DePaul Law Review

Volume 4
Issue 1 *Fall-Winter 1954*

Article 8

Full Faith and Credit and the Out of State Divorce

DePaul College of Law

FULL FAITH AND CREDIT AND THE OUT OF STATE DIVORCE

The full faith and credit clause of the Constitution[1] might be regarded by some as the savior of the union from anarchy,[2] but it has been responsible for the creation of an almost unsolvable problem in the field of divorce law. By the ruling in the case of *Williams v. North Carolina*,[3] a divorce may be granted at any site where one of the parties to the marriage has acquired a bona fide domicile, in the eyes of the divorce granting state, and this divorce will be upheld outside of the state on the basis of the full faith and credit clause, so long as no question of jurisdiction of the granting state is raised in the state required to recognize the decree. That case brought to the fore an entirely new view as to the type of domicile needed to obtain a valid divorce. The United States Supreme Court, in the *Williams* case, which involved a bigamy prosecution, overruled the prior case of *Haddock v. Haddock*[4] which had introduced for the first time the concept of an in personam divorce in American law. It is to be noted in the *Williams* case that no attack was made, by the party contesting the divorce, on the determination by the divorce granting court that domicile existed. The case was vigorously dissented to as substituting the divorce law of the state granting the divorce for that of the state of original residence.[5]

The protests of the dissenters were soon heard again when North Carolina reinstituted the bigamy prosecution and attempted a collateral attack on the finding that domicile existed. This resulted in the rule, established in the second case of *Williams v. North Carolina*,[6] that a divorce action based on bona fide domicile must be recognized, but that the sister state can take evidence to determine if domicile, in the eyes of the sister state, was actually established. The jurisdiction of the court granting the decree is presumed in all states;[7] thus the burden of showing lack of a bona fide domicile is on the party contesting the recognition of the decree.[8] *Williams II* refers only to proceedings based on a constructive service where one of the parties was unable to, or did not care to, appear. The ex parte

[1] U.S. Const. Art. IV, § 1.

[2] Discussed in Williams v. North Carolina, 317 U.S. 287, 302 (1942).

[3] 317 U.S. 287 (1942).

[4] 201 U.S. 562 (1906).

[5] 317 U.S. 287 (1942).

[6] 325 U.S. 226 (1945). This case is commonly referred to as Williams II, and the first Williams case as Williams I.

[7] Cook v. Cook, 342 U.S. 126 (1951).

[8] Johnson v. Muelberger, 340 U.S. 581 (1951); Rice v. Rice, 336 U.S. 674 (1949).

case causes no problem in the jurisdiction granting the decree, but *Williams II* leaves one who gets an ex parte decree in an unsecure position as to the recognition of the decree in sister states. The unstable situation promulgated by *Williams* II has continued to this day. Thus, a person getting a divorce can have it attacked in another state on the basis of lack of domicile and may be placed in an awkward position if he has remarried.[9]

As a result of *Williams I*, New York has seen fit to enact a statute allowing an injunction to be issued to prevent a plaintiff from carrying on divorce proceedings in another state. That statute was subsequently held constitutional by the New York Court of Appeals,[10] the validity of similar statutes having been sustained by the United States Supreme Court.[11] The *Williams* cases have been thoroughly analyzed in many states,[12] including Illinois,[13] and one finds little to add to these decisions as to what constitutes domicile.

Domicile properly is governed by the intent of the person to establish a bona fide residence, and not a residence solely for purposes of divorce.[14] On analyzing some of the cases on domicile, note must be taken of outstanding cases, such as *Shain v. Shain*,[15] where the facts of residence and proper domicile were established regardless of the fact that the parties continued to move about the country.

Eisenwein v. Commonwealth[16] considers the question of divorce where

[9] As to the need of domicile and its adequacy as a basis for a proper divorce see Justice Rutledge's dissent in Williams v. North Carolina, 325 U.S. 226, 255 (1945), where he said: "I think a major operation is (necessary). The Constitution does not mention domicile. Nowhere does it deposit the powers of the states or nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion for this delicate reason."

[10] Garvin v. Garvin, 302 N.Y. 96, 96 N.E. 2d 721 (1951).

[11] Stoll v. Gottlieb, 305 U.S. 165 (1938); Alaska Packers Ass'n v. Industrial Comm'n, 294 U.S. 532 (1935).

[12] Huggs v. Huggs, 195 F. 2d 771 (App. D.C., 1952); Locomotive Engineers Mut. Life & Acc. Ins. Ass'n v. Laurant, 172 F. 2d 889 (C.A. 7th, 1949); Brandt v. Brandt, 76 Ariz. 154, 261 P. 2d 978 (1953); Patterson v. Patterson, 208 Ga. 7, 64 S.E. 2d 441 (1951); Stricklin v. Snavely, 175 Kan. 253, 262 P. 2d 823 (1953); Epstein v. Epstein, 193 Md. 164, 66 A. 2d 381 (1949); Stultz v. Stultz, 15 N.J. 315, 104 A. 2d 656 (1954); Lynn v. Lynn, 302 N.Y. 193, 97 N.E. 2d 748 (1951); Taylor v. Taylor, 242 S.W. 2d 747 (Ky. App., 1951); Genesse v. Genesse, 278 App. Div. 779, 103 N.Y.S. 2d 927 (2d Dept., 1951).

[13] Ludwig v. Ludwig, 413 Ill. 44, 107 N.E. 2d 848 (1952); Atkins v. Atkins, 393 Ill. 202, 65 N.E. 2d 801 (1946); In re Rush's Estate, 350 Ill. App. 120, 111 N.E. 2d 801 (1953).

[14] Ulrey v. Ulrey, 231 Ind. 63, 106 N.E. 2d 793 (1952); Shain v. Shain, 324 Mass. 603, 88 N.E. 2d 143 (1949).

[15] 324 Mass. 603, 88 N.E. 2d 143 (1949).

[16] 325 U.S. 279 (1945).

property and alimony are involved and, in the concurring opinion, evolves the interesting theory that the effect of a divorce decree may be separated, requiring the recognition of the termination of the marital status, but allowing collateral inquiry into questions of property rights. This theory was adopted in the companion cases of *Estin v. Estin*[17] and *Kreiger v. Kreiger*.[18] In the *Estin* case, the wife obtained a separate maintenance decree in New York. Subsequently, the husband established domicile in Nevada and was granted an ex parte divorce after which he ceased making the payments required by the New York decree. The wife then petitioned the New York court seeking the arrearage of separate maintenance payments. The court ruled in favor of the wife, holding that the separate maintenance decree survives the divorce decree. The United States Supreme Court, in affirming the New York decree, adopted the theory of divisible divorce, that is, the termination of the marital status must be recognized under full faith and credit but the decree need not be given effect in regard to property outside of the jurisdiction of the divorce granting state. This is the theory promulgated by Justice Douglas in the *Eisenwein* case. One might conclude from this that the *Estin* case, although not affecting the rights of a spouse to property and alimony in an ex parte suit, has destroyed the marital status and thus will not allow a prosecution for bigamy in the state of domiciliary origin, as was the case in *Williams II*.

The probable reason for the *Estin* theory is thus stated by Justice Douglas:

> The state has considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized. The interest of the State extends to its domiciliaries. The State should have the power to guard its interest in them by changing or altering their marital status throughout the farthest reaches of the nation. For a person domiciled in one State should not be allowed to suffer the penalties of bigamy for living outside the State with the only one which the State of his domicile recognizes as his lawful wife. And children born of the only marriage which is lawful in the State of his domicile would not carry the stigma of bastardy when they move elsewhere.[19]

The case of *Rice v. Rice*[20] merits watching because of its significance in reaffirming *Williams II*. The *Rice* case was not a bigamy prosecution as its illustrious predecessor, but did follow the same theory as to domicile, thus adding fuel to the already bright fire of confusion existing in the field of divorce law. It is interesting to note that four justices dissented in the *Rice* case,[21] indicating that there still is vigorous disagreement with this reasoning. The late Justice Jackson also restated a prior opinion that

[17] 334 U.S. 541 (1948).
[18] 334 U.S. 555 (1948).
[19] 334 U.S. 541, 546 (1948).
[20] 336 U.S. 674 (1949).
[21] Justices Black, Douglas, Rutledge and Jackson.

to allow this type of divorce action without personal service on the party being sued is to deprive one of procedural due process.

Another aspect of the problem concerning recognition of foreign divorce decrees arises when the court has personal jurisdiction over both of the parties. The general rule is that when both parties appear, neither can subsequently attack the finding as to domicile in a collateral proceeding. This rule is illustrated in the leading cases of *Sherrer v. Sherrer*[22] and *Coe v. Coe*,[23] where the personal appearance of both parties was the factor requiring full faith and credit. In these cases, the United States Supreme Court followed the view enunciated in the earlier case of *Davis v. Davis*.[24] Thus, the appearance of both parties can forestall protest on the part of one party as to jurisdiction of the divorce granting court, on the basis that he appeared and had his day in court.

A recent extension of the personal appearance doctrine is found in the case of *Johnson v. Muelberger*.[25] A personal appearance was made by the husband's attorney in answer to a suit brought in Florida by the husband's second wife; the divorce was granted and subsequently the husband remarried for a third time. Upon his death the husband's daughter contested the validity of the second wife's divorce in order to stop the father's third wife from taking a statutory share of the estate. The failure of the second wife to meet the Florida ninety-day residence requirement was the daughter's main point of contention. The Court decided that the child would not be allowed to attack the divorce, since neither of the parties themselves would have this remedy available, because both had appeared in the divorce granting court and had a chance to attack the jurisdiction there; thus, the action was res judicata to the daughter as well as to her parents. Justice Frankfurter dissented to this ruling, just as he did in the *Sherrer* and *Coe* cases, being of the opinion that an attack, barred to the parties to the divorce, should be available to a stranger to the action. His opinion, however, has lost strength, and the majority opinion is more vigorous than ever after the recent case of *Cook v. Cook*.[26] In that case, though Justice Frankfurter dissented,[27] he failed to propound the theory of the previous case that full faith and credit, although not available to a party to a suit, is available to a stranger.[28]

[22] 334 U.S. 343 (1948).

[23] 334 U.S. 378 (1948).

[24] 305 U.S. 32 (1938).

[25] 340 U.S. 581 (1951). Also see 46 Ill. L. Rev. 307 (1951).

[26] 342 U.S. 126 (1951).

[27] Ibid., at 129.

[28] For an interesting case on full faith and credit plus res judicata, see Sutton v. Leib, 342 U.S. 402 (1951).

A recent offshoot of the *Johnson* case was a Virginia case which extended the doctrine of res judicata, allowing it to apply to a stranger where one of the parties to the case did not appear and was given only constructive service.[29] This type of extension, if ever contested, might prove too broad.

In other cases involving personal appearances by both parties, there is a great variety of opinion as to when personal appearance should be considered adequate to allow the theory of the *Sherrer* and *Coe*[30] cases to govern. A New Jersey case where, by the use of fraud, a personal appearance was signed away, was not allowed to come under the personal appearance theory, because the court refused to say that in reality both parties to the action had appeared and had a chance to contest jurisdiction.[31] *Staedler v. Staedler*,[32] a recent case in New Jersey, was also decided on a personal appearance basis. Although an appearance was made by both parties, the state refused to recognize the appearance because of the jurisdictional issue of domicile. Supposedly, the appearance of both parties would have been adequate to establish res judicata, but here it was not. In the *Staedler* case evidence was introduced to show that the husband had induced his wife to perjure herself on the jurisdictional point of domicile; thus fraud was shown, and personal appearance was not deemed adequate to overcome the fraud.

Other recent cases have shown varied opinions on what is adequate to invoke the Supreme Court doctrine of personal appearance. One such case concluded that appearance by a guardian would be adequate.[33] In contrast, there is a holding that appearance of a person with a power of attorney, for an incapacitated person, is wholly inadequate.[34] Also, a special appearance to question jurisdiction, was held not to constitute an appearance that would satisfy the personal appearance doctrine.[35] In one of the few Illinois cases, both parties appeared in Nevada. The court held that no collateral attack would be allowed.[36]

When we have personal appearances of varied types, such as a special appearance, or an appearance by a guardian, the case in all probability

[29] Evans v. Asphalt Roads & Materials Co., 194 Va. 165, 72 S.E. 2d 321 (1952).

[30] Further reference to the "personal appearance doctrine" will refer to the theory put forth in the *Sherrer* and *Coe* cases.

[31] Judkins v. Judkins, 222 N.J. Super. 516, 92 A. 2d 120 (1952).

[32] 6 N.J. 380, 78 A. 2d 896 (1951).

[33] Breen v. Breen, 199 N.Y. Misc. 366, 103 N.Y.S. 2d 554 (S. Ct., 1951).

[34] Gromeeko v. Gromeeko, 110 Cal. App. 2d 117, 242 P. 2d 41 (1952).

[35] Rubenstein v. Rubenstein, 324 Mass. 340, 86 N.E. 2d 654 (1949). Also see the discussion in Cherry v. Cherry, 208 Ga. 213, 65 S.E. 2d 805 (1951).

[36] Buck v. Buck, 337 Ill. App. 520, 86 N.E. 2d 415 (1949).

must be tried on its relative merits in the state court until the Supreme Court of the United States is given the opportunity to adjudicate on the particular point in question. Until the time of the adjudication on each particular point, it seems that an accurate attempt to predict the Court's method of disposal of the case is wholly impossible.

In the recent case of *Alton v. Alton*,[37] the Court of Appeals for the Third Circuit seems to indicate a dissatisfaction with the personal appearance doctrine laid down in the *Sherrer* and *Coe* cases. The court was of the opinion that divorce is basicly an in rem action, and the effect of the personal appearance doctrine of the *Sherrer* and *Coe* cases would be to convert divorce into an in personam action, in effect, by precluding an attack on domicile if both parties appear. While the court, in the *Alton* case, is careful to distinguish those cases, it actually adopts a view opposed to the personal appearance doctrine. In the *Alton* case, both parties appeared in the Virgin Island under a law providing that six weeks' residence in the Islands amounts to "prima facie" evidence of domicile, without even the usual showing of domiciliary intent;[38] the court thought that this type of law did away with due process and was beyond the Constitution.[39] Since both parties appeared and did not question jurisdiction, their appearance should have been sufficient to satisfy the court that the jurisdiction was adequate, but the court instead looked to the jurisdiction itself, and found the means of establishing same were wholly incorrect. However, the United States Supreme Court vacated the judgment because the question became moot upon the parties receiving a proper divorce in another state.[40]

The field of divorce law has been put in a turmoil by the cases cited and by others. The statement of the late Justice Holmes in the *Haddock* case is a fair summary of the situation. He stated:

> I do not suppose that civilization will come to an end whichever way this case is decided.[41]

True, civilization will never come to an end because of any divorce case. But it has been constantly strained by the results of carelessly made laws.

A possible answer for the problems in this field would be the enactment of a Uniform Divorce Code that could be effective in every state

[37] 207 F. 2d 667 (C.A. 3d, 1953).

[38] Divorce of Virgin Islands § 9, as amended, Laws 1953, Bill No. 55.

[39] See the late Justice Jackson's dissent on due process in Williams v. North Carolina, 317 U.S. 287, 316 (1942), which he reaffirmed in Rice v. Rice, 336 U.S. 674, 676 (1949).

[40] Alton v. Alton, 347 U.S. 610 (1954).

[41] Haddock v. Haddock, 201 U.S. 562, 628 (1905).

in the union and in all possessions, followed by agreements with some of our neighbors who have recently begun to add fuel to the fire, by the granting of "quickie divorces" to almost anyone having the postage to apply. The recent case of *Ziesniss v. Ziesniss*[42] could provide another solution to the domicile problem and a partial remedy for the whole illness, by allowing only the state where the marriage was performed to grant the divorce.

The situation as it stands today, though understandable, is completely inadequate. To tell your client that his divorce is good in this state, but that its status in another state is a matter of speculation, is tragic. And yet, this is the law. Even though one who is familiar with the jumble of irreconcilable decisions will quickly say that a change is certainly necessary, it must be recognized that such a change is a gigantic task and would require the cooperation of all the states together with the federal government. The fact that the problem remains unsolved leads one to the inference that perhaps it is unsurmountable. However, realizing that no action will work an overnight correction, it seems that the adoption of a Uniform Divorce Code by which all of the states would agree to be governed, would be a fundamental step in the right direction.

[42] 205 N.Y. Misc. 836, 129 N.Y.S. 2d 649 (S.Ct., 1954).