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CHAPTER 6

Domestic Relations

NEIL L. CHAYET

A. COURT DECISIONS

§6.1. Foreign divorce: Domicile and jurisdiction. One of the most significant domestic relations cases decided by the Supreme Judicial Court during the 1970 SURVEY year was that of *Ragucci v. Ragucci*.[1] This case illustrates once again that the foreign divorce is fraught with danger, since it is subject to invalidation by the Supreme Judicial Court if the facts do not conclusively demonstrate the acquisition of domicile in the foreign jurisdiction.

Giovanni Ragucci married Paola Iuliano Ragucci in Pietrastornina, Italy, on June 14, 1953. Six days later, Giovanni returned alone to Massachusetts while Paola remained in Italy, where she bore a son of the marriage on March 28, 1954. Neither Paola nor the son ever came to Massachusetts. On May 19, 1954, Giovanni filed for divorce in Middlesex County, describing himself as a resident of Everett. This libel was dismissed on his own motion on January 10, 1955. On June 22, 1957, Giovanni filed a complaint for divorce in the Second Judicial Court of the State of Nevada, describing himself as a citizen of Nevada for more than six weeks preceding the filing of the complaint. Service was made by publication and by mailing the summons and a copy of the complaint to Iuliano Ragucci (not Paola Iuliano Ragucci, as the Court pointed out) in Pietrostonina [*sic*], Italy, without a street address. The wife did not appear personally and was defaulted. On July 30, 1957, a divorce was granted to the husband. Giovanni left Nevada on the same day and returned to Massachusetts, where, on December 28, 1957, he married another woman, listing his address as Everett.

Paola filed petition for separate support in the Probate Court, Middlesex County, on June 14, 1954, and on September 12, 1966. Both petitions were dismissed by the probate judge on February 4, 1969. The judge found that the husband had acted in good faith in using the name Iuliano Ragucci, and that the mailing of the notice was reasonably likely to reach her in Italy. The probate judge further

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§6.1. [1]1970 Mass. Adv. Sh. 487, 258 N.E.2d 28.

stated that he was unable to find that the Nevada court did not have jurisdiction to enter the divorce decree, and that therefore the Nevada decree was entitled to full faith and credit.

The Supreme Judicial Court, citing *Barnard v. Barnard*,[2] stated that the validity of a Nevada divorce depends upon whether the husband has acquired a domicile in Nevada. While the Court grudgingly conceded that the Nevada decree did have a presumption of validity,[3] it concluded that the presumption was "clearly rebutted" in the instant case. The Court, reviewing questions of fact as well as law, noted that, according to the husband's own testimony, the reason he had gone to Nevada was that "he had consulted a lawyer in Boston who sent him to a lawyer in Reno because it was quicker to get a divorce there; that it was a question of time."[4] The Court also noted that "[e]xcept for the trip to Italy he had lived in Massachusetts from 1949 to April, 1957, when he went to Nevada for a quick result."[5] After emphasizing that Giovanni returned to Massachusetts on the same day that he had obtained the Nevada divorce, the Court closed with the cryptic statement: "We find that the respondent did not acquire a domicil in Nevada, which lacked jurisdiction to grant him a divorce for that reason."[6] The Court therefore reversed the decrees dismissing Paola's petitions for separate support.

Foreign divorces have never been well received by the Supreme Judicial Court, which, in *Coe v. Coe*[7] and *Sherrer v. Sherrer*,[8] set aside Nevada and Florida divorces, respectively, even though both parties had appeared personally in the foreign forum. These cases were later reversed by the United States Supreme Court,[9] primarily on the basis that a party is estopped to deny the validity of a divorce in which that party participated by way of personal appearance. However, the foreign divorce is often sought by a single party for reasons of time and/or convenience. When this situation obtains, the Supreme Judicial Court will closely scrutinize not only the intent of the party as to domicile but the consistency of the facts which surround that intention. There are few cases indeed in which the Court has approved of the domicile in the single-party foreign divorce situation. One such case is *Heard v. Heard*,[10] where the lower court had found that the wife did

2 331 Mass. 455, 120 N.E.2d 187 (1954).

3 The Supreme Judicial Court assumed that the probate judge had given the Nevada decree a presumption of validity, citing Rubenstein v. Rubenstein, 324 Mass. 340, 341, 86 N.E.2d 654 (1949); Williams v. North Carolina, 325 U.S. 226, 233-234 (1945); and Esenwein v. Commonwealth ex rel. Esenwein, 325 U.S. 279, 280-281 (1945).

4 1970 Mass. Adv. Sh. 487, 489, 258 N.E.2d 28, 29.

5 Id. at 489, 258 N.E.2d at 29-30.

6 Id. at 489, 258 N.E.2d at 30.

7 320 Mass. 295, 69 N.E.2d 793 (1946).

8 320 Mass. 351, 69 N.E.2d 801 (1946).

9 334 U.S. 343, 378 (1947).

10 323 Mass. 357, 82 N.E.2d 219 (1948).

not in good faith acquire domicile in Nevada. The Supreme Judicial Court reversed this finding, primarily on the basis that the wife had bought a home in Reno, this being an essential element of her burden of proving that she did not intend to remain in Massachusetts. A review of the cases in the area of foreign divorce demonstrates that such a divorce in all probability will stand if both parties have appeared in the foreign forum, despite the fact that the establishment of domicile is as questionable on the facts as it is in situations where only one party has obtained the divorce. The *Ragucci* case makes it quite clear that if one party has not appeared, the question of domicile becomes crucial. The Court, as noted above, has the power to review all questions of fact and law; and if upon review the inference may be drawn that the facts do not support the stated intention of the party who has obtained the divorce, the Court will not hesitate to overturn the findings of fact of the probate judge.

§6.2. Separation agreements: Collusion: Mergers: Subsequent modification. During the 1970 SURVEY year, the Supreme Judicial Court decided several cases dealing with questions that are potential causes for concern in virtually every separation agreement. In *Smith v. Smith,*[1] the husband sought to have a separation agreement declared void, arguing that it was the result of collusion and therefore contrary to public policy. He alleged that the following statement was by its nature a product of collusion: "the wife shall forthwith proceed with a libel for divorce on the grounds of cruel and abusive treatment and the husband will not contest said libel." It was argued that the foregoing constituted a collusive compact to compel the probate court to act upon only a partial disclosure of the real facts. By withholding a defense which might prevent a divorce, the parties had perpetrated a fraud on the court, since they had been allowed "virtually to dissolve a marital relationship by agreement."

The Supreme Judicial Court chose not to confront the issue of collusion. Rather it noted that the probate judge had denied a petition for modification filed by the husband, not on the basis of the agreement, but because the awarded alimony and support was "equitable, reasonable and proper." The Court thereby reaffirmed a principle that is essential to a determination of the reliability of the terms in separation agreements: "It is settled that a separation agreement does not deprive the Probate Court of its power to modify its decree relating to alimony for the wife or support for the children."[2] Hence the probate court retains the power to modify its decree despite the fact that the agreement containing the provisions in question had been incorporated into the decree and had thus become part of the decree. The Court pointed out that, in order to modify provisions for alimony and support incorporated into the divorce decree, it was not necessary

§6.2. [1] 1971 Mass. Adv. Sh. 7, 265 N.E.2d 858.
[2] Id. at 9, 265 N.E.2d at 859.

to set aside or or revise the agreement. It is for the probate judge to decide whether the provisions in the original decree should continue or be altered.[3] Thus, not only did the Court fail to deal with the question of collusion, it also cast a great deal of doubt upon the reliability and meaningfulness of separation agreements in general.

A related question which continually arises in connection with separation agreements is the impact of requesting that the agreement be merged or not merged with the decree. The case of *Hills v. Shearer*[4] involved a decree in which payments for support and maintenance, as contained in the agreement, were adopted as the payments of alimony and support and maintenance of the child. The agreement was modified by the parties several times; and on May 19, 1965, on the husband's petition, the probate court entered a decree further reducing the husband's payments. The wife brought a bill for a declaratory judgment in Superior Court, claiming that the agreement was a valid and binding contract, the enforceability of which is independent of decrees enforced by the probate court. The Superior Court judge so ordered, and the husband appealed. The Supreme Judicial Court affirmed the Superior Court's ruling holding that an examination of the entire agreement showed that "the parties did not intend it to be superseded by the decree."[5]

This decision points up the importance of specifying that an agreement should expressly provide that it is intended to survive the decree, if this is in fact the intent of the parties. In the *Smith* case, the Supreme Judicial Court emphasized that a probate court is the final arbiter of disputes regarding provisions of a divorce decree in cases where the parties' separation agreement has been incorporated therein. The probate court is thus empowered to "set aside or revise the agreement."[6] In the *Hills* case, however, the Court held that a separation agreement, "adopted" by the probate court in its order, could not be subsequently amended by the probate court because the agreement was a "contract" between the parties and existed independently of the divorce decree. Hence, in *Smith,* the probate court could determine the reasonableness of the terms of a separation agreement after its "incorporation by reference" into the decree, and could modify these terms if they were found to be unreasonable. Yet, according to *Hills,* the probate court did not have the power to reduce the husband's payments because it could not amend the contract between the parties. The only distinguishing factor regarding the separation agreements in the two cases was the wording by which the probate court merged the agreement with its decree. The decree in *Hills,* as quoted by the Court, stated:

3 Ibid.

4 355 Mass. 405, 245 N.E.2d 253 (1969).

5 Id. at 408, 245 N.E.2d at 256, citing Freeman v. Sieve, 323 Mass. 652, 84 N.E.2d 16 (1949).

6 1971 Mass. Adv. Sh. 7, 9, 265 N.E.2d 858, 859.

> . . . that the provisions of said agreement as to payments for the support and maintenance of said libellant and said child are *adopted* as the payments . . . which the libellee is hereby ordered to make.[7] [Emphasis added.]

The Supreme Judicial Court held that this language was not sufficient to supersede the contractual terms of the agreement. In *Smith,* the separation agreement was " 'incorporated' in the divorce decree and 'made part . . . [thereof] by reference.' "[8] The Court then held that the probate court could consider the provisions contained in the agreement and determine their reasonableness if a modification were sought. However, in its opinion, the Court directs attention to the fact that the "decree *adopted* the support provisions of the agreement since it incorporated the agreement by reference."[9] (Emphasis added.) The "adoption" then appears to be the key to the agreement's becoming part of the decree, thus enabling the probate judge to subsequently amend its terms. The Court may well consider the phrase "incorporated by reference" to extinguish the contract as it is merged into the decree and, at the same time, consider "adoption" as merely granting a formal recognition of an extant contract, which remains in effect as binding on the parties.

It is submitted that the Court's reference to and reliance upon "adoption" in these two cases is misleading. The Court should clarify in precise terms when it will recognize a separation agreement as remaining in force, despite its becoming part of the decree, and when it will consider it as superseded by the decree. The distinction is crucial in regard to the ability to subsequently alter the terms of the decree. Since intent is the controlling element in this type of case,[10] the parties and the probate court should be aware of what language will be necessary to effectuate that intent. Attorneys should be extremely careful to define in explicit terms whether or not the agreement is to survive the decree. If one's client is not satisfied with the terms of the separation agreement, the agreement must not be allowed to survive the decree, for any attempt at later modification will be futile. Conversely, if the party is content with the terms of the agreement, care should be taken so as to preclude future challenges to its provisions by having it survive on its own terms after the divorce decree is issued.

§6.3. Divorce: Petition to proceed in forma pauperis. The case of *Coonce v. Coonce*[1] raised an issue of first impression for the Supreme Judicial Court. The libellant argued that she should be permitted to "proceed in Forma Pauperis to file her divorce petition without the

7 355 Mass. 405, 406, 245 N.E.2d 253, 255 (1969).
8 1971 Mass. Adv. Sh. at 7, 265 N.E.2d at 858.
9 Id. at 9, 265 N.E.2d at 859.
10 Hills v. Shearer, 355 Mass. 405, 408, 245 N.E.2d 253, 256 (1969).

§6.3. 1 1970 Mass. Adv. Sh. 155, 255 N.E.2d 330.

payment of a fifteen dollar filing fee." The motion was accompanied by an affidavit claiming that she was the mother of five children ranging in age from one to eight years; was receiving aid for families with dependent children (AFDC) in the amount of $158.15 every two weeks; and was unable to pay the $15 filing fee without depriving her children of necessities. The probate judge denied the motion and the Supreme Judicial Court affirmed. The Court noted that the petitioner, receiving $79 per week, was not destitute, and determined that the fact that a person was qualified for AFDC and free legal services did not control disposition of the issue, which was basically one of fact. The Court deemed itself precluded from a consideration of the large amount of social "non-judicial evidence" since this evidence, although contained in the brief, had not been presented at trial.

It is significant, however, that the Court proceeded to state that the probate court does have the power to grant a waiver of fees in appropriate cases, even though there is no specific statutory authority. The Court relied upon G.L., c. 208, §33, which provides that "[t]he court may, if the course of proceeding is not specially prescribed, hear and determine all matters coming within the purview of this chapter according to the course of proceedings in ecclesiastical courts or in courts of equity."[2] The Court then felt it necessary to consider the course of judicial proceedings in the period from the Magna Carta in 1212 to the independence of the United States in 1776. Stating that detailed records of proceedings in these centuries were not available or readily accessible, the Court added that "[t]here is, however, sufficient reliable information to enable us to conclude with reasonable certainty that in forma pauperis proceedings were then recognized, allowed and used in the course of proceedings in ecclesiastical courts and in courts of equity."[3]

Thus, while Mrs. Coonce was not found to be sufficiently impoverished to have her own fee waived, she can at least rest assured that others less fortunate than she will be able to proceed in forma pauperis.

§6.4. Stubborn child statute: Definition of child. A serious blow was dealt the "stubborn child" statute[1] in the case of *Joyner v. Commonwealth*.[2] The complaint filed in the district court charged that "Camille E. Joyner, a minor, during the three months next before the making of this complaint, was a stubborn child and stubbornly refused to submit to the lawful and reasonable commands of said complainant, said Sarah Bell, whose commands said minor was bound to obey."[3] Camille appealed from her conviction which resulted in a

2 Id. at 158, 255 N.E.2d at 332.
3 Id. at 159, 255 N.E.2d at 333.

§6.4. 1 G.L., c. 272, §53.
2 1970 Mass. Adv. Sh. 1169, 260 N.E.2d 664.
3 Id. at 1169, 260 N.E.2d at 664-665, quoting from the complaint issued in the district court.

suspended sentence of ten days in the House of Correction. She claimed that she was not a "child" within the meaning of the statute; that the statute was "unconstitutionally vague, indefinite and uncertain"; and that the imposed sentence constituted cruel and unusual punishment. The Court agreed that Camille, eighteen years of age, was indeed not within the purview of the statute, noting that it would be anomalous if an eighteen-year-old girl could be legally married without her parents' consent,[4] yet be subject to punishment for refusing to obey her parents' command not to see her intended husband. The Court chose not to deal with the remaining grounds of appeal.

B. Legislation

§6.5. Power of court to bar spouse from marital home during pendency of proceedings. The legislature was also active in the field of family law during the 1970 Survey year. A persistent problem was purportedly solved by the passage of Chapter 472 of the Acts of 1970.[1] The new section provides that any court having jurisdiction of libels for divorce, annullments, or separate support petitions may, during the pendency of such libel or petition, order the husband or wife to vacate the marital home for a period not to exceed 60 days if the court finds that the "health, safety or welfare of the petitioner or libellant or the minor children of the parties would be endangered or substantially impaired by a failure to enter such an order." Three days' notice of the hearing must be given to the respondent husband or wife.

Prior to this statute, all that a judge could do to force a husband to depart the marital home in a situation where the wife or children were endangered, but had no funds to move out themselves, was to give an extraordinarily high temporary support order which he would reduce if the husband decided to leave the marital home. While this was highly effective in many cases, a considerable number of judges would not resort to this procedure. Section 34B provides a much more appropriate means of obtaining the desired result. The statute could be subject to challenge on constitutional grounds if the marital home were owned solely by the party forced to vacate and, conceivably, even in the case of jointly owned property. However, it is submitted that the question of danger to the spouse and/or minor children, the requirement of a hearing, and the fact that the time period during which the party can be barred is limited to 60 days probably would be controlling and would preserve the statute.

§6.6. Separate maintenance proceeding: Effect of decree directing conveyance. The legislature also added Section 32D to Chapter 209

4 G.L., c. 207, §7.

§6.5. 1 Amending G.L., c. 208, by adding §34B.

of the General Laws.[1] This section provides that, in a petition for separate support, a decree directing that a deed, conveyance, or release of real estate be made (1) creates an equitable right to its enforcement, and (2) if not complied with within three months, vests title in the petitioner. This is consistent with Section 32C, which has accomplished the same result in libels for divorce.

§6.7. Residence requirement: Filing divorce libel for cause occurring elsewhere. The legislature relaxed the residence requirement for a person who wishes to be divorced in Massachusetts but has never lived in Massachusetts with his or her spouse, and whose grounds for divorce have arisen elsewhere. Section 5 of G.L., c. 208, reduces the residence requirement for persons so situated from five years to two years.[1]

§6.8. Adoption: Consideration of religion. Sections 5A and 5B of G.L., c. 210, were amended to remove the emphasis upon religion as a factor in adoption.[1] Section 5A had required that, in the case of adoption of children under the age of 14, the Department of Public Welfare was to determine the suitability of the petitioners and their home, "due regard being given the race and religion of the child and of the petitioner." This portion of the statute was removed by the amendment. Section 5B, which has been the source of great hardship, provided that the judge "when practicable must give custody only to persons of the same religious faith as that of the child." The amending act decreases the emphasis upon religion by stating that the judge must consider "all factors relevant to the physical, mental and moral health of the child" and consider religion only if the natural parent or parents requested a religious designation for the child. Even if such a request is made, the judge may disregard it if compliance would not be in the best interests of the child.

These amendments have been long-awaited and the legislature has taken appropriate action to retain religion as an important consideration, particularly if the natural parents deem it to be so. However, it is no longer the paramount issue that it once was.

§6.9. Legislation affecting the parent–child relationship. Various relationships between parents and children also received attention by the legislature. Section 6 of G.L., c. 117, was amended[1] to eliminate the liability of a parent to contribute to the support of a child 21 or over who is poor or indigent, while Section 8 of Chapter 118[2] imposed such liability if the child is 21 or over and is totally and permanently disabled, and if the parents are sufficiently able to make such a contribution.

§6.6. [1] This section was added by Acts of 1970, c. 450.

§6.7. [1] This section was amended by Acts of 1969, c. 162.

§6.8. [1] These sections were amended by Acts of 1970, c. 404, §§2-3.

§6.9. [1] Acts of 1970, c. 343, §1.
[2] Acts of 1970, c. 343, §2.

Chapter 119 was amended by adding Section 29A,[3] which provides that the parents of an unemancipated minor are liable for "reasonable legal fees and expenses of an attorney . . . incurred by such minor in connection with criminal proceedings . . . not exceeding, however, three hundred dollars." The section does not apply to a parent not in custody of such minor.

Section 39B was added to chapter 119,[4] and allows a presiding judge of a district court to give permission to a hospital by telephone, or any means of communication, to keep a child in the hospital if there is reason to believe that release of the child to the requesting parent would "be detrimental to the child's health or safety." The child may be kept in the hospital "until a hearing may be held relative to the care and custody of such child." Chapter 112 was amended by the addition of two sections numbered 12E. The first Section 12E[5] provides that "[a] minor twelve years of age or older who is found to be drug dependent . . . may give his consent to the furnishing of hospital and medical care related to the diagnosis or treatment of such drug dependency." The consent of the parent or legal guardian is not required; neither the parent nor legal guardian is responsible for payment for any such care. The section does not apply to methadone maintenance therapy. The second Section 12E[6] provides that a physician shall not be held liable for damages for failure to obtain consent of a parent, guardian or spouse of a patient to emergency examination and treatment if a delay in treatment would "endanger the life, limb, or mental well-being of the patient." The section also relieves hospitals of liability. Except for possibly the addition of the concept of mental well-being, the statute is merely a codification of the common law in the area of emergency care.[7] It will, however, serve a useful purpose if only to allay the concern of physicians and hospitals about the legal implications of rendering emergency care to minors.

[3] Acts of 1970, c. 386.
[4] Acts of 1970, c. 407.
[5] Acts of 1970, c. 816.
[6] Acts of 1970, c. 847.
[7] See Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912); 76 A.L.R. 566 (1931); 139 A.L.R. 1374 (1941). See also Chayet, Legal Implications of Emergency Care (1970).