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The Present Validity Of Alabama "Consent" Divorces - Gherardi De Parata v. Gherardi De Parata

John Harris Gurley

The Present Validity Of Alabama "Consent" Divorces

Gherardi DeParata v. Gherardi De Parata[1]

Defendant husband flew to Birmingham, Alabama and during a period of several hours signed a complaint for divorce and an affidavit which recited he was "a bona fide resident of the State of Alabama and had been such for the period required by law."[2] Defendant tendered to the Alabama lawyer representing him a paper entitled, "An Acceptance of Service of process and Answer and Waiver of Respondent" signed by the plaintiff's wife and also a letter signed by her, addressed to another Alabama lawyer, authorizing him to file the "waiver" in her behalf. The purpose of these written documents was for wife to waive the right to contest the issue of her husband's domicile in Alabama. On the basis of these pleadings an Alabama divorce decree was mailed to husband and he then notified his wife that they were divorced. Plaintiff wife brought this action in the form of a bill to affirm the marriage and to nullify the allegedly fraudulent divorce obtained by husband in Alabama.[3] The lower court found that wife knew of and consented to the proposed divorce proceedings. It then held that while the proceedings in Alabama appeared on their face to be irregular, her consent and the fact that she appeared by counsel and interposed no objection to the lack of jurisdiction or took no appeal from the decree in Alabama, rendered the court without power to give her relief under the full faith and credit clause of the Federal Constitution. The Municipal Court of Appeals for the District of Columbia in reversing the lower court reasoned: "Here there was not such actual appearance and participation by the wife as to justify recognition of the decree which followed. The rule announced in Sherrer and Coe does not require it and we hold for lack of jurisdiction over the res, or over either of the parties, the Alabama decree is subject to challenge in this jurisdiction."[4]

In theory, as far as federal law is concerned, the divorce decree of an American state is entitled to full faith and credit only if the divorcing state had jurisdiction over the marriage res by virtue of being the domicile of at least one

[1] 179 A. 2d 723 (D.C. 1962).

[2] *Id.*, 724; Code of Ala., Tit. 34, § 29 (as amended) provides: "When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved; provided however, the provisions of this section shall be be of force and effect when the court has jurisdiction of both parties to the cause of action."

[3] See D.C. Code (1961) § 16-422. Which authorizes such a suit.

[4] 179 A. 2d 723, 725 (D.C. 1962).

of the parties.[5] Domicile is then the basis for jurisdiction in divorce law. Consequently a marriage can only come under the jurisdiction of a particular state court by reason of one of the parties being domiciled within the geographical jurisdiction of that court.[6] The two parties to a marriage cannot, by coming voluntarily before a court, thus confer this necessary jurisdiction over their marriage res.[7]

Williams v. North Carolina II[8] was decided in 1945 and in the approximately 18 years since then,[9] the law of interstate divorce has been debated, examined, appealed, and generally confused.[10] The essential holding of the case, that when a divorce decree of a foreign state is collaterally attacked the examining state has a free hand to determine whether or not the acting party in an ex parte proceeding was domiciled in the state granting the divorce so as to give that court jurisdiction over the marriage res, remains as the starting point of any discussion in this area of the law.[11] The Supreme Court has qualified and examined the area several times since then,[12] but the most important qualification and the one with which these Alabama decrees are most closely connected is contained in *Sherrer v. Sherrer*[13] and its companion case of *Coe v. Coe*.[14] These two cases as a unit rendered immune from such collateral attacks those divorce decrees where "there has been participation by the defendant in the divorce proceedings, and where the defendant has been accorded full opportunity to

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[5] GOODRICH, CONFLICT OF LAWS, (3d ed. 1949) 395.

[6] Maryland is in accord with these principles. See Gregg v. Gregg, 220 Md. 578, 155 A. 2d 500 (1959); Brewster v. Brewster, 204 Md. 501, 105 A. 2d 232 (1954); Epstein v. Epstein, 193 Md. 164, 66 A. 2d 381 (1949); and materials cited therein.

[7] Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236, 237, 3 A.L.R. 2d 662 (1948). There the Court said, "Jurisdiction, which is the judicial power to grant a divorce, is founded on domicile under our system of law. * * * it is recognized that unless one of the parties has a resident or domicile within the state, the parties cannot even by consent confer Jurisdiction on the courts of that state to grant a divorce." For a critical discussion of domicile see 30 St. Johns L.R. 270 (1950).

[8] 325 U.S. 226 (1945).

[9] For an excellent discussion of Interstate Divorce up to and including the first Williams case, see Strahorn and Reiblich, *The Haddock Case Overruled — The Future of Interstate Divorce*, 7 Md. L. Rev. 29 (1942).

[10] See generally, Baer, *The Law of Divorce Fifteen Years after Williams v. North Carolina*, 36 N.C. L. Rev. 265 (1958), and materials cited therein.

[11] Maryland has followed the case, *Gregg v. Gregg*, 220 Md. 578, 155 A. 2d 500 (1959).

[12] See generally, Armstrong v. Armstrong, 350 U.S. 568 (1956); Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951); Rice v. Rice, 336 U.S. 674 (1949); Kreiger v. Kreiger, 334 U.S. 555 (1948); Estin v. Estin, 334 U.S. 541 (1948); Esenwein v. Commonwealth, 325 U.S. 279 (1945).

[13] 334 U.S. 343 (1948), noted 11 Md. L. Rev. 143 (1950).

[14] 334 U.S. 378 (1948), noted 11 Md. L. Rev. 143 (1950).

contest the jurisdictional issues. . . ."[15] Dean Griswold in his article[16] on divorce jurisdiction has interpreted the cases to hold that:

> "[W]here the absent spouse participates in the divorce proceedings by appearance (which may be through an attorney), by filing an answer, or by otherwise taking part, the divorce which is granted is binding and effective, and must be recognized in other states. This is not a determination that the court *had* jurisdiction to grant the divorce; it depends rather upon a rule that the participating spouse is precluded by res judicata. . . ."[17]

Generally the concept of res judicata is now the accepted interpretation of the *Sherrer* and *Coe* cases.[18] The problem is one of determining how far the principle is applicable and under what circumstances. The key to this determination seems to lie in the meaning of the word "participation" as used by the Supreme Court. Clearly if there is *no* participation or appearance by the defendant in the foreign divorce proceeding the doctrine of res judicata is not applicable.[19] Most state courts speak of a sufficient amount of participation and look for such things as personal appearance by the defendant,[20] signing a power of attorney whereby defendant was represented by a counsel of his own choosing,[21] or personal service within the divorcing court's geographical jurisdiction even without a later personal appearance.[22] The underlying notion in all of these decisions,[23] as to what constitutes a requisite amount of participation seems to be that if the participation by the party defendant puts him in a procedural position to contest the jurisdictional fact, then in a collateral attack he is precluded by the res judicata principle of the *Sherrer*

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[15] *Supra*, n. 13, 351.

[16] Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees — A Comparative Study*, 65 Harv. L. Rev. 193 (1951).

[17] *Id.*, 216.

[18] See, Note, *Res Judicata and Interstate Divorce*, 11 Md. L. Rev. 143 (1950); Note, *Development in the Law — Res Judicata*, 65 Harv. L. Rev. 818 (1952).

[19] This was the circumstance in Williams v. North Carolina II, 325 U.S. 226 (1945). There the party defendant to the divorce proceeding in Nevada did not even know of the divorce proceeding and had only been brought before the Nevada court by means of a substituted service process.

[20] Nappe v. Nappe, 20 N.J. 337, 120 A. 2d 31 (1956).

[21] Schlemm v. Schlemm, 31 N.J. 557, 158 A. 2d 508 (1960).

[22] Johnson v. Muelberger, 340 U.S. 581 (1951).

[23] See 28 A.L.R. 2d 1303 (1953), for a comprehensive annotation of the whole area and idea of "participation."

case from raising the issue again.[24] The general consensus of these decisions is that in most of the Alabama "consent" decrees, at least in theory, there is the requisite amount of participation merely in the uncoerced granting of a power of attorney. Presuming therefore that most of these Alabama "consent" decrees would pass an "amount of participation" test and that in the instant *Parata* case there was such a requisite amount of participation by the wife,[25] why did the court rule the way it did? The *Parata* court seemed to be moving towards a distinction, which, while not impinging the res judicata rule of *Sherrer* and *Coe,* does add a qualification or additional test. The language of the *Sherrer* case itself gave the first clue when the Court suggested the type or kind of participation necessary — "where the defendant has been accorded full opportunity to contest the jurisdictional issues. . . ."[26] This seems to mean that there must be the requisite amount of participation and it must be of the right type or kind. Simply stated, the *Parata* Court seems to be adding a "type or kind of participation" test to what we have already seen might be called an "amount of participation" test. The real groundwork for this reasoning appears first in *Staedler v. Staedler,*[27] which was decided close on the heels of the *Sherrer* case. There the New Jersey Supreme Court limited the application of the *Sherrer* case to "a true adversary proceeding where the parties are represented by counsel of their independent choice and where there is opportunity to make a voluntary decision on the question as to whether or not the case should be fully litigated either on the question of jurisdiction or the merits. . . ."[28] In general this is not the kind or type of participation present in the Alabama "consent" decree. The effect of the signing of a power of attorney in the *Parata* case was merely for a lawyer to present to the court the wife's waiver of the right to contest the jurisdictional issue — it certainly was not what would be called the appointing of a lawyer to represent a client in a true adversary proceeding. In the *Parata* case the sole purpose of the wife's participation

[24] See Bozeman, *The Supreme Court and Migratory Divorce: A Re-examination of an Old Problem,* 37 A.B.A.J. 107 (1951) and Paulsen, *Divorce Jurisdiction by Consent of the Parties — Developments Since Sherrer v. Sherrer,* 26 Ind. L.J. 380 (1951).

[25] The presumption may be premature in the Parata case because of due process requirements, as mentioned on p. 726 of the decision, but the court does not seem to rest its decision on this point, so it seems fair to take the presumption that her acts were sufficient, at least in amount, to result in "participation."

[26] 334 U.S. 343, 351 (1948).

[27] 6 N.J. 380, 78 A. 2d 896, 28 A.L.R. 2d 1291 (1951).

[28] *Id.,* 902.

was for her to waive domicile requirements for her husband so, in effect, a fraud could be perpetrated on the Alabama court. If then the purpose and effect of the requisite amount of participation is only to put the defendant before the court with the clear intention of thus avoiding the domicile requirements and not for the purpose of contesting or having the opportunity to contest the issue of jurisdiction, then the *Parata* court seems to be saying that the res judicata principle of the *Sherrer* case should not be applicable to preclude collateral attack even though there well may have been the requisite amount of participation. The *Parata* case and the recent cases[29] affirmatively citing it seem to be taking this narrower approach to the *Sherrer* rule, first enunciated in the *Staedler* case, and using it to impeach the extraterritorial validity of these Alabama "consent" decrees.[30]

There is a further factor which creates widespread speculation concerning the validity of these Alabama "consent" decrees. Chief Justice Vinson's majority opinion in the *Sherrer* case contains the following statement; the doctrine is limited to cases "where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."[31] *Hartigan v. Hartigan*[32] has rendered such Alabama "consent" decrees susceptible to a collateral attack *in Alabama,* though the extent of the decision is still somewhat in doubt.[33] The basic holding of the *Hartigan* case is that a divorce decree could be vacated on the court's own motion after discovery of fraudulently alleged domicile. No matter how construed, the case casts ominous doubts on the validity of these consent decrees when tested either in Alabama or elsewhere.[34]

The combination of a narrow application of the *Sherrer* rule of res judicata by adding a "type and kind of participation" test as an instrument to prevent fraud on courts by parties who have not met domicile requirements, and

[29] Pelle v. Pelle, 229 Md. 160, 165, 182 A. 2d 37 (1962) and Guerieri v. Guerieri, 75 N. J. Super. 541, 183 A. 2d 499, 502 (1962).

[30] Maryland has affirmatively cited the Staedler case and those other state courts adopting a narrower application of the Sherrer and Coe res judicata principle: Colby v. Colby, 217 Md. 35, 42, 141 A. 2d 506 (1958); cert. den., Appleby v. Colby, 358 U.S. 838 (1958).

[31] 334 U.S. 343, 351 (1948).

[32] 272 Ala. 67, 128 So. 2d 725 (1961).

[33] Reese, *Alabama Divorces,* Prac. Law, March, 1961, pp. 78, 83; Ross and Crawford, *Gresham's Law of Domestic Relations: The Alabama Quickie,* 27 Brooklyn L. Rev. 224 (1961).

[34] Hartigan v. Hartigan, 272 Ala. 67, 128 So. 2d 725, 733 (1961). There the Court said: "Not only is it conclusive that the 1954 divorce decree was void for want of jurisdiction of the subject matter in Alabama, but it is not entitled to full faith and credit in other jurisdictions."

the factor of possible attack in Alabama itself when a court there is presented with evidence of fraud as to alleged domicile, leaves considerable legal doubt as to the validity of these Alabama consent decrees if later attacked by a dissatisfied party. There remains however, the equitable consideration of the problem.

The effect of judgments in sister states rendering these Alabama consent decrees void could, often times, be extremely harsh. If parties have remarried in reliance on these consent decrees and have had children, such sister state decrees voiding a consent divorce decree renders innocent parties guilty of bigamy and their children illegitimate. There is also the possibility that parties, not in good faith, may be given the opportunity to have a second day in court and to have these Alabama decrees overturned simply because it is now obvious that greater pecuniary benefits can be obtained. However, these equitable considerations are inconclusive in argument against the *Parata* case and cases following its narrow approach. This is so because a court faced with such equitable considerations can use the familiar equity notions of unclean hands[35] or laches to work an equitable estoppel on the party collaterally attacking the divorce.[36] In a proper case these equitable principles can be used to balance the legal result obtained under the narrow approach of the *Parata* case so that decisions are not extremely harsh on parties who have relied on consent decrees in good faith.

In conclusion, it is desirable that the courts follow the lead of the *Parata* case in restrictively applying the *Sherrer* rule as to res judicata. This combination of a narrowed application of *Sherrer* and liberal use of equitable estoppel will, in an appropriate case, harmonize the two conflicting underlying policy considerations in this area of the law; namely, that full faith and credit[37] be given to sister state decrees, but that such decrees not be used to conflict with or overturn the fundamental social and public policy of an individual state.[38]

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[35] See for application in this area, McClanahan v. McClanahan, 79 Ohio App. 231, 72 N.E. 2d 798 (1946).

[36] See generally for an excellent discussion of this area: Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L.J. 45 (1960).

[37] Johnson v. Muelberger, 340 U.S. 581, 584 (1951). There the court said: "The full faith and credit given is not to be niggardly but generous, full."

[38] Williams v. North Carolina II, 325 U.S. 226, 230 (1945). There the court said: "[T]hose not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy. . . ." Also see, Slansky v. State, 192 Md. 94, 63 A. 2d 599 (1949).