occasions while the wife was filing for divorce, he was neither personally served nor appeared. It was held that there was no opportunity whatsoever to contest the jurisdiction of the court without service or appearance.).

30. 259 Wis. 1, 47 N.W.2d 338 (1951).

31. **Id.** at 341.

a fine line distinction of appearance as laid down in the *Johnson* case,[32] would appear to be subverting the *Sherrer* doctrine of both participation and opportunity. Also, the *Cook* decision would indicate that a special appearance would be sufficient basis for *res judicata.*[33]

The *Davis* case is irreconcilable on the basis of lack of participation with the courts that hold a special appearance as a submission to all issues, thereby barring that party from impeaching the jurisdiction of the divorcing court as he has fulfilled the participation requirement or has been accorded an opportunity to contest.[34]

A general appearance either personally or through an attorney without answering the issue of jurisdiction has been held sufficient to raise the bar of *res judicata* as there was accorded an opportunity to contest the jurisdiction of the divorcing court.[35]

When the defendant signs what is commonly titled "Waiver of Summons and Entry of Appearance" and does nothing else, the courts will carefully examine the situation and will allow collateral attack if the plaintiff did not meet the domicile requirements and had no opportunity to contest domicile.[36]

Some disfavor can be found towards the defendant signing a power of attorney with no other participation, either because

---

32. Johnson v. Muelberger, 340 U.S. 581, 587 (1951) "It is clear from the foregoing that under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or **who has entered a personal appearance** from collaterally attacking the decree." (Emphasis supplied).

33. Cook v. Cook 342 U.S. 126, 128 (1951), in stating a divorce decree was entitled to a presumption of validity said: "That presumption of validity may of couse be overcome by showing, for example, that (the defendant) never was served in (the divorcing state) **nor made an appearance, generally or specially** to contest the jurisdictional issue." (Emphasis supplied).

34. Cherry v. Cherry, 208 Ga. 726, 69 S.E.2d 252 (1951); Cummiskey v. Cummiskey, 107 N.W.2d 864 (Minn. 1961) In concluding at page 868 what the principles are as laid down in the Sherrer and Coe cases said: "Where a defendant appears in a foreign court and participates in the proceedings to the extent that he contests the issue of **good-faith domicile** or has an opportunity to do so, he has made a general appearance and he may not thereafter relitigate the issue by collateral attack in a sister state."; Hendricks v. Hendricks, 275 App. Div. 642, 92 N.Y.S.2d 338 (1949); Perry v. Perry, 51 Wash. 2d 358, 318 P.2d 968 (1958).

35. Haden v. Haden, 120 Cal. App. 722, 262 P.2d 73 (1953); Rubenstein v. Rubenstein, 324 Mass. 340, 86 N.E.2d 654 (1949); Woodhouse v. Woodhouse, 11 N.J. 225, 94 A.2d 301 (1953).

36. Eaton v. Eaton, 227 La. 992, 81 So. 2d 371 (1955); Winters v. Winters, 236 Miss. 624, 111 So. 2d 418 (1959); Brasier v. Brasier, 200 Okl. 689, 200 P.2d 427 (1948).

37. Gromeeko v. Gromeeko, 110 Cal. App. 2d 117, 242 P.2d 41 (1952) (wife signed because of husband's fraud in telling her he had to marry another woman but would divorce that woman and remarry her.)

of fraud,[37] or because it doesn't constitute an appearance.[38] However, most courts will preclude a later collateral attack if the defendant was represented by counsel at the proceeding through a power of attorney,[39] especially if the attorney contested the issue of jurisdiction.[40] The appearance of an attorney is justified since it is participation of the defendant and an opportunity to contest the jurisdiction of the court.[41]

Although the courts are in reasonable agreement with the Supreme Court on participation and opportunity to contest, they will draw a line when fraud is involved. The first type of fraud is collusion which was involved in *Straedler v. Straedler*[42] and allowed a party to impeach a foreign divorce decree because the *Sherrer* and *Coe* cases applied only to "true adversary proceedings".[43] The court stressed the fact that the plaintiff spouse had falsely alleged domicile and the attorney for the defendant did not conscientiously attempt a defense.

When the participation of, or service upon, the defendant is induced by fraud or coercion by either having the unsuspecting spouse sign some papers on some pretext that is inherently false,[44] or having the defendant enter the divorcing state for another reason and then handing him the papers,[45] the courts, through their admonishment towards fraud, will allow collateral attack. In the first situation posed, *i. e.* signing of papers under fraud or duress, the coercion factor will vitiate the entire divorce proceeding because there never was an oppor-

---

38. Kurman v. Kurman, 11 Misc. 2d 1035, 174 N.Y.S.2d 128 (1958) (defendant husband signed a blank power of attorney for divorce proceedings in Mexico and it was held there was no appearance because he didn't specify what attorney).

39. **In re** Day's Estate, 7 Ill. 2d 348, 131 N.E.2d 50 (1955); Chittick v. Chittick, 332 Mass. 554, 126 N.E.2d 495 (1955); Schlemm v. Schlemm, 31 N.J. 557, 158 A.2d 508 (1960).

40. Schlemm v. Schlemm, **supra** note 39.

41. Jamieson v. Jamieson, 14 Ill. App. 2d 233, 144 N.E.2d 540 (1957); Fitzgerald v. Starratt, 330 Mass. 75, 111 N.E.2d 682 (1953); Roskein v. Roskein, 25 N.J. 415, 96 A.2d 437 (1953).

42. 6 N.J. 380, 78 A.2d 896 (1951) (The husband went to Florida to obtain a divorce pursuant to an agreement between him and his wife that she would not object. Subsequent to the divorce the wife, being dissatisfied with the alimony payments, attacked the decree in their home state of New Jersey on the grounds that the husband had not fulfilled the Florida residency requirements).

43. **Id.** at 902, ". . . a true adversary proceeding where the parties are represented by counsel of their independent choice and where there is an opportunity to make a voluntary decision on the question as to whether or not the case should be fully litigated either on the question of jurisdiction or the merits . . ."

44. Gromeeko v. Gromeeko, **supra** note 37; Eaton v. Eaton, **supra** note 36; Kurman v. Kurman, **supra** note 38; Winters v. Winters, **supra** note 36. **Contra,** Haden v. Haden, 120 Cal. App. 2d 722, 262 P.2d 73 (1953).

45. Zenker v. Zenker, 161 Neb. 200, 72 N.W.2d 809 (1955).

tunity to contest the jurisdiction of the divorce court as required in the *Sherrer* and *Coe* cases.[46]

A recent Nebraska case[47] has dealt with inducing the defendant into the divorcing state's limits. After discussing the Supreme Court's decision on participation, the court decided they covered narrow situations and were inapplicable where both domicile was acquired by fraud and also lack of due process.[48]

When the only fraud to be found is that of testifying as to domicile, it has been held immaterial as long as the defendant had an opportunity to contest the allegation.[49] However, it has also been held that this fraudulent statement of domicile vitiates the entire proceedings even though the defendant spouse appeared and contested.[50]

The Supreme Court by reserving any opinion of the effect of fraud in an out-of-state divorce proceeding,[51] has allowed the states to pass on the question though final decision will lie with the Supreme Court.

DOMICILE—NECESSITY—UNIFORM DIVORCE RECOGNITION ACT

Since domicile of one party is sufficient to give a divorce court jurisdiction,[52] it is proper that space be allotted to discussion of this often nebulous and intangible term "domicile". The generally accepted definition of domicile is: (1) physical presence in the place where the domicile is claimed, and (2) an intent to make that place the home of the person whose domicile is in question.[53]

Although the Supreme Court has stated that domicile is a

46. Gromeeko v. Gromeeko, **supra** note 37.
47. Zenker v. Zenker, **supra** note 45.
48. **Id.** at 819, "The Supreme Court of the United States has never held . . . that full faith and credit must be given to a divorce decree of a sister state where jurisdiction of the subject matter (domicile) and procedural due process (service of the summons) have each been obtained by fraud. Consequently we hold that the Colorado decree is subject to collateral attack and under the state of the record, it is not entitled to full faith and credit."
49. Heur v. Heur, 33 Cal. App. 2d 268, 201 P.2d 385 (1949).
50. Brasier v. Brasier, 200 Okla. 689, 200 P.2d 427 (1948).
51. Cook v. Cook, 342 U.S. 126, 129 (1951) "We also reserve the question . . . whether respondent would be in a position to attack the Florida decree collaterally if it were found to be collusive and he participated in the fraud."
52. Williams v. North Carolina, 317 U.S. 287 (1942).
53. Alton v. Alton 207 F.2d 667 (3d Cir. 1953), **cert. den.** 347 U.S. 911, **dismissed as moot** 347 U.S. 610 (1954); RESTATEMENT, CONFLICTS OF LAWS § 15 (1932).

prerequisite to jurisdiction for divorce,[54] it has never directly held it necessary in a case involving the issue. However, the Circuit Courts have had two occasions to test the soundness of the requirement of domicile. In *Alton v. Alton*,[55] the issue was whether a statute in the Virgin Islands was valid that created a presumption of domicile by mere presence for six weeks. The statute was held unconstitutional, but the Supreme Court dismissed the case as moot because the defendant husband got a divorce in Connecticut during the interim of appeal. Again in *Granville-Smith v. Granville-Smith*[56] the Circuit Court affirmed the *Alton* decision on the same statute,[57] but the Supreme Court failed to discuss the validity of the statute and affirmed the decision of the lower court on other grounds.

A statute requiring mere physical presence has been held valid both in that state[58] and in the court of a sister state examining the same statute.[59] The same credence has been afforded a Nevada "quickie" divorce on the basis of mere presence for six weeks although there was an obvious lack of intent to be domiciled by the plaintiff.[60]

However, the colorable nature of a claim of domicile is usually revealed by an immediate return to the state of original domicile as soon as the divorce is signed[61] and the courts will generally require something more than physical presence to satisfy the jurisdictional prerequisite of domicile.[62] The courts will also be inclined to view the intent of the plaintiff as merely being present for the purpose of obtaining a divorce and refuse a contention of jurisdiction on that basis alone.[63]

Although the idea that domicile is required before jurisdic-

54. Williams v. North Carolina, 325 U.S. 226, 229 (1945), "Under our system of law, judicial power to grant a divorce, jurisdiction, strictly speaking—is founded upon domicile."
55. **Supra,** note 53.
56. 349 U.S. 1 (1955).
57. 214 F.2d 820 (3d Cir. 1954).
58. Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958).
59. Cummiskey v. Cummiskey, 107 N.W.2d 864 (Minn. 1961).
60. Roskein v. Roskein, 25 N.J. 415, 96 A.2d 437 (1953) (The plaintiff wife had an airplane ticket in her pocket while testifying).
61. Naylor v. Naylor, 217 Md. 615, 143 A.2d 604 (1958).
62. Peoper v. Peoper, 102 Cal. App. 2d 612, 228 P.2d 62 (1951) (planned to engage in business activities in new residence before leaving); Heard v. Heard, 323 Mass. 357, 82 N.E.2d 219 (1946) (purchased home for self and children prior to divorce); Brown v. Brown, 28 N.J. Super 165, 100 A.2d 315 (1953) (removed belongings; re-registered auto; opened bank account; installed telephone; sought business investment; never returned to original domicile); Lebensfeld v. Lebensfeld, 16 Misc. 2d 337, 157 N.Y.S.2d 678 (1956) (residence exceeded legal requirement; rented substantial apartment; placed children in school); Ische v. Ische, 252 Wis. 250, 31 N.W.2d 607 (1948) (secured permanent employment; planned to engage in business; bought ranch).
63. See, **e.g.,** Barnard v. Barnard, 331 Mass. 455, 120 N.E.2d 187 (1954).

tion is unquestionable, the problem does not end there. One problem was pointed out in the preceding section that dealt with the non-recognition of the divorce because fraud was used in establishing the domicile.[64]

Another problem that could arise is in regard to the Uniform Divorce Act,[65] adopted in nine states[66] which is a direct result of the Supreme Court decisions in that the Act is designed to legislate domicile in an effort to discourage migratory divorces. The problem does not appear to be in the recognition or non-recognition of *ex parte* divorces, since the *Williams* cases have said that full faith and credit does not require consistant opinions of domicile.[67] The difficulty will lie in the divorce proceedings in which both parties have participated and the statute of the "home" state would compel the courts to deny the decree because the parties would be technically still domiciled in the "home" state under the terms of the statute.

One court has passed on the validity of the Act in its own state and has determined it not to be in contravention of the full faith and credit clause.[68] The main reasoning was: Since the court granting the divorce must have before it at least one who is domiciled, the state of original domicile still has the right to determine the conduct of its own domiciliaries. Therefore, if the "home" state feels the parties were at all times during the divorce proceeding still domiciled in that state, the out-of-state divorce has no effect on those parties. The fraud and chicanery of the plaintiff were the motivating factors be-

---

64. **Supra,** notes 42-51.
65. 9A U.L.A. 275 (1957).
66. **Id.** at 275 lists the following states as having so adopted; California, Louisiana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, Washington, and Wisconsin. N.D. Cent. Code § 14-05-08.1 (1961): "Recognition of foreign decree of divorce and foreign annulment of marriage.—A decree of divorce or of annulment of marriage obtained in a court of another jurisdiction shall be of no force or effect in this state, if the parties to the marriage were domiciled in this state at the time such decree was rendered."
"If a person obtains a decree of divorce or of annulment of marriage from a court of another jurisdiction and was domiciled in this state within less than twelve months prior to obtaining the decree, it shall be prima facie evidence that such person did not abandon his or her domicile in this state prior to obtaining the decree."
"The provisions of this section shall not apply to any divorce or annulment of marriage obtained in proceedings begun prior to the passage of this section."
67. Williams v. North Carolina, 325 U.S. 226, 231 (1945) "Neither the Fourteenth Amendment nor the full faith and credit clause . . . requires uniformity in the decisions of the courts of different states as to the place of domicile, where the exercise of state power is dependent upon domicile within its boundaries . . . If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matter of most intimate concern could be subverted by the policy of every other State."
68. Zenker v. Zenker, 161 Neb. 200, 72 N.W.2d 809 (1955).

hind the courts decision that the parties were still domiciled in the state. Another state court has just mentioned the statute as being valid because of the right of a state to regulate the conduct of those it deems domiciled in that state.[69]

Although it is an old and established rule that where neither party is domiciled in a state granting a divorce decree, that state is powerless to grant a decree,[70] these statutes do create a narrowing of the Supreme Court decisions into special situations that will add to the ground of brushwood and inconsistency that will need clearing up, lest the issues at hand be obscured. The statutes are primarily designed to deal with the situations posed above, but also do give the "home" state the right to ignore a divorce in which both parties fully participated.

DIVISIBLE DIVORCE

It is pretty well determined by all courts that full faith and credit will be given to foreign divorces when certain minimal standards are met by the parties and the divorcing court. The solution does not end with a general statement such as the foregoing when the divorce not only severs the bonds of matrimony, but also adjudicates the wife's right to alimony and support. Of course, there is no problem if the wife appears in the divorce proceeding or somehow submits herself to the court because she will both be precluded from attacking the alimony award and the divorce itself as the court had jurisdiction to both divorce the parties and distribute alimony.[71]

The problem stems from the fact that sister states are now compelled to give credence to a foreign *ex parte* decree when one of the parties can prove domicile in the granting state, and the absent wife later attempts to either have support given to her or change whatever adjudication there had been on the matter of alimony in the divorce decree.

The situation was not enhanced by an early Supreme Court decision that allowed the husband to avoid the obligation of supporting his ex-wife by obtaining an *ex parte* divorce in a state where the right to support terminated upon divorce since

69. Davis v. Davis, 259 Wis. 1, 47 N.W.2d 338 (1951).
70. Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901); Streitwolf v. Streitwolf, 181 U.S. 179 (1901).
71. Davis v. Davis, 305 U.S. 32 (1938); Yarborough v. Yarborough, 290 U.S. 202 (1933).

the support rights of the wife were dependant on the laws of the divorcing state.[72]

However, an attempt to rectify this inequity was made in a concurring opinion in *Esinwein v. Commonwealth*,[73] wherein it was suggested that the divorce be divided in two, giving full faith and credit to the severance of the marriage but not to the adjudication of support because of the interest of the State of matrimonial domicile in the well-being of the wife.[74]

Then in *Estin v. Estin*[75] the Supreme Court had before it the issue of whether a wife who had reduced to judgement her support award before an *ex parte* divorce granted to her husband in another state had a right to bring an independant action in her "home" state where the prior support award was rendered. The court then finally announced the divisible divorce theory as suggested in the *Esinwein* decision.[76] The court indicated: (1) the interests of the domicle of the wife that she nor her children become a public charge;[77] (2) the property right the wife has in alimony that cannot be defeated without personal jurisdiction over her,[78] as the two grounds upon which to rest the soundness of the decision.

Later in *Armstrong v. Armstrong*[79] the Court allowed a subsequent collateral attack by a wife when she did not have an adjudication of support prior to the *ex parte* divorce be-

---

72. Thompson v. Thompson, 226 U.S. 551 (1937).
73. 325 U.S. 279 (1945).
74. See Justice Douglas concurring at page 282, "But I am not convinced that the 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 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 and 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."
75. 334 U.S. 541 (1948).
76. **Id.** at 541, "The result is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."
77. **Id.** at 547, "In this case New York evinced a concern with this broken marriage, when both parties were domiciled in New York and before Nevada had any concern with it. New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest."
78. **Id.** at 548, "The New York judgement is a property interest of (the wife), created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations."
79. 350 U.S. 568 (1956).

cause the divorce decree was construed as being silent on the matter of alimony.[80]

Therefore, the only issue left to be determined by the Court was whether the prior reduction to judgement of the support award was necessary for the wife to maintain an independent action for support after the husband had acquired a divorce without personal jurisdiction over the wife that either precluded her of alimony or determined the amount. This issue was involved in *Vanderbilt v. Vanderbilt*,[81] wherein the Supreme Court held that the wife's action for alimony was not dependant on a prior support award as follows:

> "The factor which distinguishes the present case from *Estin* is that here the wife's right to support had not been reduced to judgement prior to the husband's *ex parte* divorce. In our opinion this divergence is not material on the question before us. Since the wife was not subject to its jurisdiction, the Nevada divorce had no power to extinguish any right she had under the law of New York to financial support of her husband."[82]

The social interest reasoning of the *Estin* case was thereby abandoned in the *Vanderbilt* decision for reasoning allowing the wife to have her alimony rights restored because the alimony being a property interest was not subject to *in rem* jurisdiction.

Again, to give a complete perusal of this problem, one cannot terminate the discussion with what the Supreme Court has laid down. It is necessary to give the state's reaction to the divisible divorce theory equal time. It could be stated that the state decisions indicate a general acceptance of the divisible divorce theory,[83] and that the dominating reasons in so granting the wife an independant action for alimony are the lack of jurisdiction over the property interest of the wife and/or the interest of the domicile of the wife in her welfare.[84]

In the cases following the divisible divorce theory when the wife has acquired a prior adjudication of her support, the grounds for allowing an action for alimony in arrears after

---

80. **Id.** at 575-581. Justice Black in his concurring opinion stated that the divorce adjudicated the alimony therefore calling for division of the decree, and that the obtaining of a prior support award would be meaningless.
81. 354 U.S. 416 (1957).
82. **Id.** at 418.
83. Hudson v. Hudson, 52 Cal. 2d 735, 344 P.2d 295, 297 (1959) wherein the court states that 23 states of 33 states considering the issue have followed the divisible divorce theory.
84. **Ibid.**

the divorce are again based on the state's interest in the welfare of the wife,[85] or that support is a right not subject to dissipation without *in personam* jurisdiction, or that the divorce decree was silent as to alimony.[87]

The more recent decisions will also allow the wife to have the decree divided when her first request for alimony is made after the *ex parte* divorce proceeding, mainly on the dominant concern of the wife's domicile that she not be impoverished,[88] or that alimony is a property right subject only to adjudication when personal jurisdiction is acquired.[89]

However, the courts have not unanimously adopted the divisible divorce doctrine. The reason for the dissent among some of the states is that a wife's right to support terminates upon divorce as the right to bring an action for alimony is dependant upon the existence of a marriage.[90]

Although both divorce and support are purely a matter of statutory grace,[91] the state courts conflicting views have not ameliorated the deserted wife's situation. Even in the light of the Supreme Court and the majority of the state courts advocating the wife's right to an independant action for support, it would seem she would still be compelled to move from state to state until she found a statute more conducive to the existence of her right of action. Disfavor regarding this sort of statute hunting has been expressed by one member of the Supreme Court, who advances the proposition that she should be limited to her own home state.[92]

Another problem that has arisen from the inconsistent rulings on the ability to receive support after the marriage has been dissolved is whether the state granting the divorce will recognize the subsequent support award. Two cases can be found that hold where there had been a prior reduction to

85. White v. White, 83 Ariz. 305 P.2d 702 (1958).
86. Sorrells v. Sorrells, 82 So. 2d 684 (Fla. 1955).
87. Tobin v. Tobin, 93 Ga. App. 568, 92 S.E.2d 304 (1956); Allerd v. Allerd, 12 Utah 2d 325, 366 P.2d 478 (1961).
88. Hudson v. Hudson, **supra** note 83; Davis v. Davis, 303 S.W.2d 256 (Ky. 1957).
89. Willoughby v. Willoughby, 178 Kan. 62, 283 P.2d 428 (1955); Daniel v. Daniel, 348 P.2d 185 (Okla. 1959); Nelson v. Nelson, 71 S.D. 342, 24 N.W. 2d 327 (1946); Pollock v. Pollock, 273 Wis. 233, 77 N.W.2d 485 (1956).
90. Shaw v. Shaw, 332 Ill. App. 442, 75 N.E.2d 411 (1947); Brewster v. Brewster, 204 Md. 501, 105 A.2d 232 (1954); Shain v. Shain, 324 Mass. 603, 88 N.E.2d 143 (1949); Rodda v. Rodda, 185 Ore. 140, 200 P.2d 616 (1948); Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518 (1955); Perry v. Perry, 51 Wash. 2d 358, 318 P.2d 968 (1957).
91. See MADDEN, DOMESTIC RELATIONS §§ 81-82 (divorce); §§ 97-98 (support) (1931).
92. Vanderbilt v. Vanderbilt, 354 U.S. 416, 434 (1957) (dissenting opinion).

judgement of the wife's support right, the divorcing state will then look to the law of the state granting the support award to determine whether the subsequent divorce exonerates the husband from alimony.[93]

CONCLUSION

The enigma created by out-of-state divorces has resulted in a three-party concern, with the Supreme Court playing the major role and the parties and the states that of minor leads; and is further cluttered with confusion with each side claiming preemption and stubbornly resisting those that attempt to question their integrity. Complete unification is a long ways off but appears to be slowly creeping into the decisions. At the present time, compromise appears to be the pass word. Complete disregard of vested states rights in the moral conduct of its own citizenery will meet with a vociferous opposition. On the other hand, decisions that still tenaciously cling to earlier concepts of extra-territorial recognition of divorce decrees will receive renovation by the higher court.

Many states have revamped their divorce laws either judicially or by legislation aimed at creating a more secure and realistic atmosphere for divorce litigants. There are still remaining the states which are more conducive towards expedient severance that seems to be the vortex of many of these problems. Until the courts and the legislatures are willing to examine the problems they have brought about and conscientiously attempt to solve them, inconsistency will be allowed to breed in abundance among the jurisdictions. Many of the states have followed the leads of the Supreme Court, and as a result an aura of perception has emanated from the decisions which may be a forecast of more intelligent and realistic approaches to be found in future decisions.

CHARLES R. HUDDLESON

93. Tobin v. Tobin, 93 Ga. App. 568, 92 S.E.2d 304 (1956); Summers v. Summers, 69 Nev. 83, 241 P.2d 1097 (1952).