INJUNCTION TO RESTRAIN HUSBAND FROM PROCEEDING WITH FOREIGN DIVORCE ACTION DENIED

Arpels v. Arpels
9 App. Div. 2d 336, 193 N.Y.S.2d 754 (1959)

This was an action by a wife to restrain her husband, a French citizen, from proceeding with a French divorce action in which personal jurisdiction over her had been obtained while she was visiting friends in France. The wife had obtained in an earlier separation action in New York, a consent decree incorporating a separation agreement entitling her to $18,000 a year alimony and a $10,000 life insurance policy on her husband; however, the latter provision would terminate if he obtained an absolute divorce in any jurisdiction on grounds recognized in New York. The trial court issued a temporary restraining order against the husband upon the wife's allegation that her husband was not domiciled in France, stressing the possible injustice and hardship to the wife.[1] Defendant in fact kept in France a year round residence, staying in a hotel when in New York. The Appellate Division reversed, dismissed the complaint and denied the wife's motion for a temporary injunction[2] on the ground that any possible injury to the wife could be prevented when the decree was sought to be recognized in New York; pointing out that it would be an extraordinary insinuation of domestic power into the judicial action of a foreign nation to restrain citizens of a foreign nation from prosecuting actions in their own courts against parties who are not United States citizens.[3]

The court relied on the different results which follow from refusing to enjoin a divorce action in a foreign country and the same action in a state court, where both actions are based on fraudulent domicile.[4] A decree of divorce of a sister state must be accorded full faith and credit in another state if the sister state had jurisdiction of the subject matter, meaning the plaintiff was domiciled there, in fact.[5] The determination of domicile by the sister state will be prima facie evidence of the fact of domicile.[6] However, "the basis of recognition of judgments of foreign nations is comity; and this is a recognition which depends, when the last word is said, upon the policy and sense of justice of the domestic court."[7]

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1 Arpels v. Arpels, 17 Misc. 2d 471, 187 N.Y.S.2d 100 (1959).

2 Arpels v. Arpels, 9 App. Div. 2d 336, 193 N.Y.S.2d 754 (1959). The hardships and injustices include the necessity for her to go abroad to defend the action; the finding of her fault without her being able to defend herself except with difficulty; and the use of her name by the second wife along with other marital rights.

3 *Supra* note 2, at 758. The court emphasized the close connection between the husband and France, noting that he probably was not domiciled in New York, the lack of any showing that her alimony rights would be harmed and that the separation agreement itself anticipated a possible later divorce action in any other jurisdiction.

4 *Supra* note 2, at 757.

5 Williams v. North Carolina, 317 U.S. 287 (1942); Williams v. North Carolina, 325 U.S. 226 (1945).

6 *Supra* note 5.

7 Arpels v. Arpels, *supra* note 2, at 757. *Accord* Gould v. Gould 235 N.Y. 14, 138

New York courts have continually enjoined a spouse who attempts a divorce action in a sister state whenever they feel that the domicile was a sham.[8] The reason being that a court has the power to restrain a person admittedly within their jurisdiction from proceeding with a divorce based on fraudulent domicile in another jurisdiction.[9]

In the recent case of *Rosenbaum v. Rosenbaum*[10] which involved a husband who had gone to Mexico for one day to prosecute a divorce there, the court denied an injunction restraining the husband from proceeding with his divorce action. The language of the decision is susceptible of interpretation on either of two grounds; first, the distinction between recognition of decrees of a sister state and a foreign nation, ". . . Thus, under comity —as contrasted with full faith and credit—our courts have power to deny even prima facie validity to the judgments of foreign countries for policy reasons, despite whatever allegations of jurisdiction may appear on the face of such foreign judgments."[11] Another view of the *Rosenbaum* decision relies on the conceded invalidity of the Mexican divorce and the rationale that it was worthless and hence could not harm the wife at all. This latter view of *Rosenbaum,* which the dissent in the principal case adopts,[12] is illustrated by the following: "The issue . . . is, simply whether the drastic remedy of injunction may be employed to restrain . . . a concededly invalid divorce action in a foreign country . . . .";[13] and that the decree was "of no more validity than a so-called mail-order divorce . . . ."[14]

The court reached a proper result in the principal case by refusing to enjoin even temporarily a French citizen from proceeding with a French divorce action against his wife, a foreign citizen, even though the French court had obtained personal jurisdiction over her. The distinction between decrees of sister states under the full faith and credit clause and foreign nation decrees can not be pushed too far, however. A court will refuse

N.E. 490 (1923). For a general discussion of when state courts will refuse to recognize foreign divorce decrees, see I Rabel, The Conflict of Laws, A Comparitive Study, 500 *et seq.* (2d ed. 1958).

[8] Hammer v. Hammer, 303 N.Y. 481, 104 N.E.2d 864 (1951); Garvin v. Garvin, 302 N.Y. 96, 96 N.E.2d 721 (1951).

[9] Restatement, Conflict of Laws § 96 (Tentative draft no. 4, 1957) "A state can forbid a person, who is subject to its jurisdiction, to do an act in another state"; Clark, Equity § 13 (1954); McClintock, Equity § 172 (2d ed. 1948); See Annot., 54 A.L.R.2d 1240 (1957); Annot., 128 A.L.R. 1467 (1940).

[10] 309 N.Y. 371, 130 N.E.2d 902 (1955). Noted in 42 Iowa L. Rev. 326 (1957); 69 Harv. L. Rev. 1327 (1956); 7 Syracuse L. Rev. 335 (1956); 30 St. John's L. Rev. 290 (1956); 41 Cornell L.Q. 728 (1956). Speculation in these notes included the question as to the result in a case like the principal one where it was unclear whether there was a valid domicile; see *e.g.,* 26 Fordham L. Rev. 327 (1957). The *Rosenbaum* case was followed in New York in Vesci v. Vesci, 15 Misc. 2d 791, 181 N.Y.S.2d 221 (1958); Simone v. Simone, 11 Misc. 2d 255, 173 N.Y.S.2d 890 (1958).

[11] *Rosenbaum, supra* note 10, at 903.

[12] *Arpels, supra* note 2, at 762.

[13] *Rosenbaum, supra* note 10, at 903.

[14] *Rosenbaum, supra* note 10, at 904.

recognition of a foreign nation decree when the decree is obnoxious to the public policy of the state.[15] However, in a state where divorce is permitted, the public policy argument reduces itself simply to the question of whether there was due notice and a valid domicile in the other jurisdiction.

There is no valid point in relying as a distinction upon the name of an inquiry, either jurisdiction in other state decrees or public policy in foreign nation decrees, when the same question must be answered; was the spouse domiciled in the other jurisdiction? This is so because the foreign decrees are in fact nearly always recognized unless the wife can come forward and show her spouse was not domiciled in the other jurisdiction, as in Mexican mail-order divorces.[16] In fact, the wife has not been allowed to attack the jurisdiction of the foreign court when she appeared there and failed to contest the action.[17]

Both *Rosenbaum* and the principal case indicate that the New York courts are quite aware of their obligation to foreign nations not to interfere prematurely in foreign nation divorce actions. The court in *Rosenbaum* has shown they will not interfere when the domicile is a sham, nor will they interfere, as in the principal case, when domicile is in dispute. The loss of certain matrimonial rights which result from a divorce abroad such as the use of her name by a second wife and the loss of her husband's companionship as well as the hardship of defending the action abroad are, in the court's view, not as important considerations as respect and trust of foreign courts and countries. The New York courts will in the future, regardless of domicile, simply refuse to enjoin a foreign nation divorce. The decision was a sound one because of the admirable restraint of the court in refusing to interfere in a foreign tribunal unless clear injury of a substantial nature is shown. Clear injury of a substantial nature is not likely to be shown in the future either, because property rights can be protected by refusing recognition of the decree in so far as alimony rights are concerned. A state's matrimonial and divorce policy, while important in that state, should not stray beyond that state's borders or legitimate interests—especially on the international scene—where respect and trust for each nation's courts should be paramount.

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[15] Schnieder v. Schnieder, 232 App. Div. 71, 248 N.Y. Supp. 802 (1931); Gould v. Gould, 235 N.Y. 14, 138 N.E. 490 (1923). *cf.* Martens v. Martens, 284 N.Y. 363, 31 N.E.2d 489 (1940).

[16] See cases collected in Grossman, New York Law of Domestic Relations § 967 *et seq.* (1947 plus 1959 supp.).

[17] Schnieder v. Schnieder, *supra* note 15.