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Article 6

Domestic Relations

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tory appeal is inadequate or nonexistent. *Tyler* had the effect of cutting off any statutory appeal upon refusal to parole, and thus determined that such a decision could properly be appealed by writ of certiorari, subject as always to the discretion of the court to whom the writ is directed. In effect, the court extended the rationale of *State ex rel. Johnson v. Cady*,[65] wherein the court determined that revocation of probation is appealable by writ of certiorari, and the same procedures applying in that situation, and in fact in any writ of certiorari review, would apply to this situation. [The reviewing court is limited to determining: (1) whether the board kept within its jurisdiction, (2) whether it acted according to law, (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.][66]

LAWRENCE J. LASSE

DOMESTIC RELATIONS

I. NAME OF MARRIED WOMAN

Wisconsin this term joined the small number of jurisdictions that have determined whether a woman's surname changes to that of her husband by operation of law on marriage.[1] In *In re Petiton of Kruzel*,[2] the court adopted the English common law rule that a woman's name does not automatically change when she marries. A married woman has the right, under this rule, to use either her own family name or her husband's name, and a change to the husband's name occurs, if at all, only through the wife's customary use of that name.

The petitioner, Kathleen Harney, was a teacher who at all times after her marriage had used her family name, Harney, rather than her husband's name, Kruzel. The case arose when the school board demanded that for insurance purposes she

1. Application of Sara Ryan Halligan for Leave to Change Her Name to Sara Ryan, 46 App. Div. 2d 170, 361 N.Y.S.2d 458 (1974); Custer v. Bonadies, 30 Conn. Supp. 385, 318 A.2d 639 (1974); Stuart v. Board of Elections, 266 Md. 440, 295 A.2d 223 (1972); State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961); Rice v. State, 37 Tex. Crim. 36, 38 S.W. 801 (1897).

2. 67 Wis. 2d 138, 226 N.W.2d 458 (1975).

either use her husband's name or institute court proceedings to "change" her name from Kruzel to Harney.[3] She initiated proceedings to change her name, but the petition was denied on the grounds that all family members should have the same name and that the best interests of any children later born required that husband and wife have the same name.

While the school board and the trial judge worked from the assumption that the petitioner's name had automatically changed from Harney to Kruzel upon marriage, the supreme court rejected that premise, and held that the correct issue was whether this change had ever occurred. Looking to the common law in other jurisdictions and to Wisconsin cases and statutes, the court concluded that the law has never held that a woman's name changes merely because she marries. If a woman chooses to use her husband's name and consistently does so, her name changes through customary use, but if she customarily uses her own family name after marriage, no change takes place. This is an application of the common law rule that anyone may change his name through customary use so long as the change is not for a fraudulent purpose.[4]

The only authority found by the court in support of the proposition that a change of name occurs by law upon marriage was an 1881 New York case, *Chapman v. Phoenix National Bank of New York*,[5] which said in unsupported dicta that at common law a married woman takes her husband's name. The court found all other cases holding that a change occurs to have relied on *Chapman*. It was noted, however, that *Chapman* was not followed in a 1974 New York case similar to *Kruzel*,[6] and that an 1823 English case held, long before *Chapman*, that a married woman can have a name different from that of her husband.[7]

Analyzing the Wisconsin authorities, the court found that, although the supreme court had never before decided the issue, several attorneys general's opinions[8] had stated that marriage

3. WIS. STAT. § 296.36 (1973) provides a procedure for change of name by petitioning the court.

4. 57 AM. JUR. *Name* §§ 1, 10 (1971).

5. 85 N.Y. 437 (1881).

6. Application of Sara Ryan Halligan for Leave to Change Her Name to Sara Ryan, 46 App. Div. 2d 170, 361 N.Y.S.2d 458 (1974).

7. The King v. The Inhabitants of St. Faith's, Newton, 3 Dowling and Ryland's Reports 348 (1823).

8. 1906 OP. ATT'Y GEN. WIS. 270; 12 OP. ATT'Y GEN. WIS. 256 (1923); 13 OP. ATT'Y

does not effect a change of name and that an early case, *Lane v. Duchac*,[9] had held that a married woman may make a valid contract using either her family name or her husband's name. The court regarded these as indicating that Wisconsin has never assumed that the husband's name is adopted upon marriage as a matter of law, stating that:

> [W]e conclude, from these limited Wisconsin authorities, that the common law in Wisconsin has never ossified to the point of holding that a wife is required to take her husband's name. The implicit assumption is to the contrary.[10]

Various statutes referring to a change of name resulting from marriage presented a difficult hurdle to the court in reaching this conclusion. Cited were section 256.30(4),[11] which prohibits an attorney from practicing law under a name other than that used at the time of admission to the bar, but excepting "a change in name resulting from marriage or divorce," and section 247.20,[12] which provides that a court granting a divorce may, with some exceptions, allow the wife to resume her family name. The trial judge argued that these and similar statutes demonstrate an understanding by the legislature that marriage causes a change of the wife's name. However, the court held that these statutes only recognize that a change can occur if a woman customarily uses her husband's name, not that it necessarily does.

Justice Robert W. Hansen, in a concurring opinion, agreed that a married woman has the right to use her own name, but questioned the policy of the particular rule adopted. He pointed out that the customary use test set by the court seems to make it impossible for a woman to use her family name for some purposes and her husband's name for others, for instance, to use her own name for business purposes and her husband's name for personal and social purposes, and that the rule leaves unclear the name of a woman who does so. Justice Hansen argued that *Lane v. Duchac*, by recognizing the validity of a contract made by a married woman in either her family name

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GEN. WIS. 632 (1924).

9. 73 WIS. 646, 41 N.W. 962 (1889).

10. 67 Wis. 2d at 148, 226 N.W.2d at 463.

11. Similar provisions relating to other professions are found in WIS. STAT. §§ 445.07(7), 443.01(8), 447.08(7), 446.02(6), and 448.02(4).

12. WIS. STAT. § 247.20 (1973).

or her husband's name, gave a married woman the right to use either name or both interchangeably.[13] She is not required, under this interpretation, to make the choice of one name or the other apparently demanded by the majority. It was also contended by Justice Hansen that the "concept of marriage as a partnership"[14] requires a single legal name for the family unit.

The concurring opinion also agreed with the trial judge that the statutes recognizing a change of name through marriage indicate that a change invariably occurs, not, as the majority held, that one *may* occur. Justice Hansen, although he did not expressly state it as such, seems to feel that a woman's name does change by operation of law upon marriage, but that she retains the right to enjoy the use of her family name. This is not the same conclusion that the majority reached when it determined that a married woman's name does not change unless she voluntarily changes it through custom, and it would not seem to satisfy the petitioner's desire that her name be Harney, not Kruzel.

The court in *Kruzel* only decided the specific question of whether a change of name takes place if the wife has never used her husband's name, expressly avoiding "the legal problems that might arise were a married woman, who had assumed and used her husband's surname, to seek to change that married name and resume her maiden name."[15] Under a consistent application of the rule adopted by the court, this would not appear to pose undue difficulties. Just as the wife had once changed her name through customary use of her husband's name, it seems that she could change it again by resuming the use of her family name, subject only to the limitation that the change not be attempted for fraudulent purposes.

A more difficult question is whether a change of name occurs when a married woman uses both names. If a change takes place only through customary use, does the continued use of the wife's family name for some purposes preclude a change of name through custom? Perhaps the consistent use of the husband's name for some purposes will be sufficient to effect a change without abrogating the right to use the family name as well.

13. 73 Wis. at 654, 41 N.W. at 965:
14. 67 Wis. 2d at 159, 226 N.W.2d at 468.
15. *Id.* at 142-43, 226 N.W. at 460.

II. PARENT AND CHILD

A. Custody

1. Best Interests of the Child

Since 1919, when Wisconsin in *Jensen v. Jensen*[16] abolished the father's common law right to custody in a divorce action and adopted the rule that the best interests of the child determine custody, the court has steadily moved toward the position that the best interests of the child are truly paramount to all other considerations.[17] In *LaChapell v. Mawhinney*,[18] the court took the final step, holding that the best interests of the child are determinative even when one of the parents is fit to have custody.

Following a divorce in 1965, the mother had received custody of the children, two girls aged thirteen and ten at the time of the custody action. After her death, the father and maternal grandparents sought custody. The grandparents were able to care for the girls, with whom they had been in daily contact since the divorce. The father, who had been found unfit to have custody at the time of the divorce, had rarely seen the children thereafter and had fallen behind in support payments. The trial court, nevertheless, determined that he had become a fit parent since he then had an adequate home, secure income and stable family life. Both children expressed a desire to remain with their grandparents.

The trial court granted custody to the father, based upon the rule of *Ponsford v. Crute*,[19] which required that custody go to a parent if he or she is fit. The supreme court reversed and remanded for a determination of whether the best interests of the children would be furthered by giving custody to the father or the grandparents, ruling that the best interests of the child supersede the right of a fit parent to have custody:

> As a general matter, but not always, the child's best interest will be served by living in a parent's home. However, if circumstances compel a contrary conclusion, the interests of the child, not a supposed right of even a fit person to have

16. 168 Wis. 502, 170 N.W. 725 (1919).

17. *See* Greenlee v. Greenlee, 23 Wis. 2d 669, 127 N.W.2d 737 (1964); Bliffert v. Bliffert, 14 Wis. 2d 316, 111 N.W.2d 188 (1961); Mayhew v. Mayhew, 239 Wis. 489, 1 N.W.2d 184 (1942).

18. 66 Wis. 2d 679, 225 N.W.2d 501 (1975).

19. 56 Wis. 2d 407, 202 N.W.2d 5 (1972).

> custody, should control. There well may be cases where it would be detrimental to the best interests of the child to award custody to a surviving spouse.[20]

The court attempted to reconcile its decision with *Ponsford* by distinguishing the cases on their facts. The father in *Ponsford* was originally found unfit because he had been involved with another woman while still married to the mother of the child and because he was in the military service and unable to adequately care for the child, who was then two years old. At the time of the *Ponsford* case, he had married the woman with whom he had been involved, left the service, and had a good job. The court in *Mawhinney* found the cases distinguishable on the basis of the ages of the children there involved, ten and thirteen, the fact that the father there had rarely shown any interest in the children since the divorce, and that he had been illicitly involved with a woman whom he later married. Although the court in *Ponsford* clearly stated that the two grounds for the finding of unfitness were the father's immoral conduct and his military service, the court in *Mawhinney* never discussed the immoral conduct, stating that the only grounds for the finding of unfitness was the father's military service and consequent inability to care for the child.

While factual differences between the two cases do exist, the manner in which the court in *Ponsford* framed the issue and reached its conclusion makes it apparent that *Mawhinney* in fact overruled *Ponsford*. In *Ponsford*, the court refused to consider whether the best interests of the child would have been served by granting custody to the grandparents rather than the father, discussing only whether the evidence supported a finding that the father had become a fit parent. The basis for this approach was the ruling that a parent "cannot be deprived of the custody of his minor child unless there is a finding that either he is unfit or is unable to care for the child."[21] It may be that if the court in *Ponsford* had considered the best interests of the child, it would still have granted custody to the father. Since it did not, however, it is clear that the cases cannot be reconciled and that in *Mawhinney* the exactly opposite rule has

20. 66 Wis. 2d at 684, 225 N.W.2d at 503.

21. Ponsford v. Crute, 56 Wis. 2d at 413, 202 N.W.2d at 8. *See also* Sommers v. Sommers, 33 Wis. 2d 22, 146 N.W.2d 428 (1966); Larson v. Larson, 30 Wis. 2d 291, 140 N.W.2d 230 (1966); Hamachek v. Hamachek, 270 Wis. 194, 70 N.W.2d 595 (1955).

been adopted, that is, that even a fit parent can be denied custody if the welfare of the child demands that custody be granted elsewhere.

2. Preference for the Mother

After the abolishment of the father's right to custody in *Jensen v. Jensen*,[22] Wisconsin, in *Jenkins v. Jenkins*,[23] established a strong preference for the mother when both parents were fit. Although the strength of this rule has diminished, with the welfare of the child becoming the controlling factor, the *Jenkins* rule remained basically unchanged into the 1960's.[24] In 1966, in *Larson v. Larson*, the court said:

> The rule that the law favors the mother as to the custody of a minor child is a strong and fundamentally natural consideration in determining custody. . . .[25]

In 1971, the legislature appeared to end the preference for the mother when it adopted the current section 247.24(3):

> In determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent.[26]

In *Scolman v. Scolman*,[27] however, the supreme court held that, despite the statute, a slight preference for the mother remains as a matter of law.

In *Scolman*, a divorce case, the trial court granted custody of a four-year-old son to the mother. It rejected the recommendations of the family court commissioner and the guardian ad litem that custody be given to the father, holding that the rule of law was that custody must be awarded to the mother if she is fit. The supreme court reversed and remanded the case to the trial court. In stating the rule to be followed on remand, the court said that section 247.24(3) had merely codified existing case law and that the rule remained that "other things being equal, there is usually a preference for the mother."[28]

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22. 168 Wis. 502, 170 N.W. 735 (1919).

23. 173 Wis. 592, 181 N.W. 826 (1921).

24. Belisle v. Belisle, 27 Wis. 2d 317, 134 N.W.2d 491 (1965); Dodge v. Dodge, 268 Wis. 441, 67 N.W.2d 878 (1955); Mayhew v. Mayhew, 239 Wis. 489, 1 N.W.2d 184 (1942).

25. Larson v. Larson, 30 Wis. 2d at 299, 140 N.W.2d at 235.

26. WIS. STAT. § 247.24(3) (1973).

27. 66 Wis. 2d 761, 226 N.W.2d 388 (1975).

28. *Id.* at 766, 226 N.W.2d at 390.

It is difficult to determine whether the court meant that there is a preference for the mother as a matter of law, or merely that in most situations the welfare of a small child will, as a matter of fact, best be promoted by leaving him with his mother. There is language in the case that would seem to support the latter interpretation,[29] but the court's statement that section 247.24(3) only codifies case law makes it more likely that it did intend that the preference for the mother be a rule of law.

Justice Heffernan, in a concurring opinion, felt that the majority had kept the maternal preference as a matter of law and that this was a misinterpretation of the statute. He recommended that the statute be interpreted literally, with no preference for either parent. The test, he said, should be which parent can better provide the "mothering function," which he defines as giving love, care, and attention.[30]

This appears to be the better construction, since the statute in unequivocal language states that there is to be no preference based on sex. Under this interpretation, custody would undoubtedly continue to be granted more often to the mother, not as a rule of law but because in most instances the mother is more able to perform the "mothering function." This would be in line not only with the apparent intent of the legislature in section 247.24(3), but also with the rule of *Mawhinney*,[31] that the best interests of the child, not the fitness of the parent, are the controlling factors in determining custody.

B. Termination of Parental Rights

In *State ex rel. Lewis v. Lutheran Social Services*,[32] the court held that the putative father of an illegitimate child can abandon the child and thus terminate his parental rights by his actions toward the mother before the child is born. Although the facts of the case are unlikely to be repeated, the case is of considerable practical importance in light of the United States

29. *Id.* at 764, 226 N.W.2d at 389:

> [T]he preference for the mother is not a rule of law but is only an important element to be considered. The crucial and controlling factor is the welfare of the child.

30. *Id.* at 771-72, 226 N.W.2d at 393.

31. 66 Wis. 2d 679, 225 N.W.2d 501 (1975).

32. 68 Wis. 2d 36, 227 N.W.2d 643 (1975).

Supreme Court decision in *Stanley v. Illinois*[33] that the father of an illegitimate child cannot be denied parental rights.

Lewis has a long and complex history. When the mother of the child informed the putative father of her pregnancy, he immediately attempted to disassociate himself from both her and the child. He conceded that he could be the father but claimed that he could not be sure because he did not know how many other men with whom she had had relations. He refused to marry her and asked for the name of her doctor so he could contact him to make sure his name could not be used on the birth certificate. They separated shortly afterward. The mother kept up a correspondence for several months, hoping to arrange a marriage; but, when his consistent response was that there was no reason for marriage when he did not know if he was the father, she informed him that she was terminating their relationship and intended to put the child up for adoption.

At this point, he underwent a change of heart and began to acknowledge paternity and propose marriage in letters that she returned unopened. Shortly after the child was born, the mother terminated her parental rights, and the child was adopted. As soon as the father heard of this, he brought habeas corpus proceedings asserting his parental rights. The petition was denied and the decision affirmed by the supreme court[34] on the grounds that the father of an illegitimate child has no parental rights. Following *Stanley*, the United States Supreme Court reviewed the first *Lewis* decision and remanded it for reconsideration in light of *Stanley*.[35]

On remand, a referee found that the petitioner was the father of the child and that he was fit to have custody, but that it was in the best interests of the child to stay with the adoptive parents.[36] The court held, however, that the custody question depended on whether the father had terminated his parental rights prior to the adoption proceedings, termination of the natural parents' rights being a condition precedent to valid adoption.[37] If termination had occurred, the adoption would be

33. 405 U.S. 645 (1972).

34. State *ex rel.* Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated* 405 U.S. 1051 (1972).

35. Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972).

36. State *ex rel.* Lewis v. Lutheran Social Services, 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

37. WIS. STAT. § 48.84 (1973).

held valid. If not, the father would probably have received custody as he had been found fit and Wisconsin was then following the *Ponsford* rule that a fit parent is entitled to custody even if the best interests of the child would be served by granting custody elsewhere.[38]

The case went back to the trial court for a hearing to determine whether the father's rights had been terminated. The trial court found that they had, and the case returned to the supreme court for review. The court affirmed on the grounds that the father had abandoned the child, which is a basis for termination under section 48.40(2)(a),[39] quoting with approval the trial court's finding:

> That his repeated denials of paternity, lack of concern for or interest in the support, care and well-being—including prenatal care—of the child, and the disregard for the well-being of the child's mother from the date of the pregnancy was announced [sic] to approximately the birthdate of the child manifested a clear intent on the part of the petitioner, Rothstein, to disassociate himself from responsibility for the birth and care of the child.[40]

The court further held that the father's attempt to acknowledge paternity did not affect the termination of rights and that, due to the abandonment, the best interests of the child would be served by allowing him to remain with the adoptive parents.

The case is in part a very pragmatic response to an unusual fact situation and the unexpected intervention of *Stanley*.[41] As such, it could be considered of little practical importance, as the situation is unlikely to recur and because the legislature, in line with *Stanley*, has amended the statutes to require that the putative father of an illegitimate child be given notice and

38. Ponsford v. Crute, 56 Wis. 2d 407, 202 N.W.2d 5 (1972).

39. WIS. STAT. § 48.40 (1973) reads in part:

The court may, upon petition, terminate all rights of parents to a minor in any of the following cases:

(2) If it finds that one or more of the following conditions exist:

(a) That the parents have abandoned the minor.

40. State *ex rel.* Lewis v. Lutheran Social Services, 68 Wis. 2d at 40-41, 227 N.W.2d at 646.

41. The court in the second *Lewis* case, 59 Wis. 2d 1, 207 N.W.2d 826, ruled that *Stanley* would be applied retrospectively only where the parents had been living in a familial situation or where, as in *Lewis*, the father had attempted to assert his rights to the child.

an opportunity for a hearing prior to adoption and that termination of the rights of both natural parents precede adoption.[42] If these procedures are followed, problems similar to those in *Lewis* will not arise in most cases. *Lewis* does provide a workable solution, however, to the problems that could arise when the father is unknown or cannot be located. Under the abandonment rule of *Lewis*, the very conduct that makes it impossible to locate or determine the father would be grounds for a determination that he had abandoned the child before birth and thus had terminated his rights.

The pragmatic advantages were obtained somewhat at the expense of statutory construction. Section 48.40(2)(a) provides that a court may terminate parental rights to a "minor" on grounds of abandonment.[43] Minor is defined in section 990.01(20) as "a person who has not attained the age of 18 years."[44] Case law in other jurisdictions has generally held that criminal abandonment statutes do not extend to abandonment of unborn children unless the statute expressly so provides.[45] The Wisconsin court has, without discussion, decided that an unborn child is a person, at least for purposes of termination of parental rights. Had the facts of the case been less compelling, the court might have done better to let the legislature decide whether a father can terminate his parental rights prior to the birth of the child.

By construing a statute referring to a "minor" as including an unborn child, the Wisconsin court has added another facet to the problem made salient by the United States Supreme Court in *Roe v. Wade*[46] where, by holding that the states cannot prohibit abortion in the first trimester, the Court in effect held that an unborn child is not a person entitled to the fourteenth amendment guarantees. Perhaps the only way to reconcile *Roe* with *Lewis* and other situations in which the law treats the unborn child as a person[47] is to recognize that the law, like

42. *See* Wis. Laws 1974, ch. 263 for amendments.

43. *See* note 39.

44. WIS. STAT. § 990.01(20) (1973).

45. People v. Yates, 114 Cal. App. 782, 298 P. 961 (1931); People v. Sianes, 134 Cal. App. 355, 25 P.2d 487 (1933); McCoy v. People, 165 Colo. 407, 439 P.2d 347 (1968). *But see* Bull v. State, 80 Ga. 704, 6 S.E. 178 (1888); Fairbanks v. State, 105 Ga. App. 27, 123 S.E.2d 319 (1961).

46. 410 U.S. 113 (1973).

47. *See* Kwaterski v. State Farm Mut. Automobile Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967), recognizing a right of an unborn child to recover in tort under some

science and philosophy, has not yet been able to define when life begins and is forced to decide each problem on its own facts without trying to define a single criterion applicable to all situations.

C. *Support of Adult Child*

In *Miller v. Miller*,[48] the court considered the effect of lowering the age of majority to eighteen[49] on a stipulation for child support made before the change. When the parties to the action were divorced in 1967, they stipulated, and the court ordered, that support would be paid "until further order of the court." No age was indicated, nor was there any statement that support would be paid until the children reached majority. The oldest child reached eighteen after the age of majority had been lowered by the legislature. The father then ceased payment. The mother petitioned for payment until the children reached twenty-one, arguing that since twenty-one had been the age of majority when the stipulation had been made, it had been their intent that support should continue until the children reached that age and therefore that the father was estopped, under the rule of *Bliwas v. Bliwas*,[50] from asserting the children's majority as grounds for stopping support payment'

The parties in *Bliwas* had stipulated that the father would pay for the child's education beyond the age of twenty-one. He stopped payment when the child reached majority, contending that the order was unenforceable because by statute[51] the court can order payment only for minor children. The court had held that the order was unenforceable, but that the father was estopped from asserting that defense because he had consented to the stipulation and order.

The court distinguished *Miller* from *Bliwas*, saying that because there was no statement in the stipulation as to the age at which support would stop or any reference to minority, the express language that support would continue "until further order of the court" controlled. The reasoning was that since the court cannot order support after majority, the father could not

circumstances, and WIS. STAT. § 700.12 (1973), allowing afterborn children to take property given as a class gift.

48. 67 Wis. 2d 435, 227 N.W.2d 622 (1975).

49. The lowered age became effective March 23, 1972. Wis. Laws 1971, ch. 213.

50. 47 Wis. 2d 635, 178 N.W.2d 35 (1970).

51. WIS. STAT. § 247.24(1) (1973).

have had the intent to pay after the children reached the age of majority and thus that he was not estopped from asserting that defense on the grounds of his intent under the *Bliwas* rule.

The practical lesson of the case is that if the parties to a divorce intend support payment to continue after age eighteen, a common situation since most parents expect to support their children until their education is completed, the stipulation should expressly state either an age or a level of education until which support is to be paid. Without such specification, the order will be unenforceable after the children reach eighteen.

III. DIVORCE

A. Bilateral Foreign Divorce

Following the rule of the majority of American jurisdictions,[52] Wisconsin in *Estate of Steffke*[53] ruled that a divorce judgment from a foreign country of which neither party is a domiciliary and granted on grounds not recognized in the jurisdiction of residence is invalid, even if both parties voluntarily submitted to the jurisdiction of the foreign country.

Priscilla and Crockett Lane were residents of Wisconsin at the time that she went to Mexico to obtain a divorce. Both submitted to the jurisdiction of the Mexican court, she by making a personal appearance and he through the execution of a waiver and an appearance by an attorney. The divorce was in full compliance with the Mexican laws, and was granted on-grounds of incompatibility of temperaments, a ground not recognized in Wisconsin. Priscilla remarried, and the case arose during probate of her second husband's estate. The probate court held that she was not the legal wife of the decedent because her prior marriage had not been effectively terminated. The practical effect of the decision was that the inheritance tax was computed at the rate applicable to strangers, rather than at the rate applicable to surviving spouses.

The supreme court first noted that since the divorce was not granted by a jurisdiction in the United States, there was no obligation to recognize the divorce under the full faith and credit clause of the United States Constitution.[54] It further held

52. *See* Annot., 13 A.L.R.3d 1439 (1967) for a discussion of recognition of divorce judgments granted in foreign countries.

53. 65 Wis. 2d 199, 222 N.W.2d 628 (1974).

54. U.S. CONST. art. IV, § 1.

that comity would be the only alternative basis for recognition, and that sections 247.21[55] and 247.22[56] compelled a decision that the Mexican judgment was invalid in Wisconsin. Section 247.21 affirms the power of the court to recognize a divorce granted by a foreign country on comity, but also provides that if a Wisconsin domiciliary goes to another country to obtain a divorce on grounds not recognized in Wisconsin, the judgment is of no effect in Wisconsin. Section 247.22, the Uniform Divorce Recognition Act, also provides that a divorce judgment granted by another jurisdiction is of no effect if both parties were Wisconsin domiciliaries at the time the proceeding was commenced.

The court held that these sections constitute a legislative standard for determining whether comity allows the court to recognize a divorce judgment granted by a court of a foreign country. Since both parties in this case were domiciled in Wisconsin when the divorce action was initiated and the divorce was granted on grounds not recognized in Wisconsin, the court found it invalid.

In rebuttal, appellants had argued that section 247.21 was an unconstitutional interference with the right to travel. The court disposed of this by saying:

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55. WIS. STAT. § 247.21 (1973):
Full faith and credit shall be given in all the courts of this state to a judgment of annulment of marriage, divorce or legal separation by a court of competent jurisdiction in another state, territory or possession of the United States, when the jurisdiction of such court was obtained in the manner and in substantial conformity with the conditions prescribed in s. 247.05. Nothing herein contained shall be construed to limit the power of any court to give such effect to a judgment of annulment, divorce or legal separation, by a court of a foreign country as may be justified by the rules of international comity. No person domiciled in this state shall go into another state, territory or country for the purpose of obtaining a judgment of annulment, divorce or legal separation for a cause which occurred while the parties resided in this state, or for a cause which is not ground for annulment, divorce or legal separation under the laws of this state and a judgment so obtained shall be of no effect in this state.

56. WIS. STAT. § 247.22 (1973):
(1) A divorce obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.
(2) Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within 12 months prior to the commencement of the proceeding therefor, and resumed residence in this state within 18 months after the date of his departure therefrom, or (b) at all times after his departure from this state, and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

> The situation posed in this case is unlike cases cited by the appellants which hold unconstitutional various durational residence requirements for the purpose of gaining residency for voting or eligibility for welfare. The Wisconsin statute in question merely provides that Wisconsin domiciliaries cannot evade or avoid the effect of Wisconsin laws affecting marital status while they remain and continue to be domiciliaries of Wisconsin.[57]

The appellants urged the court to adopt the New York rule that comity requires recognition of a foreign divorce decree if both parties voluntarily submit to the foreign court's jurisdiction.[58] When only one party comes under the jurisdiction of the foreign court, New York follows the nonrecognition rule.[59] New York, which has not adopted the Uniform Divorce Recognition Act, rejects the concept that domicile is essential to a valid divorce, relying upon the fact that the residency requirements of many liberal divorce states are mere formalities. The Wisconsin court refused to consider the "sociological wisdom"[60] of the New York rule, holding that the statutes require the decision that a bilateral foreign divorce is invalid in Wisconsin.

Although Wisconsin has not before ruled on the validity of a "bilateral" divorce judgment granted by a court of a foreign country, that is, one in which both parties voluntarily submit to the jurisdiction of the foreign court, *Steffke* is consistent with earlier Wisconsin decisions on divorce granted by a foreign court. In *St. Sure v. Lindsfelt*,[61] the court refused to recognize a Swedish divorce judgment involving a couple who had immigrated from Sweden to Wisconsin some years earlier. The wife had returned to Sweden, started divorce proceedings, and come back to Wisconsin. The husband remained in Wisconsin throughout and never came under the jurisdiction of the Swedish court. The divorce was granted on grounds not recognized by Wisconsin.

More recently, in *Estate of Gibson*,[62] the husband had obtained a Mexican divorce. The wife, who was a Wisconsin dom-

57. 65 Wis. 2d at 206, 222 N.W.2d at 632.

58. Rosenstiel v. Rosenstiel and Wood v. Wood, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 209 N.E.2d 709 (1965), *cert. denied*, 384 U.S. 971 and 383 U.S. 943 (1966).

59. Rosenbaum v. Rosenbaum, 309 N.Y. 371, 130 N.E.2d 902, 54 A.L.R.2d 1232 (1955); Considine v. Rawl, 39 Misc. 2d 1021, 242 N.Y.S.2d 456 (1963).

60. 65 Wis. 2d at 206, 222 N.W.2d at 632.

61. 82 Wis. 346, 52 N.W. 308 (1892).

62. 7 Wis. 2d 506, 96 N.W.2d 859 (1959).

iciliary, never submitted to the jurisdiction of the Mexican court. The court reasoned that since the basis of jurisdiction in a divorce action is the domicile of at least one of the parties, the divorce would have been void and not entitled to full faith and credit had it been granted in another state, and, therefore, no valid reason existed to distinguish a divorce granted in another state from one granted in a foreign country.

St. Sure and *Gibson* were decided before sections 247.21 and 247.22 were enacted,[63] and therefore the court in *Steffke* was not required to follow them. Nevertheless, the legislative policy expressed in the statutes was virtually the same as the judicial policy of those cases, and it would have been most inconsistent for the court to reject its own policy after it had been affirmed by the legislature.

B. Contractual Nature of Stipulation

The court in *Vaccaro v. Vaccaro*[64] clarified prior case law as to whether a stipulation regarding alimony, support, or property settlement is of a contractual nature. At the time of their divorce, Dr. and Mrs. Vaccaro stipulated, and the court ordered, that Dr. Vaccaro would maintain $48,000 worth of life insurance on himself with their children designated as irrevocable beneficiaries. The order was later modified by another stipulation to require that he keep only $40,000 worth of insurance on his life until the youngest child reached twenty-one, the children continuing as beneficiaries.

In the instant action, Mrs. Vaccaro petitioned the court to order Dr. Vaccaro to cash in the policies to pay for the children's education. He argued that under the second order he was obliged only to keep the insurance until the youngest child reached twenty-one and a cash-in would result in a substantial increase in his obligation. Mrs. Vaccaro countered by contending that the second order was invalid because the first order, naming the children as irrevocable beneficiaries, was contractual in nature and thus the children, as third party beneficiaries, would have had to give their consent to any modification of the order. Since they had not consented to the second order, it was invalid and the original order was still in force.

63. Both sections were adopted in Wis. Laws 1959, ch. 595, § 65, and took effect January 1, 1960.

64. 67 Wis. 2d 477, 227 N.W.2d 62 (1975).

Examining Wisconsin cases on the nature of a stipulation on which a divorce judgment or order is based, the court encountered language in *Estate of Boyd*[65] to the effect that a stipulation in a divorce action was in the nature of a contract. The court held this to be an overbroad statement of the correct rule, laid down in *Miner v. Miner*,[66] that unless the parties make a formal agreement outside of court, a stipulation is only a joint recommendation to the court and not a contract. While in either case the stipulation must be approved by the court, the difference is that the formal agreement becomes a contract which cannot be subsequently modified by the court without the consent of the parties and any third party beneficiaries. In *Vaccaro* the court held that the stipulation was a joint recommendation and that the second order was therefore valid.

MARY F. WYANT

INSURANCE

I. CONSTRUCTION OF TERMS

A. "Named Insured" Clause

In *Belling v. Harn*,[1] the Wisconsin Supreme Court considered whether a separated spouse is a resident of the same household and therefore, entitled to insurance coverage under a "named insured" clause of an automobile liability policy. The court found that defendant, Ruth C. Harn, was a member of her husband's household, although at the time of the accident he was voluntarily living away from the family home following the commencement of divorce proceedings.[2] The defendant purchased the automobile in question with her own funds after the institution of the divorce action and asked her husband to arrange for insurance. Defendant's husband simply added the automobile to his policy which defined "named insured" to include "his spouse, if a resident of the same house-

65. 18 Wis. 2d 379, 118 N.W.2d 705 (1963).
66. 10 Wis. 2d 438, 103 N.W.2d 4 (1960).

1. 65 Wis. 2d 108, 221 N.W.2d 888 (1974).
2. The court specifically stated that it is immaterial whether the separation is voluntary or court-ordered. *Id.* at 116-17, 221 N.W.2d at 893.