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One of the many anomalies in the law regulating the lives of divorced persons is the fact that few appellate decisions and even fewer lawyers or judges have given much consideration to the question of the identity, the rights and the precise legal status of an ex-wife. It is assumed without any apparent doubt that an ex-wife, regardless of the extent of moral misbehavior on her part, may retain the name of the man she married. With almost the same certainty every ex-wife is presumably entitled to some type of alimony, and in about 95 percent of all cases she will get custody of the children of the marriage.

All available evidence appears to indicate that a large number of divorced women—perhaps the vast majority of them—remarry rather quickly after their divorce. There have been consequently few occasions for the courts to discuss and decide upon the rights of an ex-wife in cases unencumbered and unclouded by disputed factual issues about property, children and/or step-children.

The whole thrust of divorce law is in the direction of constructing a formula by which each and every right of the ex-wife would be settled at the moment that the marriage, which is the basis of all her rights, is dissolved. For better or for worse, however, it seems increasingly difficult to extinguish all the rights of an ex-wife even when the marriage, from which alone these rights were created, is "dissolved."

Purists and absolutists in the law—especially when they represent would-be ex-husbands—insist that marriage is just another

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contract and that when the parties to the contract, with judicial permission, sever the bond they should be allowed to determine at that time the nature and extent of their obligations to each other in perpetuity. Other jurists, however,—particularly when they represent prospective ex-wives—reason that marriage cannot be reduced to the level of the ordinary commercial contract. In every marriage, they would argue, a woman changes her position irrevocably; she assumes a new name and a break-up of her marriage for any reason besides the death of the husband brings upon her harms which the husband must provide for, not merely by the divorce settlement but by assuming some type of perpetual duty towards his ex-wife so long as she bears his name.

If the legal fictions about grounds and defenses employed in divorce actions had more validity we might be able to refine the problem a bit by postulating a hypothesis that the ex-wife whose misconduct alone caused the divorce would not be entitled to the benefits due to the "innocent" wife. As is well known, however, about 80 percent of all divorces are secured by the wife and in almost 70 percent of all divorce cases the ground is "cruelty". For these reasons any definition of the term "ex-wife" must realistically include *all* former wives, even those whose conduct was the sole cause of the divorce.

Although the law has not developed very much literature about the identity, nature and rights of ex-wives, there appears to have developed nonetheless a pragmatic way to settle the claims of the 400,000 American women who each year assume the status of "ex-wives". At least most divorcees, having agreed to and accepted in writing the most advantageous property and financial arrangement they can secure, do not return to the courts to plead for a better settlement of the claims which they obtained as wives. Nor do many women who agreed to allow their husbands a divorce—by some type of informal if not collusive consent —return to the courts to complain about their bargain.

Anyone with even a minimum acquaintance with divorce procedures will recognize that there exists little if any reliable information on the forces operating on a wife when either she and/or her husband have come to the decision that a divorce is the best solution to their marital problems. If both parties agree to give their consent to whatever legal and financial arrangement

is to be worked out the rights of the ex-wife are obviously subject to the adage "volenti non fit injuria." Until or unless an ex-wife can show that her consent to become an ex-wife was induced by coercion and pressure which should in justice permit her to rescind her consent, any petition on her part to renounce the status of an ex-wife to which she consented can hardly be expected to receive very much support, at least according to the ordinary rules of contract law.

The future, however, may well bring about a widespread feeling that a wife whose husband desires to divorce her cannot realistically be said to be in a position of consenting freely to a request by her husband for a divorce. It is one of the silent premises of the concept of romantic love on which modern marriage seems to be based that it is wrong to continue to live with a spouse who no longer has "love" for you. According to the same philosophy of marriage it is improper and even immoral for a husband or wife not to secure a divorce if he or she no longer has "love" for the other spouse.

If this outlook on marriage can in any way be said to be a part of the law regulating the tripartite contract of marriage its incorporation into this law further complicates the issue of the freedom or the non-coercion of a wife during the period in which she arranges for a divorce.

The basic difficulty in assessing the voluntariness of a wife's part in securing a divorce is made more complex by the fact that American law, at least theoretically, does not permit the contract of marriage to be dissolved by bilateral rescission and much less by unilateral cancellation or withdrawal. Both of these methods are, of course, widely employed to terminate marriages which for any number of reasons have become unsatisfactory to the partners involved.

It seems safe to predict, therefore, that eventually there will arise the classic case of the ex-wife who, having consented to a divorce and a property settlement, will thereafter return to the courts to relitigate her claims, stating that during the entire proceedings leading to the divorce and financial settlement, she was too frightened, bewildered and psychologically coerced to be capable of having that minimum voluntariness and freedom from fear which are an indispensable condition precedent for a valid

consent and agreement to the settlement of multiple claims arising out of a contractual relationship which lasted for several years.

When this future plaintiff ex-wife comes into court to repudiate the settlement to which she agreed both she and her lawyers will have some intriguing legal arguments to employ to buttress her case. The right case and resourceful lawyers might force the courts to come to some conclusions on the hard questions which have been for some time floating in a sort of legal limbo on the fringes of family law. Among the questions which the ex-wife could try to force to a resolution are the following:

> (1) If it can be demonstrated that the husband was the moving force in bringing about the divorce, could an ex-wife, sometime after the divorce, allege and prove that, at the time of the divorce, she was placed in a position of such shame, humiliation and anger, that she was not able to and could not have been expected to bargain in good faith with her husband but was in effect pressured into accepting those financial terms which would alone allow her husband to carry out his plans for a remarriage?
>
> (2) If time and circumstances have brought it about that the plaintiff ex-wife has not remarried and that she is prominently, unpleasantly and embarrassingly known as the "*first* Mrs. A.B.C." would it be possible to plead this eventuality as another factor why the ex-wife did not and could not at the time of divorce insist upon a full indemnification of all her claims arising out of the marital partnership? If, furthermore, the ex-wife's chances of remarriage were substantially diminished by the subsequent prominence or notoriety of her former husband would she have any colorable right to assert that, at the time of her divorce proceedings, she simply was not in a position to give a truly voluntary, meaningful and binding consent to the settlement that was offered to her?
>
> (3) If an ex-wife, having lived for a period without any expressed grievance at the financial arrangement given her, becomes a semi-invalid as a victim, let us say, of multiple sclerosis, can her permanent disability be advanced as a reason to renegotiate what she agreed to accept as the net worth of her interest in her marital partnership? Even more difficult and complex is the question of whether a state would ever have the right to raise the issue of alleged coercion on a prospective ex-wife by a husband when, for example, the

ex-wife has become totally dependent on the state by reason of chronic disability or involuntary unemployment.

If some readers conclude that all the foregoing hypotheticals would be resolved against the ex-wife who consented at the moment of divorce to the most advantageous bargain she could secure, such conclusions but highlight the underlying basic assumption in thinking about the ex-wife's position, she is entitled only to that which she freely consents to accept.

These principles may be helpful as background in a consideration of the rights of the ex-wife who *never* consented to a divorce or to any financial settlement but who nonetheless, because of a valid *ex parte* divorce secured by her husband, is truly divorced. The woman who is legally turned into a divorcee although she never appeared in court or consented to any decree of divorce or property agreement is a very new creature in Anglo-American law. She was prefigured in *Williams v. North Carolina II*[1] and introduced to the world in *Estin*[2] and *Vanderbilt*.[3] Her past is unknown, her present status is ambiguous but her future may be surprisingly eventful.

About eleven percent of America's annual 400,000 divorces are "migratory", that is, secured by plaintiffs in one of the five states with a residence requirement of less than a year. When one spouse brings action in a foreign state the stay-at-home wife (or husband) can elect to fight her case in an alien and probably unsympathetic forum and accept as *res judicata* whatever the court in the "quickie divorce" state decrees. On the other hand, the wife may elect not to appear in any way in the divorce proceedings; thereafter she may exercise her right to attack collaterally her husband's divorce decree in the courts of her home state.

Both of these strategies have their advantages but the non-appearing wife faces the built-in possibility that her husband may convert his residence in another state into a domicile or at least into a non-attackable, presumptively valid domicile. At the moment when this phenomenon occurs the plaintiff husband has

[1] Williams v. North Carolina II, 325 U.S. 226 (1945).
[2] Estin v. Estin, 334 U.S. 541 (1948).
[3] Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

in his possession a valid *ex parte* divorce and his non-appearing, non-consenting spouse becomes an ex-wife with her rights to be determined according to that elusive newcomer to family law, "divisible divorce".

One need not review the long and tortuous story by which the "matrimonial domicile" of *Haddock*[4] became "divisible divorce" in *Estin* to realize the fact that neither the courts nor society have really thought out what justice requires for the wife who has become a divorced women without her consent. Indeed *Estin* and *Vanderbilt* hardly raise the relevant and important questions; these decisions tend to rest their main arguments on the ground that the states in which involuntarily divorced ex-wives reside may decline to support these women on the basis that an abandoned ex-wife may look to the assets of her former husband within the state where he formerly lived with her but in which he now neither has his domicile or residence and in which he could legally remarry. The valid *ex parte* divorce, in the words of Mr. Justice Douglas, did not extinguish all the "roots and tendrils" of the marriage it dissolved.

The law appears to be caught in a basic contradiction regarding the rights of the woman divorced by an *ex parte* decree. As the dissent in *Vanderbilt* pointed out, the law gives no right to the stay-at-home wife to protest or to prevent the dissolution of her marriage in a foreign jurisdiction. Yet the law has now decreed that, although a wife may be involuntarily deprived of her status as a married woman, she may *not* be deprived of the right to reach those assets of her ex-husband which he may have left in the state where he last lived with his wife.

It may well be, as Justice Frankfurter's dissent in *Vanderbilt* noted, that many wives value their status as married women much more than their right to some form of alimony or support. Is it therefore logical, consistent or fair to permit husbands to acquire a valid divorce without even their wives' acquiescence, yet grant to the same ex-wives the lesser right of whatever support from their ex-husbands' assets they can acquire by a court decree in the last state of cohabitation? There is logic, of course, in saying that an *ex parte* divorce decree cannot terminate the property rights of the non-appearing spouse, but perhaps it would be more

[4] Haddock v. Haddock, 201 U.S. 562 (1906).

logical to hold that the involuntarily divorced ex-wife should be able to compel her ex-husband to come into the courts of *her* domicile in order to have an adjudication of her rights in the financial assets of the marital partnership which her husband has severed without her consent.

"Divisible divorce" therefore appears to be a term which obscures more questions than it resolves. It seems to mean essentially that the breaking of the marriage bond, unconsented to by one party, does not terminate all the bases of the rights of the spouses involved. These rights continue presumably until such time as a wife may somehow be deemed to have consented or acquiesced in her husband's divorce, by a failure to assert her rights, by reliance on her status as a divorced woman or by some other action or non-action from her husband and the world could reasonably conclude that she has forfeited or renounced whatever rights she may have as a non-consensual divorcee.

The theory of "divisible divorce" assumes or asserts a definition of marriage which would include a wife's right to virtually perpetual support as an inseparable part of the marriage contract. *Estin* and *Vanderbilt* do not, of course, expressly reach this conclusion but rest on the unchallengeable principle that the property rights of a wife may not be terminated without *in personam* jurisdiction. By employing this simple legal rule the Court was able to avoid some basic questions such as the following:

(1.) From what concept of the marriage relation does the right of an ex-wife to support derive?

(2.) Does every ex-wife who refuses to consent to her husband's out-of-state divorce action have an inherent and not merely a statutory right to seek support from her former husband? Furthermore, should such a right extend not merely to the assets which the husband has left in the ex-wife's state of residence but to all his assets wherever they may be?

(3.) Would a failure on the part of an ex-wife to assert her rights over an extended period give any right to her former husband to rely on the extinction of whatever rights his former spouse may have asserted?

(4.) Should an ex-husband be permitted to employ those defenses to an award of alimony which were available to him in the state where he secured a valid, *ex parte*

> divorce? Should a husband, for example, be allowed to show the adultery of his wife in a proceeding in the state of matrimonial domicile in a suit in which she is the plaintiff when, as in Florida, a divorce obtained because of the wife's adultery precludes alimony?

If these questions seem somewhat fanciful and far-fetched it is only because ex-wives, divorced involuntarily by *ex parte* decrees, who have the perseverance to fight for alimony are rare. But the number of ex-wives turned into divorcees by legal proceedings in which they did not appear and in which the tribunal granting the divorce denied them alimony appears to be very large and probably growing. It may be that the financial needs of these women will force an increasing number of states to enact legislation permitting involuntary ex-wives to reach the assets of their ex-husbands within the state of the last marital residence.

Such laws, however, would help only a very few of the more well-to-do reluctant ex-wives. Such a law would, of course, be more useful if it included within it a provision to the effect that if property were removed from the state by the husband within one year prior to the out-of-state *ex parte* decree such an act would raise a rebuttable presumption that the removal was effected for the purpose of defrauding his wife of her right to support and alimony.

A satisfactory law providing for the economic needs of the involuntary ex-wife can hardly be written until law and society have come to some rather fundamental conclusions regarding the validity and the duration of an ex-wife's right to support. It seems clear that contemporary indecisiveness about this issue causes prospective ex-wives who actually do not want a divorce to accept one in return for a financial settlement which, their lawyer counsels them, would in all probability not be available to them if they refused to enter within their home state into the usual "Wife-Plaintiff-Cruelty" divorce action which so often is a mockery of any true legal proceeding. The great uncertainty about the rights of an ex-wife who has no *in personam* decree against her husband is, moreover, clearly an inducement to wives to appear as a defendant in a foreign state in a quasi-fictitious suit in which a pre-arranged financial settlement is given the appearance and

respectability of a judicial decision thoughtfully pondered and wisely decreed.

Not a little of the hypocrisy and not a few of the legal fictions in domestic relations courts therefore can be attributed to the fact that law and society have been reluctant and indeed unwilling to come to firm conclusions with regard to the nature of the right of ex-wives to support and alimony. Lawyers and judges have substituted for real thought in this area the half-truth that every case must be decided on its own facts.

There exist two extreme but seldom articulated positions on the question of an ex-wife's right to support. One position would argue that it can be demonstrated from statutory and decisional law that an ex-wife—and in particular the involuntarily divorced wife—has an inherent and life-long right to support in the manner to which she was accustomed during the period of the marriage. So long as a woman legally carries the name of her husband, this line of reasoning would urge, she is entitled to that support which every man agrees to supply when he enters the contract of marriage. This right to support survives the dissolution of the marriage bond by a divorce.

The second position is at the other extreme and would advocate—or at least suggest as discussable—that ex-wives do not have a vested right to perpetual support since it is totally unrealistic to think of them as the "innocent" wronged party. Their conduct or attitudes or selfishness probably entered into the failure of the marriage so that they should not be permitted to live off the resources of their ex-husbands as if they were blameless. Such a result should be forbidden particularly in those cases where continued substantial alimony would in effect prevent the ex-husband from entering a second marriage or at least from providing adequately for a second wife and second family.

Very few spouses, judges or litigants adopt either of these polarized views. All theories about the rights of ex-wives collapse in confrontation with the realities of the basic and undeniable fact that hardly any man, unless he be wealthy, can support an ex-wife and a second wife in any way approaching the manner to which they have been accustomed.

Despite the overwhelming truth that virtually no remarried ex-husband can "support" his ex-wife, courts and judges continue

to repeat the platitudes and pieties that underlie the rule that a divorced man must "support" his former wife. Such a rule may have been wise in past generations when few women worked and when a respectable remarriage for a divorcee was almost impossible. But clearly some new paths of thought must be chartered if law and society are to make some reasonable accommodation between the right granted to an ex-husband to remarry and the fact that an ex-wife is seldom if ever a completely "innocent" wife deserted and abandoned by a "guilty" husband. In seeking to define the concept of an "ex-wife" and to refine notions about her rights, all considerations of the fact that many if not most ex-wives serve in the capacity of mothers and housewives for their minor children are omitted in this paper. The rights of the children of divorce constitute a separate subject which has been discussed by this writer elsewhere.[5] The precise problem in the discussion which follows is the task of identifying the rights of an ex-wife who has been validly divorced by a foreign *ex parte* decree.

It sometimes appears that it is conceivable that the courts could eventually cut the heart out of a foreign valid *ex parte* divorce granted to a husband-plaintiff. By such a decree a husband may not cut off his wife's right to a property and alimony settlement nor may he deprive her of the right to custody of the children of the marriage, as *May v. Anderson*[6] made clear. No reported case has yet appeared in which a foreign divorce court has ruled in an *ex parte* decree that a "guilty" non-appearing ex-wife must cease using her married name. One would suppose that, if such a court cannot terminate a wife's right to alimony and to custody of her children, it cannot deprive a woman of the most tangible legal evidence of her marriage, her assumption of her husband's name.

It appears increasingly clearer, therefore, that the spouse who secures a "divisible divorce" receives a mere legal right to have a second spouse but is not relieved of many of the obligations of the first marriage.

Aside from the question of the full faith and credit due to the *ex parte* decree—a problem not really resolved in a very satis-

[8] Drinan, *The Rights of Children Whose Parents are Divorced,* Illinois Law Forum, 618 (1962).

[9] May v. Anderson, 345 U.S. 528 (1953).

factory way in *Estin* and *Vanderbilt*—there is emerging, with increasing frequency and deepening urgency, the basic policy question of whether law and society should permit the further growth of a class of remarried ex-husbands, the security of whose second marriages and second families may be severely threatened by the presence of unresolved claims of an ex-wife.

An attempt has been made to prevent injustice to ex-wives by the familiar proposal that, before a man could enter a second marriage, he must demonstrate to the appropriate official that he is satisfying his obligations to his former wife. If such a proposal were carried out it would at least put ex-wives on notice that their former husbands are planning a remarriage. Such a plan, however, could only be helpful on an intra-state basis and could be easily evaded by ex-husbands contracting a second marriage at any of the numerous out-of-state "marriage mills." Such a scheme, moreover, would be of no service at all to the ex-wife who, involuntarily divorced in an *ex parte* decree, has filed no claim against her ex-husband, much less reduced it to judgment.

What therefore should law and society do for the wife who refuses or is unable to appear in a foreign forum established by her husband where he secures an *ex parte* decree of divorce which subsequently is converted into a collaterally unimpeachable judgment entitled to full faith and credit in every state? The following considerations may be helpful:

(1.) Perhaps the familiar and seldom analyzed adage that an ex-husband must "support" his ex-wife could be restated in terms of treating the marriage as a contractual partnership of a unique nature. Thus the wife who is divorced without her consent could be analogized to the creditor in a bankruptcy proceeding who is virtually forced to settle for a part of his claim when his debtor becomes insolvent.

Following this line of reasoning the non-consenting ex-wife would be required to recognize the bankruptcy of the marriage she entered and accept as full compensation for all her claims a lump sum settlement adjudicated to be equal to her share of the assets of an insolvent partnership. The most serious difficulty with this analogy is its apparent assumption that either party to a marriage can unilaterally have the marriage declared to be in a state of bankruptcy. Courts, publicists and a deep-seated and

widespread moral conviction have always insisted that one partner to a marriage, especially the husband and breadwinner, cannot in justice be permitted to withdraw from the marriage partnership without the fault or consent of the other partner. The very possibility of a valid *ex parte* divorce has eroded the traditional position of the law in forbidding a one-sided cancellation of the tripartite marriage contract. If, therefore, the valid *ex parte* decree is to remain available—and there appears to be no discernible movement to eliminate its existence—a new theory of compensating the involuntarily divorced spouse seems to be called for.

A step towards developing that theory could be the elimination of the somewhat meaningless assertion that an ex-husband must "support" his former spouse and a substitution for that ambiguous formula a rule that a wife may under certain circumstances be compelled to accept a share of the assets of a marriage which has entered into receivership.

A contemplation of a new formula of this nature leads one inevitably into the question of the wisdom of continuing to employ the adversary procedure with grounds and defenses as the legal method by which marriages are dissolved. The entire problem of employing "guilt" or "innocence" in trials for divorce cannot really be separated from the fairness of "divisible divorce." Let us therefore analyze the background of present divorce procedures.

(2.) It is never recalled often enough that the American method of granting divorces on the basis of "grounds" to the "innocent" party against the "guilty" spouse was taken from the practice of the English ecclesiastical courts in which only a separation was granted and never a divorce *a vinculo.* Both before and after the Reformation and in fact up until the year 1857 the ecclesiastical courts of England had exclusive jurisdiction over mariage and separation. It was only in 1857 that divorce became available in the civil courts, not from an act of Parliament, and it was in that year in England—and around that time in America—that non-ecclesiastical courts began to award divorces *a vinculo* for the first time in the history of Anglo-American law. The judicial action for divorce adopted by the civil courts was not the customary procedure used for cases of broken contracts

or alleged torts but rather the machinery employed by the ecclesiastical courts for several centuries, *not* to give divorces but only to grant judicial separations. Hence the processes adopted in all American jurisdictions for litigation that might result in a decree of divorce were never intended and have never really been suitable to the type of action contemplated in a petition for divorce.

For many years and indeed for several decades there has been a growing realization in America that the pretensions, fictions and outright hypocrisy involved in the widespread use of quasi-collusive arrangements to secure divorces indicate that a fundamental change in the manner of handling domestic relations cases is needed. It may be that the emergence of the *ex parte* but valid dissolution of marriage with its corollary of "divisible divorce" is in effect an answer of an almost unconscious nature to the demands for a change in basic procedures in family law. The uncontested divorce has eroded the procedures based on guilt or innocence borrowed from the ecclesiastical courts; the divorce in which the defending party neither consents nor appears is in effect the ultimate repudiation of the adversary system in domestic relations cases.

It seems clear that uncontested and unconsented-to divorces will continue and probably increase in number so long as the present adversary procedure is employed. A contested divorce is employed more as a threat by which spouses can secure better property or visitation rights than as a judicial means to discover the more culpable partner in a marriage which has resulted in failure.

(3.) Amid all the confusion and ambiguity which surrounds some of the most fundamental questions of divorce and family law the whole notion of "divisible divorce" stands as an isolated legal-constitutional conundrum actually relevant to only a few but highly significant to everyone.

"Divisible divorce" could not have become a reality but for the validation by the United States Supreme Court of the *ex parte* decree of divorce. Such validation was in itself an implicit revolt against many venerable traditions. The severe limitation placed on the *ex parte* decree by the Supreme Court's gloss on the full faith and credit clause in the "divisible divorce" doctrine has

added to the general confusion regarding the nature and legal meaning of marriage and divorce. And, as in so many other areas, legislators and judges look to the Supreme Court of the United States not merely for the resolution of constitutional questions but for the establishment of basic public policy.

If any lesson is clear from the Supreme Court's two attempts, in *Estin* and *Vanderbilt,* to deal with the nature of the *ex parte* divorce it is that the desirability and accessibility of *ex parte* decrees of divorce and the availability of post-decree alimony to non-appearing wives are questions far too complex to be resolved in technical cases revolving around the full faith and credit clause.

A thorough, candid and realistic investigation of foreign and *ex parte* divorces is therefore long overdue. A massive search by a highly sophisticated group of social scientists would develop facts and statistics of a most significant nature. Until the results of that study are available, jurists and legal writers will continue to discuss *ex parte* decrees and the rights of ex-wives in a manner that is so conceptualistic and legalistic as to be almost totally unrealistic and unreliable.