North Dakota Law Review

Volume 22 | Number 11 Article 3

1945

Award of Alimony Subsequent to a Decree of Divorce

William H. Conlee

The members of the Executive Board of the various Judicial Districts are now laying plans for the raising of such funds. May I urge your cooperation in their efforts. Conditions in our State at the present time are good and I am sure that each member of the Bar will be willing to participate in this fund.

The Executive Board will meet again at Minot on November 23rd. If the response is prompt and generous we shall set up our budget and put the machinery in motion for our activities for the coming year.

We hope to have your whole hearted cooperation.

Sincerely yours,

H. A. MACKOFF
President

SIXTH DISTRICT MEETING

The meeting of the District Bar of the Sixth Judicial District will be held in Dickinson on November 16th, 1946, at 2:00 o'clock p.m. at the Villard Hotel.

The Sectional Assembly topic of "Bringing Actions to Quiet Title under the North Dakota Statute" will be discussed. Judge Leo. F. Broderick will lead the discussion, and Judges Harvey J. Miller and J. O. Wigen will also participate. A banquet for the members and their ladies will following the business meeting. Every member who plans on attending this meeting is urged to write to Mr. Theo. Kellogg at Dickinson, giving the number of reservations for the banquet.

NOTICE OF ELECTION TO STATE BAR BOARD

The Executive Committee has nominated Geo. F. Shafer, and Gordon V. Cox, both of Bismarck, N. D., for the State Bar Board to fill the term of Geo. F. Shafer expiring December 31st, 1946.

Attorneys may make additional nominations by a petition signed by ten members, and filed with the secretary on or before December 1st, 1946.

AWARD OF ALIMONY SUBSEQUENT TO A DECREE OF DIVORCE

By
WILLIAM H. CONLEE

(April 1946 Issue of Current Legal Thought)

The general rule is that where the decree of absolute divorce, without provision for alimony, has been entered, a subsequent action for alimony cannot be instituted. However, perplexing problems often arise wherein the courts are asked to relax the general rule stated above.

First; there are cases in which a divorce decree is obtained and alimony is not asked although there has been personal service on the defendant husband within the jurisdiction of the court. It is held generally that alimony will not be awarded thereafter. Spain v. Spain, 177 Iowa 249, 158 N. W. 529 (1916); Hebert v. Hebert, 221 Mo. App. 201, 299 S. W. 840 (1927). If the decree of divorce specifically reserves the question of alimony for later adjudication, or if it can be shown that the omission of the reservation of the right to later adjudicate the question of alimony was due to the perpetration of a fraud on the part of the husband, the case may be reopened. In Hank v. Hanks, 282 Ky. 236, 138 S. W. (2d) 362 (1940), it is interesting, to note that subsequent to the divorce decree in which alimony was neither asked nor awarded, the wife was allowed to seek alimony through a counter-claim to a petition by the husband for the return of property deeded to the wife during the marriage. Apparently such a situation would not arise except in a suit for the restitution of property deeded by the husband to the wife as a result of the marriage relationship as provided by the Kentucky Code. (Carroll, 1938) Sec. 425. The above case was cited as an exception to the general rule in Kentucky, by the United States Circuit Court of Appeals, in the case of In Re Potts, 142 F. (2d) 883, 890 (C. C. A. 6th, 1944. The few jurisdictions permitting an action for alimony by the wife after the decree of divorce has been entered, irrespective of whether or not the decree reserved the question of alimony for future adjudication, do so under the authority of a statute. Noel v. Noel, 15 N. J. Misc. 716. 193 Atl. 558 (1937).

Second; there are cases in which a divorce is obtained by the wife on constructive service of process in state A and later the defendant comes within the jurisdiction of the court state A and is personally served in a subsequent action for alimony. Under this situation the majority of the courts hold that a subsequent suit for alimony cannot be instituted by the wife. Doekson v. Doekson, 202 Iowa 489, 210 N. W. 545 (1926); Darby v. Darby, 152 Tenn. 287, 277 S. W. 894 (1925.) There is, however, a strong minority view that a subsequent suit for alimony can be maintained if personal service within the jurisdiction can be had upon the defendant husband. Stephenson v. Stephenson, 54, Ohio App. 2396 N. E. (2d) 1005 (1936);Hutton v. Dodge, 58 Utah 228, 198 Pac. 165 (1921); (Statutory provision). Likewise, some jurisdictions allow a suit for alimony under these circumstances if the question of alimony was reserved for later adjudication. Karcher v. Karcher, 204 Ill. App. 210 (1917).

Third; there are also cases in which a divorce is obtained by the husband on constructive service of process in state A and the wife later comes within the jurisdiction of the court in state A and institutes a subsequent suit for alimony with personal service upon the husband in state A. A subsequent action for alimony will be allowed in this type of case if it can be shown that the husband perpetrated a fraud upon the court in securing the divorce. Honaker v. Honaker, 218 Ky. 212, 291 S. W. 42 (1927); Cralle v. Cralle,

79 Va. 182 (1884). Generally the courts will not avoid the decree of divorce already granted but will permit the reopening of the case for the purpose of determining the question of alimony only. Honaker v. Honaker, 218 Ky. 212, 291 S. W. 42 (1927). However, the Virginia Court, by way of dictum,, indicated that it might be possible for the prior decree of divorce to be set aside and in a subsequent suit by the wife the question of divorce as well as alimony might be adjudicated. See Cralle v. Cralle, 79 Va. 182 at 187 (1884).

Fourth; there are also cases in which the matrimonial domicle is in state A and the wife goes to state B and obtains a divorce, with constructive service of process upon the defendant husband in the suit for divorce in state B,and in which the wife returns to state A and institutes a subsequent action for alimony, obtaining personal service upon the husband in state A. This situation is governed by the general rule, which forbids a subsequent action for alimony in the majority of the jurisdictions. However some jurisdictions allow a subsequent action, if the decree of divorce reserved the question of alimony for future adjudication in a state in which personal service could be had upon the defendant husband. Darnell v. Darnell, 212 Ill. App. 601 (1918); Woods v. Waddle, 44 Ohio State 449, 8 N. E. 297 (1886).

Fifth; there are cases in which the matrimonial domicile is in state A and the husband goes to state B and obtains a divorce with constructive service of process upon the wife, and he then returns to state A and the wife institutes an action for alimony, with personal service upon the husband. The majority of the jurisdictions permit the wife to institute a subsequent action for alimony when personal service can be had upon the husband upon his return to the matrimonial domicile. Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921); Searles v. Searles, 140 Minn. 385, 168 N. W. 135 (1918).Since the action for alimony is in personam although the action for divorce is in rem, the alimony decree requires personal service whereas the divorce decree may be had upon constructive service. Therefore it may seem that unless the court allow the wife to institute the subsequent action, she would be unable to prosecute her right to maintenance. The minority view which does not permit the wife to prosecute the subsequent action for alimony refuses it upon the ground that the divorce decree destroyed the marital relationship upon which the subsequent action for alimony must be based. Shaw v. Shaw, 92 Iowa 722; 61 N. W. 368 (1894).

In conclusion it is believed that the majority of the jurisdictions reach a logical result in adhering to the general rule and refusing to allow a subsequent suit for alimony after a final decree of divorce has been entered, in the first, third, and fourth situations; and by permitting the subsequent action in the fifth situation. However, the exceptions which are allowed are based upon justice. The majority rule governing the second situation which denies the wife the right to reopen the decree of divorce for the question of alimony where she has obtained a divorce with constructive service

of process in the matrimonial domicile and thereafter the husband returns to the jurisdiction is not supportable. The husband may give the wife ample grounds for divorce but may escape his responsibilities by the simple expedient of "skipping out," crossing the state line and keeping himself absent for a short period. By this procedure he has prevented an admittedly wronged wife from securing her legal right to support. It is fortunate that a strong and rapidly growing minority is working to correct this situation.

COMMITTEES

UNAUTHORIZED PRACTICE OF LAW

Milton K. Higgins, Chairman, Washburn
J. F. X. Conmy, Fargo
Philip R. Bangs, Grand Forks
Everett E. Palmer, Williston
T. F. Murtha, Dickinson

LEGAL EDUCATION

E. T. Conmy, Chairman, Fargo
H. P. Remington, Lisbon
Ross McIntosh, Cavalier
Theo. A. Sailer, Hazen
Arley R. Bjella, Williston

AMERICAN LAW INSTITUTE

H. A. Bronson, Chairman, Grand Forks
Walter F. Spaulding, Towner
M. S. Byrne, Bowman
John A. Storman, Rolla
Charles E. Crane, Mott

JURISPRUDENCE AND LAW REFORM

R. N. Davies, Chairman, Grand Forks
A. G. Porter, La Moure
Phil B. Vogel, Fargo
L. J. Palda, Jr., Minot
Aloys. Wartner, Jr., Harvey

LEGISLATIVE

Vernon M. Johnson, Chairman, Wahpeton
Carroll E. Day, Grand Forks
Fred J. Graham, Ellendale
Gordon V. Cox, Bismarck
C. C. Wattam ,Fargo
George S. Register, Bismarck
Nelson A. Mason, Bismarck

UNIFORM LAWS

O. H. Thormodsgard, Chairman, Grand Forks
Clair F. Bricker, Fargo
W. T. DePuy, Grafton
Robert D. Dames, Jamestown
Max A. Weshek, Ashley

SECTIONAL MEETINGS

Mart R. Vogel, Chairman, Fargo
John J. Nilles, Fargo
George A. Soule, Fargo
Norman G. Tenneson, Fargo
Emanuel Sgutt, Fargo

AMERICAN CITIZENSHIP

James M. Hanley, Chairman, Mandan
J. J. Kehoe, Cando
W. G. McDonald, Minnewaukan
J. N. Mendro, Williston
Rober L. Vogel, Garrison

MEMORIALS

Hon. A. G. Burr, Chairman, Bismarck
C. J. Murphy, Grand Forks
Charles Coventry, Linton
John Knauf, Jamestown
L. A. W. Stephan, Valley City