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The Arrival of Divisible Divorce in Pennsylvania

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Notes

THE ARRIVAL OF DIVISIBLE DIVORCE IN PENNSYLVANIA

Stambaugh v. Stambaugh, 222 Pa. Super. 360, 294 A.2d 817 (1972).

In *Stambaugh v. Stambaugh*[1] the Superior Court of Pennsylvania held in a four-to-three decision that "a departure from a home to take up residency in another state, even though sufficient to obtain divorce, cannot be utilized to defeat an existing valid right to support."[2] In so ruling, the court reversed a lower court decree which had denied an appellant wife alimony pendente lite of $450 per week and permanent alimony of $375 per week pursuant to a decree for divorce *a mensa et thoro*.[3] The court indicated, however, that whereas a survival of support rights will henceforth obtain in the face of a valid divorce granted by a sister state,[4] a divorce granted by a Pennsylvania court will continue to operate as a termination of all rights incident to marriage.[5]

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1. 222 Pa. Super. 360, 294 A.2d 817 (1972).
2. *Id.* at 365, 294 A.2d at 819-20. The dissent bases its opinion on the fact that "[i]t is the settled law in Pennsylvania . . . that a divorce a v.m., validly granted in a sister state, terminates a wife's right to support." *Id.* at 365, 294 A.2d at 820. The dissent also gives recognition to the view that legislative action is necessary to preserve support orders after *ex parte* divorces from the bonds of matrimony issued by a sister state. *Id.* at 367, 294 A.2d at 821, *citing* 3 A. FREEDMAN & N. FREEDMAN, LAW OF MARRIAGE AND DIVORCE IN PENNSYLVANIA 1432 (2d ed. 1957) [hereinafter cited as FREEDMAN].
3. A divorce *a mensa et thoro* [hereinafter cited as a divorce *a m.e.t.*], is a divorce from bed and board.
4. 222 Pa. Super. 360, 363, 294 A.2d 817, 819 (1972).
5. *Id.* at 364, 294 A.2d at 819.

In so holding, *Stambaugh* appears at long last to be adopting for Pennsylvania the doctrine of "divisible divorce," which was foreshadowed in the concurring opinion of Mr. Justice Douglas in *Esenwein v. Pennsylvania*[6] and announced by the United States Supreme Court in *Estin v. Estin*.[7] *Esenwein*, which until the decision in *Stambaugh* provided the foundation for Pennsylvania's refusal to allow support rights to survive divorce *a vinculo matrimonii*,[8] involved litigation between a husband and wife who had been married in Pennsylvania in 1899. A support order was granted the wife in 1919. Following his procurement of a Nevada divorce in 1941, the husband petitioned the Pennsylvania courts for termination of the order of support. His petition was denied, not on the basis that the support decree survived the divorce, but on the ground that his wife had met her burden of impeaching the foundation of the Nevada decree by showing that the husband had not established bona fide domicile in the divorce granting state.[9] The holding of the Pennsylvania court was sustained by the United States Supreme Court.[10] The Court noted that although the full faith and credit clause of the Constitution[11] required that prima facie validity be accorded the Nevada judgment, the record warranted the finding of lack of domiciliary intent on the part of the husband and consequent lack of Nevada jurisdiction.[12] In a concurring opinion, Mr. Justice Douglas stressed the basic difference between the question of marital status and the question of support.[13] He noted that an accommodation of the conflicting interests of the various states would require each jurisdiction to recognize a validly granted foreign divorce decree,[14] since the marital capacity of a party to a divorce would often be in doubt if a valid foreign divorce were not granted full faith and credit.[15] However, Mr. Justice Douglas also observed that such a conflict is not necessarily present in the issue of support, since "if he is required to

6. 325 U.S. 279, 282 (1944) (concurring opinion).
7. 334 U.S. 541 (1948).
8. A divorce *a vinculo matrimonii* [hereinafter cited as a divorce *a v.m.*] is a divorce from the bonds of marriage.
9. Commonwealth v. Esenwein, 348 Pa. 455, 458, 35 A.2d 335, 336 (1944).
10. 325 U.S. 279, 281 (1944).
11. U.S. CONST. art. IV, § 1.
12. 325 U.S. 279, 281 (1944).
13. *Id.* at 282 (concurring opinion).
14. Although "foreign divorce" bears the connotation of a decree from another country, it will be used in this Note exclusively to designate a divorce granted by a sister state, since it appears to be the phrase most commonly employed in that context. The problem is discussed in Lindey, *Foreign Divorce: Where Do We Go From Here?*, 17 U. PITT. L. REV. 125, 129 (1956). There the writer notes the unsatisfactory quality of "out-of-state" and "sister state," since their connotations prevent their being employed in connection with divorces granted by territories and possessions of the United States. "Migratory" is found to be equally unsatisfactory, since it "evokes an image of birds and beasts seeking gentler climes." *Id.*
15. 325 U.S. 279, 282 (1944) (concurring opinion).

support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized."[16]

In *Estin v. Estin*,[17] whose doctrine of divisble divorce *Stambaugh* appears to adopt, the Supreme Court faced the issue of whether a valid New York support order would survive a valid Nevada divorce decreed *ex parte*. After noting that the New York courts have held that a support order could survive divorce,[18] the Court established the principle that the incidents of marital status, such as support, are separable from the marital status itself.[19] Accordingly, although a state is under constitutional obligation to give full faith and credit to a valid foreign *ex parte* decree, it is not obligated to recognize a foreign divorce order insofar as it purports to affect the incidents of maintenance previously established by a local court.[20] Of course, if instead of being *ex parte*, the foreign proceeding is one in which the divorced spouse made an ap-

16. *Id.* at 282-83 (concurring opinion).

17. 334 U.S. 541 (1948).

18. The Court observed in *Estin* that neither statute nor common law in New York had bestowed upon the courts of that state the power to compel a man to support his ex-wife. Indeed, the law of New York appeared to be that alimony was payable only so long as the relation of husband and wife existed so that a support order would not seem to survive a decree of absolute divorce. Nevertheless, the Court found that:

> [T]he highest court in New York has held in this case that a support order can survive divorce and that this one has survived petitioner's divorce. That conclusion is binding on us. . . . It is not for us to say whether that ruling squares with what the New York courts said on earlier occasions. It is enough that New York today says that such is her policy.

334 U.S. 541, 544 (1948).

19. *Id.* at 545.

20. *Id.* at 549. It should be noted that full faith and credit must be accorded divorce decrees insofar as they nullify a marital union if, but only if, one of the parties to the action is domiciled in the state granting the decree. This principle was announced by the United States Supreme Court in *Williams v. North Carolina*, 317 U.S. 287 (1942) [hereinafter cited as *Williams I*]. In a later appeal of the same case, the Supreme Court held that the state which is requested to recognize the validity of a foreign decree may decide for itself whether one of the spouses possessed a bona fide domicile in the decree granting state. If it is found that neither party was a good faith domiciliary of the foreign state, the local jurisdiction need not recognize the decree. *Williams v. North Carolina*, 325 U.S. 226 (1945) [hereinafter cited as *Williams II*]. Prior to *Williams I*, the states were free to refuse recognition to *ex parte* foreign divorce decrees. This state discretion had been substantiated by *Haddock v. Haddock*, 201 U.S. 562 (1906), which *Williams I* overruled. Pennsylvania was one of the few states still refusing to recognize *ex parte* foreign decrees at the time *Williams I* was announced. It is suggested that this refusal was motivated to a considerable extent by a desire to protect the support rights of Pennsylvania domiciliaries, since until *Stambaugh* Pennsylvania has regarded such rights as automatically terminated by a divorce *a v.m.*

pearance of if the spouse was personally served within the foreign jurisdiction, the decree would be determinative of both marital status and any support status which the dependent spouse might have enjoyed prior to the granting of the foreign decree.[21] It must be noted that *Estin* did not guarantee that support rights previously arising in a local jurisdiction would survive a foreign dissolution of the bonds of marriage. Rather, *Estin* held that the *ex parte* foreign decree would not deprive her of the maintenance rights only if the particular jurisdiction in which they had been granted allowed such rights to survive a divorce *av.m.*[22]

In response to the "divisible divorce" holding in *Estin,* a number of states took measures to assure that their domiciliaries would be accorded the same benefits enjoyed by domiciliaries of states such as New York, which allowed the survival of such support rights.[23] In several jurisdictions the provision was made by statute.[24] In others the courts have permitted support rights to survive even absent statutory provisions.[25] Prior to *Stambaugh,* however, the courts of Pennsylvania had refused to consider the possibility that a support decree granted in connection with a divorce *am.e.t.* could survive an *ex parte* foreign divorce *av.m.* Indeed, the courts of Pennsylvania appear to have cited *Estin* on only four occasions prior to *Stambaugh.*[26] Prior to 1972 there was a period of twenty-three years during which the Pennsylvania appellate courts neither referred to nor distinguished *Estin* in any of the divorce-support appeals coming before them.[27]

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21. Even Pennsylvania, despite its refusal to recognize *ex parte* foreign decrees before *Williams I,* has traditionally recognized that full faith and credit must be given to a foreign determination of both marital status and support rights if the spouse domiciled in Pennsylvania submitted herself to the jurisdiction of the sister state. *See, e.g.,* Commonwealth v. Parker, 59 Pa. Super. 74 (1915).

22. 334 U.S. 541, 546 (1948).

23. *See* note 17 and accompanying text *supra.*

24. *E.g.,* N.J. REV. STAT. § 2A:34-23 (1972); ORE. REV. STAT. § 107.310 (1971). The latter statute changed Oregon law so that the doctrine of divisible divorce would no longer be denied application in that state. An earlier state supreme court decision had held that the results of *Estin* did not obtain in Oregon. Rodda v. Rodda, 185 Ore. 140, 200 P.2d 616 (1948), *cert. denied,* 337 U.S. 946 (1949).

25. *E.g.,* Armstrong v. Armstrong, 162 Ohio 406, 123 N.E.2d 267 (1954), *aff'd,* 350 U.S. 568 (1956).

26. Commonwealth v. Western Union Telegraph Co., 400 Pa. 337, 343, 162 A.2d 817, 820 (1960); Moser v. Grandquist, 362 Pa. 302, 309, 66 A.2d 267, 270 (1949); Commonwealth v. McCormack, 164 Pa. Super. 553, 557, 67 A.2d 603, 605 (1949); Commonwealth v. Bowser, 163 Pa. Super. 494, 497, 63 A.2d 117, 119 (1949).

27. The most recent reference to *Estin* in a Pennsylvania decision before *Stambaugh* occurred in 1949 in *Commonwealth v. McCormack,* 164 Pa. Super. 553, 557, 67 A.2d 603, 605 (1949). *McCormack* concerned the effect of an *ex parte* Alabama divorce on an order of support of the wife and child. Noting the "well settled" law of Pennsylvania that a valid divorce decree terminates the duty of a husband to support his wife, the Superior Court proceeded to find that the man had been validly domiciled in Ala-

The reluctance of the Pennsylvania courts to allow a support order to survive the granting of a divorce *av.m.* can be best understood by an examination of the medieval English antecedents of the current Pennsylvania support decrees. The American practice of granting alimony as an incident to divorce was borrowed from the ecclesiastical law, which persisted in England until the reform of that country's court system in 1857.[28] Since the church viewed marriage as a relationship which could not be dissolved by human authority, divorce *av.m.* was forbidden by ecclesiastical policy. In certain specified instances such as adultery or cruelty to the extent that cohabitation was rendered unsafe, the "innocent" party was granted the right to live apart from the errant spouse. This right was provided by a decree of separation, a divorce *am.e.t.*[29] Such a decree did not dissolve the marital tie, however, so that the parties continued in their status as husband and wife.[30] On occasion an English spouse was provided with alimony in connection with a decree of divorce *av.m.* even before the reforms of 1857, but such provisions were an incident of parliamentary divorce, and it was the ecclesiastical rather than the parliamentary policy which has set the pattern for Pennsylvania law.[31]

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bama and therefore upheld the termination of the support order concerning his wife. *Id.* at 557, 67 A.2d at 605. In an almost parenthetical manner the court referred to *Estin* as not controlling in Pennsylvania. *Id.* The bases on which *McCormack* is predicated were questioned in Packel, *The Right to Support After An Ex Parte Divorce*, 29 PA. B.A.Q. 29, 32 (1957). The writer of that Note is the writer of the opinion in *Stambaugh*.

28. H. CLARK, LAW OF DOMESTIC RELATIONS 420 (1968) [hereinafter cited as CLARK].

29. 3 FREEDMAN, *supra* note 2, at 795. The divorce law of Pennsylvania currently provides that the following actions on the part of the husband constitute grounds for the wife's procurement of bed and board divorce: malicious abandonment of his family, maliciously turning his wife out of doors, cruel and barbarous treatment which endangers her life, such indignities to her person as to render her condition intolerable and her life burdensome, and adultery. PA. STAT. ANN. tit. 23, § 11 (1955). There are no provisions for maintenance of the action by the husband.

30. 3 FREEDMAN, *supra* note 2, at 794. This is still the Pennsylvania position. *See, e.g.*, Rudolph's Estate, 128 Pa. Super. 459, 462 (1937).

> A divorce a mensa et thoro is a judicial separation . . . it is a separation which is not final; and it does not put it out of the power of the husband and wife to effect a reconciliation. . . . [I]t merely suspends certain mutual rights and obligations of the parties definitely or for a limited time.

Id. at 462.

31. *See* CLARK, *supra* note 30, at 420. Even in Pennsylvania alimony was allowed as a right with a decree of divorce *a v.m.* from 1854 to 1895 and in certain circumstances where the court deemed it just and proper from 1895 to 1925. Hooks v. Hooks, 123 Pa. Super. 507, 510-12, 187 A. 245, 246-47 (1936). PA. STAT. ANN. tit. 23, §§ 1-69 (1955), officially known as

Examined in terms of its historical development there is a certain logic to the traditional Pennsylvania position. The right to support is held to exist wherever the marital status exists and continues. Since divorce *am.e.t.* perpetuates the marital status, despite its barring of cohabitation, the obligation of the husband to support the wife is enforced. On the other hand, since the purpose of divorce *av.m.* is to nullify the marital status, the granting of alimony following a divorce from the bonds of matrimony would be anomalous. However, with contemporary mores so drastically different from those which prevailed when the ecclesiastical laws were devised, the Pennsylvania policy of denying support following absolute divorce has come under increasing attack. The criticism is exemplified by the observation of the Third Circuit in *Dixon v. Commissioner of Internal Revenue.*[32]

> The law givers of Pennsylvania have refused to advance a step beyond the medieval notion of alimony as an incident of limited divorce. . . . At the same time they have recognized the modern concept of absolute divorce. But no matter how great the wickedness of the husband—be he bigamist, bully, philanderer or worse, see 23 PS. § 10—his innocent wife must risk the poorhouse to be rid of him. . . . We may say that this rather unchivalrous anomaly is unique among the . . . states. . . .[33]

In addition to reliance upon the centuries old traditions denying maintenance after divorce *av.m.*, the Pennsylvania courts prior to *Stambaugh* attempted to solidify this result with a somewhat dubious application of the full faith and credit clause of the Constitution.[34] For example, in 1967 when the Pennsylvania Supreme Court held[35] that a wife who had been divorced by her husband in an *ex parte* Nevada proceeding possessed no right to election against her husband's will,[36] the court spoke as though any other holding were rendered impossible by the full faith and credit clause. "Greatly as we desire to protect the citizens of Pennsylvania from foreign divorces, we cannot evade or circumvent the Constitution of the United States. . . . To hold otherwise . . . would make the Full Faith and Credit Clause . . . an empty and . . . meaningless provision."[37] The unsoundness of this position becomes patent in the face of *Estin*, wherein the Court specifically

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"The Divorce Law," made no provision for such support, thus causing Pennsylvania to revert to her traditional stance of providing alimony only with divorce *a m.e.t.* The only apparent exception to the policy of not allowing alimony following a divorce *a v.m.* is in the case of a respondent who is insane, for whom permanent support may be decreed. PA. STAT. ANN. tit. 23, § 45 (1955).

32. 109 F.2d 984 (3d Cir. 1940).
33. *Id.* at 986.
34. U.S. CONST. art. IV, § 1.
35. *In re* Estate of March, 426 Pa. 364, 231 A.2d 168 (1967).
36. *Id.* at 373, 231 A.2d at 173.
37. *Id.*

held that although a valid foreign divorce decree was entitled to full faith and credit insofar as it affected marital status, it was not effective on the issue of alimony.[38] Furthermore, Pennsylvania seems to have obscured the double edge of the full faith and credit clause. Although a home state must recognize those foreign holdings which are predicated on proper jurisdiction, foreign states in turn must refrain from adjudicating rights over which jurisdiction has been retained by the home state.[39] Even before *Estin*, the Ninth Circuit had held in *Bassett v. Bassett*[40] that a federal district court sitting in Nevada must give full faith and credit to all existing New York judgments for maintenance under a separate New York support decree, although the husband had obtained a Nevada divorce from the wife.[41] The Ninth Circuit Court of Appeals reasoned that the New York court had obtained jurisdiction over both parties in the maintenance action and had, by New York law, retained jurisdiction over the support question.[42]

The result of the Pennsylvania courts' application of the full faith and credit clause was to obscure the due process considerations inherent in an *ex parte* adjudication of the right to support of a non-appearing party. Since the landmark case of *Pennoyer v. Neff*,[43] it has been clear that where a suit is brought to determine a party's personal rights, *i.e.*, where the litigation is concerned solely with a right in personam, substituted service by publication or in any other authorized form is ineffectual for any purpose.[44] However, where the action is in the nature of a proceeding in rem, substituted service on non-residents is sufficient.[45] Accordingly, any proceeding to determine the private personal rights of a party cannot be in accord with the due process of law unless the party is brought within the jurisdiction by service within the state or by his voluntary appearance.

The correct manner of applying the in rem—in personam analysis to divorce proceedings was at one time much debated.[46] However, in recent times, divorce has been viewed as neither a strictly in rem nor a strictly in personam proceeding.[47] As stated in *Williams I*,

38. 334 U.S. 541, 549 (1948).
39. *Id.*
40. 141 F.2d 954 (9th Cir.), *cert. denied*, 323 U.S. 718 (1944).
41. *Id.* at 956.
42. *Id.* at 955.
43. 95 U.S. 714 (1877).
44. *Id.* at 727.
45. *Id.*
46. 3 FREEDMAN, *supra* note 2, at 782.
47. *Id.*

> The . . . view that a proceeding for a divorce was . . . in rem . . . was rejected by the Haddock case. . . . Such a suit, however, is not a mere in personam action. Domicil of the plaintiff, immaterial to jurisdiction in a personal action, is . . . essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect. . . .[48]

Thus, divorce may best be analyzed as a quasi in rem action. There have been occasions on which the Pennsylvania courts have distinguished between the in rem character of the divorce decree and the in personam nature of the alimony decree.[49] Similarly, it has been noted in Pennsylvania that since the alimony decree is in personam and rests upon a completely different foundation from that of the divorce order, the awarding of alimony is "a separate order . . . severable from the decree of divorce."[50] Nevertheless, the Pennsylvania courts have failed to investigate fully the significance of the due process guarantee for the support rights of a spouse. Until *Stambaugh* the Pennsylvania position seemed to be that no rights survive a divorce *av.m.*, and if none survive there is nothing to protect constitutionally.[51] Even in *Stambaugh*, where Pennsylvania appears to be coming into line with other states on the question of survival of support rights, there is no recognition of possible due process underpinnings of the decision.

The neglect of the due process question by *Stambaugh* and prior Pennsylvania cases dealing with foreign divorce stands in contrast to the emphasis placed upon this question by certain other jurisdictions in their handling of the foreign divorce—support decree question. For example, the Supreme Court of California has held that "the due process clause forbids the divorce court to adjudicate the absent wife's right to support"[52] so that a foreign

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48. 317 U.S. 287, 297 (1942).

49. *See, e.g.*, Grimm v. Grimm, 42 C. 685, 689, 24 Dist. 90, 93 (Pa. 1914). The holding in *Grimm* was that a decree of divorce with permanent alimony made in another state against one who at the time was a resident of Pennsylvania is a nullity beyond the limits of the other state and there can be no action on the resident of Pennsylvania to recover from him arrearages in alimony, even though his remarriage estopped him from denying the validity of the decree of divorce. *Grimm* was, of course, decided in the days before *Williams I*, which compelled Pennsylvania and the other states to accord full faith and credit to foreign divorces. For a more recent Pennsylvania expression of the view that marital status and property rights should be separated, see Moser v. Granquist, 362 Pa. 302, 309, 66 A.2d 267, 270 (1949) (dissenting opinion of Jones, J.).

50. Grimm v. Grimm, 42 C. 685, 689, 24 Dist. 90, 93 (Pa. 1914).

51. *See, e.g.*, Commonwealth v. McVay, 383 Pa. 70, 118 A.2d 144 (1955). If the Federal Constitution art. 4, § 1 requires that the Nevada decree be recognized in this commonwealth, respondent's obligation to support his wife ceased automatically when the divorce was granted; conversely, if the constitutional mandate of full faith and credit does not compel such recognition the support order continued in force and the judgment for the arrears was properly established.

Id. at 72, 118 A.2d at 146.

52. Hudson v. Hudson, 52 Cal. App. 2d 735, 344 P.2d 295, 297 (1959).

ex parte divorce procured by her husband cannot deprive her of whatever rights to support she possessed under the law of her domicile at the time when she was divorced. This view is predicated on the principle that support rights are not necessarily extinguished by the mere termination of the marital status, as contrasted with the traditional Pennsylvania view that the right to support is merely an incident of the marital relationship and hence extinguished when that relationship is dissolved.[53] It is suggested that even without relying upon the due process clause the Pennsylvania courts could have looked to the centuries old precedents upon which their divorce-support policies are based and drawn therefrom the conception that marital status and rights of support are distinct entities. Even in medieval England it was possible that a man and woman could be considered simultaneously married and unmarried, depending upon what tribunal was adjudicating the question and for what purpose it was being adjudicated.[54] It was in the temporal courts of that era that questions of dower and inheritance were decided, and there existed circumstances in which the decisions of the temporal courts regarding right to dower flew in the face of the determination of marital status by the ecclesiastical courts.[55]

Because of Pennsylvania's pre-*Stambaugh* position that a valid foreign *ex parte* divorce terminated support rights, the Pennsyl-

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Hudson would appear to be the leading case propounding the due process argument to this extent. Traynor, J., in the opinion of the court draws upon the in rem-in personam analysis, noting that a foreign forum has the authority to adjudicate the status (in rem) of one served constructively, provided the forum possesses jurisdiction over the other spouse, but that it has no power to adjudicate the property rights (in personam) of the absent spouse who was not personally served in the foreign state and who does not appear in the action. *Id.* at 742-43, 344 P.2d at 299.

53. 3 FREEDMAN, *supra* note 2, at 1332.

54. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 374 (2d ed. 1909).

55. *Id.* From the middle of the twelfth century until the Council of Trent (1545-1563), the church did not view a religious ceremony or the presence of a priest as an absolute prerequisite to the formation of a valid marriage. Although marrying without benefit of clergy necessitated the imposition of penance and the subsequent blessing of the union by an ordained cleric, the ecclesiastical courts nevertheless viewed the couple as "married already when they exchanged a consent . . . or became one flesh after exchanging a consent." *Id.* at 373. The temporal courts, however, stipulated that no woman could claim dower unless she had been endowed at the church door, even though the fact of her marriage could not be gainsaid. The most obvious contrast to the church-door marriage was the death-bed marriage where "the sinner 'makes an honest woman' of his mistress. This may do well enough for the church . . . but it must give no rights in English soil." *Id.* at 375.

vania courts possessed but one method for preserving a maintenance judgment for the spouse, namely finding grounds for declaring the foreign divorce invalid. Prior to *Williams I*[56] the state encountered no difficulty, as it simply refused to honor *ex parte* foreign divorces.[57] Whereas *Williams I* required each state to accord prima facie validity to a foreign decree,[58] *Williams II* held that the presumption was rebuttable,[59] and Pennsylvania became known for its tendency to subject sister state *ex parte* divorces to extreme scrutiny.[60] Accordingly, the Pennsylvania courts did not deem the filling of the minimum residence requirements of the foreign forum to be sufficient to sustain the presumption of validity.[61] Pennsylvania exacted as a further requisite of valid foreign jurisdiction not only the intent of the divorcing party to stay, but also the fact that he did stay, in the purported new domicile after the decree was granted.[62]

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56. 317 U.S. 287 (1942).
57. For the basis of this Pennsylvania position see note 19 *supra*.
58. 317 U.S. 287, 295 (1942).
59. 325 U.S. 226, 229 (1945).
60. *See, e.g.*, Commonwealth v. McVay, 383 Pa. 70, 118 A.2d 144 (1955). In *McVay* the wife obtained an Allegheny County support order in 1946. In January 1949 the husband went to Las Vegas, Nevada, and was granted a divorce by the Nevada courts in April of that year. Service on the wife was made by publication, but she did not enter an appearance. Following the Nevada decree the divorced husband discontinued support payments. In January 1950 he moved to California where he still resided at the time of the 1955 litigation brought by the wife for recovery of the unremitted support payments. The Pennsylvania Supreme Court accorded no weight to the fact that the husband had severed all ties with Pennsylvania. The court noted that his motive in going to Nevada had been to obtain the divorce, and while reciting the fact that motive is not conclusive of the question the court was nevertheless preoccupied with that consideration. (*See* Foster, *Domestic Relations*, 18 U. PITT. L. REV. 382, 392-93 (1957), wherein this undue dwelling upon motive is criticized). The court found that there was sufficient basis for overcoming the prima facie assumption of validity of the foreign action even though the husband had gone to Nevada with the intent of acquiring a domicile there. This they did by reasoning that "the intention required for the acquisition of a domicile is not to acquire the domicile but to make a home in fact." *Id.* at 75, 118 A.2d at 147.
61. *See, e.g.*, Commonwealth v. Esenwein, 348 Pa. 455, 35 A.2d 335, *aff'd*, 325 U.S. 279 (1944). In *Esenwein* the husband went to Nevada at the end of June 1941, lived in a hotel, was divorced September 8, 1941, and left Nevada immediately afterwards to take up residence in Ohio. Although the husband testified that he had gone to Nevada with the intention of becoming a domiciliary of that jurisdiction, the Pennsylvania Supreme Court observed that "[h]is acts spoke louder than his words" and found that he had no intention of making his domicile in Nevada. *Id.* at 458, 35 A.2d at 336.
62. *See, e.g.*, Commonwealth v. Lorusso, 189 Pa. Super. 403, 150 A.2d 370 (1959), in which the Pennsylvania Superior Court did find the requisite domiciliary intent and thus cut off support rights of the spouse. In *Lorusso* a Pennsylvania physician arrived in Nevada on January 24, 1957, and on March 8, 1957, almost immediately after fulfilling the residence requirement, filed for divorce, which was granted April 2, 1957. After that time, however, he continued to live in Nevada, establishing practice and still remaining there at the time the contest of the divorce decree was filed three

It is noteworthy that *Stambaugh* seems to have presented circumstances in which the allegation of the husband's foreign domicile was sufficiently vulnerable that, had the court been so disposed, it could have overcome the prima facie assumption of the jurisdiction of the divorce granting forum. In the court's own words, "The record of this case is replete with indicia that the appellant's domicile might be that of Florida or of Pennsylvania."[63] Furthermore, the lower Pennsylvania court had determined that full faith and credit did not have to be accorded the Florida divorce since the husband was not domiciled in Florida.[64] The Pennsylvania Superior Court noted that it "would not disturb the fact-finder's conclusion as to domicile where there is a hodge podge of conflicting intangibles."[65] Yet, with only a mere rehearsal of the factors favoring each side of the argument the court proceeded to invoke the doctrine of the presumptive validity of a foreign divorce and announced that the appellee had not met her burden of establishing lack of Florida jurisdiction, so that the foreign divorce would be given full faith and credit.[66] This summary handling of the domicile-jurisdiction question contrasts markedly with the extensive discussion accorded the problem in many other Pennsylvania appellate decisions.[67]

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years later. It should be noted that although his duties to support his former wife in accordance with a prior Pennsylvania decree were terminated by the foreign divorce, the physician was not entitled to have remitted the arrearages which had accumulated under the support order prior to the date of the divorce. *Id.* at 415, 150 A.2d at 377.

63. 222 Pa. Super. 360, 362, 294 A.2d 817, 818 (1972). The brief for the appellant husband stresses the fact that he purchased $60,000 worth of Florida property to serve as a residence, affiliated with a church and clubs in Florida, registered his car there, was enrolled on the voting lists of that state, and had his passport issued to a Florida address. Brief for Appellant at 3-4, Stambaugh v. Stambaugh, 222 Pa. Super. 360, 294 A.2d 817 (1972). The brief for the appellee wife emphasizes that the appellant told his business associate that he was going to Florida to develop the necessary indicia of residency to qualify for a Florida divorce, that within a few days after obtaining his Florida divorce decree the appellant returned to Pennsylvania to live in an apartment on which he had recently obtained a one year lease, that he was actually living in Pennsylvania a substantial part of the time during which he was supposed to be a Florida domiciliary, and that he filed his personal income tax return in Philadelphia, rather than in Florida. Brief for Appellee at 20-21, Stambaugh v. Stambaugh, 222 Pa. Super. 360, 294 A.2d 817 (1972).

64. Stambaugh v. Stambaugh, 222 Pa. Super. 360, 363, 294 A.2d 817, 818 (1972).

65. *Id.*

66. *Id.* at 363, 294 A.2d at 819.

67. *See, e.g., In re* Estate of March, 426 Pa. 364, 231 A.2d 168 (1967); Commonwealth v. McVay, 383 Pa. 70, 118 A.2d 144 (1955); Commonwealth v. Esenwein, 348 Pa. 455, 35 A.2d 335 (1944); Commonwealth v. Lorusso, 189 Pa. Super. 403, 150 A.2d 370 (1959).

In addition to *Stambaugh's* uncharacteristic approach to the domicile-jurisdiction issue, its treatment of the doctrine of divisible divorce is also unconventional. At the outset of its analysis of this question, the court properly notes that permanent support is the characteristic feature of divorce *am.e.t.*[68] The court subsequently interjects the issue of whether a valid foreign *ex parte* divorce must terminate rights of support in the same manner as would a divorce *av.m.* granted by a Pennsylvania court. At that juncture, unfortunately, the force of the court's opinion is blunted by its unexplained manner of citing the Divorce Act of 1929.[69] The court quotes from a wording which was eliminated in 1959 rather than from the current amended version which was enacted in the latter year.[70] Following this, the court invokes the *Estin* principle of divisible divorce, making no mention of Pennsylvania's prior emphatic holdings that *Estin* does not apply in that state.[71] The court then distinguishes *Commonwealth v. Lorusso*,[72] in which it was held that an *ex parte* absolute divorce of a sister state terminated rights of support which had accrued in Pennsylvania.[73] The distinction is not made, however, on the basis of factual differences or statutory enactments or Supreme Court holdings subsequent to *Lorusso*, but on the novel ground that in the *Lorusso* appeal neither the opinion of the court nor the briefs of counsel referred to the doctrine of divisible divorce.[74] The court offers no explanation of how the mere citing of *Estin* in the briefs of counsel in *Stambaugh* can be parlayed into an adoption of the *Estin* doctrine of divisible divorce in 1972 when in 1949 the same

68. Stambaugh v. Stambaugh, 222 Pa. Super. 360, 363, 294 A.2d 817, 819 (1972).

69. PA. STAT. ANN. tit. 23, §§ 1-69 (1955).

70. PA. STAT. ANN. tit. 23, § 55 (1972).

71. Commonwealth v. McCormack, 164 Pa. Super. 553, 557, 67 A.2d 603, 605 (1949). It should be noted that even prior to *Stambaugh* Pennsylvania courts had not been entirely adverse to applying the *Estin* rationale when discussing the necessity for personal jurisdiction in adjudicating in personam matters. In 1960 the Pennsylvania Supreme Court allowed its cognizance of *Estin* to slip into open view in *Commonwealth v. Western Union Telegraph Co.*, 400 Pa. 337, 162 A.2d 617 (1960). In that case the Commonwealth successfully brought action against a utility for the escheat of moneys which had been deposited with the defendant and left unclaimed for the statutory period. In reaching its decisions, the court built upon *Estin* but did not cite it directly. Instead, it placed, as it were, a buffer between itself and *Estin* by citing a portion of the opinion in *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), in which the United States Supreme Court had quoted *Estin* for the principle that since choses in action have no special or tangible existence, control over them can "only arise from control or power over the persons whose relationships are the source of the rights and obligations." Commonwealth v. Western Union Telegraph Co., 400 Pa. 337, 343, 162 A.2d 617, 620 (1960), *citing* Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951), *citing* Estin v. Estin, 334 U.S. 541, 548 (1948).

72. 189 Pa. Super. 403, 150 A.2d 370 (1959).

73. *Id.* at 406, 150 A.2d at 372.

74. Stambaugh v. Stambaugh, 222 Pa. Super. 360, 365, 294 A.2d 817, 819 (1972).

Pennsylvania Superior Court explicitly dealt with *Estin* in *Commonwealth v. McCormack*[75] and quite understandably did not allow *Estin* to control its decision by the mere fact of its being mentioned in the *McCormack* opinion.

With the rationale of the *Stambaugh* decision so unclear, the scope which it will be accorded in future Pennsylvania litigation concerning foreign *ex parte* divorces necessarily remains uncertain. Future decisions may seize upon the fact that *Stambaugh* involved the question of the termination of alimony previously granted in the course of a Pennsylvania divorce *am.e.t.* and thus limit the holding to cases involving similar *am.e.t.* support orders rather than extending the *Stambaugh* holding to protect the rights of women whose divorce in *ex parte* foreign proceedings was not preceded by a Pennsylvania bed and board divorce and maintenance decree. If this limited applicability of the *Stambaugh* holding is adopted by the Pennsylvania courts, it would be in line with the policy recently developed by Maryland, which like Pennsylvania had traditionally refused to allow support rights to survive an *ex parte* divorce of a sister state.[76] In *Dackman v. Dackman,*[77] however, the Court of Appeals of Maryland noted its traditional position, but nevertheless invoked its equity powers to award support payments even though a Nevada decree had previously been awarded the husband.[78] Subsequent Maryland decisions have refused to allow *Dackman* to be applied to circumstances beyond those of the "innocent wife" to whom support is awarded out of the sequestered or attached property within the jurisdiction.[79]

Despite the opportunities which *Stambaugh* provides for its close construction, the opinion contains a hint that the court may in the future be willing to expand rather than confine the circumstances under which it will allow a spouse to receive support from her divorced husband following an *ex parte* foreign decree. The muted suggestion appears in the cases which *Stambaugh* cites as being in accord with *Estin.* Among those mentioned is *Vanderbilt v. Vanderbilt*[80] *Vanderbilt* reached the Supreme Court fol-

75. 164 Pa. Super. 553, 557, 67 A.2d 267, 270 (1949).
76. *See, e.g.,* Brewster v. Brewster, 204 Md. 501, 105 A.2d 232 (1954).
77. 252 Md. 331, 250 A.2d 60 (1969).
78. *Id.*at 346, 250 A.2d at 67. The classification of decrees of alimony as within the jurisdiction of equity has been questioned. *See, e.g.,* CLARK, *supra* note 30, at 421, where such classification is regarded as a misreading of English legal history, since alimony was the exclusive province of the English ecclesiastical courts, rather than being within the scope of equity.
79. *See, e.g.,* Reed v. Reed, 11 Md. App. 396, 399, 274 A.2d 652 (1971); Blumenthal v. Blumenthal, 258 Md. 534, 539, 266 A.2d 337 (1970).
80. 334 U.S. 416 (1957).

lowing the husband's procuring of a Nevada divorce and the divorced wife's obtaining a New York support order *subsequent* to the Nevada decree. Although the Court noted that the facts of *Vanderbilt* were distinguishable from *Estin* in that in the former case the wife's right to support had not been reduced to judgment prior to the husband's *ex parte* foreign divorce,[81] it found that the difference was not material under the circumstances *sub judice*.[82] Consequently, the Court held that since the wife was not subject to Nevada jurisdiction, Nevada possessed no power to extinguish any rights to financial support from her husband which the wife enjoyed under the law of New York.[83]

It is suggested that in *Stambaugh* the court has wisely changed its position regarding divisible divorce. The decision should be welcomed despite the imprecision of its analysis and the uncertainty of the scope which it will be accorded in future Pennsylvania decisions. Without the advantage of the doctrine of divisible divorce a Pennsylvania spouse was often provided with no satisfactory recourse if her husband sued for a foreign divorce. If she entered an appearance, all actions that could have been determined in the proceeding would be regarded as res judicata so that there was the possibility that her support rights would be cut off even when the question of maintenance was not raised. If, on the other hand, she did not enter an appearance, her home state would refuse to allow her to assert that she possessed any support rights to be protected by the principles of due process. The only possibility remaining would be for her to establish domicile in some other state more receptive to her predicament, but such a move could very likely entail counterbalancing difficulties. To solve this problem *Stambaugh* has offered the Pennsylvania spouse greater protection from financial embarrassment and has also eliminated a vestige of interstate turmoil which has been viewed as unnecessary by the great majority of American jurisdictions.

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81. *Id.* at 418.
82. *Id.*
83. *Id.*