Maryland Law Review

Volume 10 | Issue 3 Article 3

And Now That You Have Your Divorce, Where Do You Stand? - Estin v. Estin Kreiger v. Kreiger

Casenotes

AND NOW THAT YOU HAVE YOUR DIVORCE, WHERE DO YOU STAND?

Estin v. Estin[1]
Kreiger v. Kreiger[2]

These companion cases came before the United States Supreme Court on *certiorari* to the Court of Appeals of New York, and as they are both decided on the same basis, it will be understood that a reference to the *Estin* case will refer equally to both cases.

After five years of marriage, husband left wife in 1942, and upon her action for separation a year later, husband having entered a general appearance, the court found she had been abandoned and granted a separation decree plus an award of $180 per month permanent alimony. Husband never appealed the decision, and paid the monthly alimony. In 1944 he went to Nevada, where he sued for divorce, constructive service being had on the wife, who never appeared in the action. In May, 1945, Nevada granted husband an absolute divorce, the decree being silent as to the New York alimony provision, though the Nevada court was apprised of this provision. Husband then refused to pay any more alimony, contending that the Nevada decree, being entitled to full faith and credit in New York, abrogated the support decree. Wife sued in New York for arrears, and husband appeared to contest it. The Supreme Court of New York denied his motion to eliminate the alimony decree and granted wife a judgment.[3] This judgment was affirmed by both the Appellate Division[4] and the Court of Appeals.[5] The United States Supreme Court affirmed.

The decision can be placed in the alternative on either of two grounds, and a consideration of each will be undertaken before any general discussion of the problems raised by the case.

The Court here was face to face with the cases of *Williams v. North Carolina*[6] (Case No. 1)[6a] and *Williams v. North Carolina*[7] (Case No. 2)[7a] as regards the full faith and

[1] 334 U. S. 541 (1948).
[2] 334 U. S. 555 (1948).
[3] Estin v. Estin, 63 N. Y. S. (2d) 476 (1946).
[4] Estin v. Estin, 271 App. Div. 829, 66 N. Y. S. (2d) 421.
[5] 296 N. Y. 308, 73 N. E. (2d) 113 (1947).
[6] 317 U. S. 287, 143 A. L. R. 1273 (1942).
[6a] Italics supplied.
[7] 325 U. S. 226, 157 A. L. R. (1945).
[7a] Italics supplied.

credit to be given an *ex parte* divorce based on domicile. New York had found that husband "is now and since January, 1944, has been a *bona fide* resident of the state of Nevada."[8] The husband's argument was that as New York was obliged to recognize the Nevada divorce under full faith and credit, it must naturally follow that no vestigial remnants of the legal incidences of the marriage remained, and thus the antecedent support order was nullified by the subsequent Nevada divorce decree.[9] The Court countered this by stating that New York in the instant case expressly refused to follow such rule by holding that a support order *can* survive divorce, and the point for consideration is whether or not New York has refused to give full faith and credit to the Nevada decree. It is at this point that the "divisible" aspect of a divorce decree becomes important. It is admitted that there was a valid divorce in Nevada effecting a change in the marital capacity of both parties to the decree, but not all of the marriage obligations were severed. There remains despite the divorce the New York support decree. Mr. Justice Douglas, fully realizing the criticism which might be leveled at such a stand, justifies his position by saying:

> ". . . An absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind. But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests."[10]

He then goes on to discuss the conflicting interest of Nevada and New York in the present case. Nevada, the state of domicile, has an interest in the case in that here decrees must be recognized as binding so as not to prevent the husband from freely remarrying. Its interest in the legitimacy of children of such remarriage is obvious. Such factors justify the state of domicile in changing the marital status of the parties by *ex parte* divorce proceedings. However, New York, too, had a legitimate interest at stake, namely that the wife should not be left penniless to become a public charge, and New York had already taken steps

[8] *Supra*, n. 3, 482.

[9] Petitioner argued that New York common and statutory law followed that of Pennsylvania holding that a support order will not survive a divorce. See Eisenwein v. Commonwealth, 325 U. S. 279, 157 A. L. R. 1396 (1945).

[10] *Supra*, n. 1, 545.

to prevent this possibility when it had handed down its separation order and alimony decree. By balancing the requirement of full faith and credit on the one hand against the legitimate interest of New York in its domiciliaries on the other, the Court reached the conclusion that New York had given all the faith and credit it was required to give to the Nevada divorce when it recognized the dissolution of the *vinculum* of the marriage, and felt that New York did not have to hold its own prior support award vitiated through the medium of the Nevada decree. New York's legitimate interest in the status of the wife thus justified the partial nullification of the constitutional mandate of full faith and credit.

The Court was not unaware of the possibilities of a valid dichotomization of the problem presented, for after having discussed this one ground for decision, it proceeded to lay down yet a second basis founded on the property concept of the support decree. The New York judgment created in the wife an intangible property interest, jurisdiction over which could arise only from personal jurisdiction over her as owner. The cases are legion holding invalid any determination of the personal rights of the creditor in the intangible unless the debtor appears or has been personally served.[11] The Court regarded the argument that the Nevada decree ends the New York support order as an attempt by Nevada to exercise personal jurisdiction over the wife by restraining her from asserting any claim under the New York order. To allow any court to exercise such power without personal service is to fly directly in the face of the long line of cases, beginning with *Pennoyer v. Neff*[12] holding void any personal judgment rendered without personal service or appearance of defendant. Nevada then, not having secured personal service over the wife, is unable to avoid her intangible property rights in the New York judgment by any decree it might pass, and yet the divorce decree proper will be given effect insofar as it affects the marital status of the parties. As the Court puts it, "the result . . . is to make the divorce divisible",[13] and the primary interest of both Nevada and New York are in such manner fully protected. Each state is restricted to those matters with which it is most urgently concerned, and the accommodation between conflicting interests is thus resolved.

[11] Pennoyer v. Neff, 95 U. S. 714 (1877); New York Life Insurance Company v. Dunlevy, 241 U. S. 518 (1916).

[12] *Supra*, n. 11.

[13] *Supra*, 1, 545.

Several problems suggest themselves in this case, nor are all of them as yet resolved. In the conflict of laws field we find raised the question of the probable decision of a third state, not having a set policy in such matters, when faced with a similar set of facts. Nevada has determined that its divorce decrees will override prior support decrees in Nevada,[14] while New York has decided that a New York support order can survive a later Nevada divorce,[15] but is silent as to the effect of a subsequent New York divorce on the same support order. There is no constitutional requirement that F-3 follow the law of F-1 to the exclusion of F-2 or *vice versa*. F-3 would be free to exercise its independent judgment in the matter. A glance at the contacts of F-3 with the problem might be indicative of the line of reasoning it would apply. The suit would be by wife for judgment of accrued alimony, and a prerequisite to such action would be personal service or appearance of the husband. It would seem that the result could be predicted in such case if either husband or wife were a domiciliary of F-3. If the wife were the one there domiciled, F-3 would have the same legitimate interest that New York had in preventing her becoming a public charge, and hence the result would probably be to refuse to give full faith and credit to the decree of divorce so far as it attempted to abrogate the support order. Were the husband the domiciliary a contrary result would seem logically to follow, as there the interest of F-3 would be that its domiciliary should be protected if possible from the admittedly onerous burden of supporting two families when he has been freed by F-1 of the *vinculum* of the first marriage. Such protection could be afforded by adopting the Nevada view that the divorce ended the support order. Yet such position would be doubtless met by the argument of due process, and with great likelihood of success. If the support order is a property interest, the owner thereof may not be deprived of it by a judgment of a court without personal jurisdiction over him. To allow such deprivation is to disregard the due process clause, and for F-3 so to act is similarly such a disregard. The remaining situations where neither husband or wife is domiciled in F-3 or where both are so domiciled will be answered in a like manner for the same factors apply equally there as where husband alone is a domiciliary. It would seem then that the better

---

[14] Herrick v. Herrick, 55 Nev. 59, 68; 25 P. (2d) 378, 380 (1933).

[15] *Supra*, n. 5, Kreiger v. Kreiger, 297 N. Y. 530, 74 N. E. (2d) 468 (1947).

reasoned approach would favor the wife's position in such suit.

Another problem posed by the case is that of the effect of F-2's issuing a support order after F-1 has granted the husband an *ex parte* divorce. The answer here depends on the forum's view as to alimony. It has been variously answered in several states. Some hold that an action for alimony will lie apart from divorce proceedings[16] reaching their result by arguing that the wife may not be deprived of her property (alimony) by a decree of a court not having personal jurisdiction over her. Other states take a contrary view and say that an *ex parte* divorce so completely ends the marriage contract that no later action, dependent on the existence of such contract, may be brought.[17] Maryland has never had to rule on this exact set of facts, but in *Staub v. Staub*[18] it was faced with a situation wherein the wife had left Maryland and gone to Arkansas, and having presumably established domicile there, secured an absolute divorce on grounds of cruelty. Service on husband was by publication, and he never appeared. Later wife returned to Maryland and sued husband for alimony alleging impotency as grounds for such relief. Husband's demurrer was sustained without leave to amend and this was affirmed on appeal. Wife argued that as she could not get personal service on husband in Arkansas, she could not litigate the question of alimony there and that her right now to litigate the matter remained unimpaired by the Arkansas divorce. The court had its choice of grounds upon which to rest a decision, there being open alternative bases. It could have argued that wife, by going to Arkansas and securing the divorce, knowing full well that the Arkansas court could not pass an alimony decree in the absence of personal service on husband, had in effect had the question of alimony decided against her so that the matter would now be *res adjudicata*. However, the court chose the other available position in refusing to grant alimony to the wife, and because of the basis on which it rested its opinion the *Staub* case is apposite here. The only time the problem of "divisible divorce" arises is when a state makes it its policy to provide alimony for ex-wives, and if the state in question has neither the procedural mechanism for, nor the policy of, providing alimony for ex-wives then in that

[16] Davis v. Davis, 70 Colo. 37, 197 P. 241 (1921); Searles v. Searles, 140 Minn. 382, 168 N. W. 133 (1918).

[17] Calhoun v. Calhoun, 70 Cal. App. (2d) 233, 160 P. (2d) 923 (1945); Patterson v. Patterson, 187 P. (2d) 113 (Cal. App. 1947); McCoy v. McCoy, 191 Iowa 973, 183 N. W. 377 (1921).

[18] 170 Md. 202, 183 A. 605 (1936).

state there can exist no "divisible" aspect of divorce. The *Staub* case sets out, in some detail, Maryland's position as to alimony, noting that, "in this state alimony has not been defined by statute; hence its definition must be sought from the adjudicated cases and texts".[19] Alimony in Maryland has always been allowed as an incident of the marriage, and the right to alimony is dependent on the status of the parties.[20] Having made up its mind as to the necessity of the existing relationship of husband and wife as condition precedent to any suit for alimony the court in summation declares:

> ". . . we are unable to conclude that the right to maintain a proceeding for alimony may survive the dissolution of the marriage relation, since alimony is founded upon the common law obligation of a husband to support his wife, which, in the absence of some saving statute, must necessarily end by the passage of a decree effectively dissolving the marriage tie . . ."[21]

Maryland then clearly follows those other states which hold that a divorce for *one* purpose is a divorce for *all* purposes, thereby precluding any possibility of a "divisible divorce" here.

Here it should be noted that it is only the policy of the state as to whether or not alimony survives divorce which gives rise to the type of problem presented in the *Estin* case. New York's policy as laid down by her highest court,[22] is that a support order can and does survive divorce, and even the dissent by Judge Frankfurter recognizes the validity of such policy, his query being whether or not New York had such a policy.[23]

To that end, having once determined the Maryland view on alimony it would appear at first blush that there could

[19] 170 Md. 202, 207.

[20] Accord Tabeling v. Tabeling, 157 Md. 429, 437; 146 A. 389, 392 (1929): ". . . and as alimony *pendente lite* and counsel fees are allowable only to a wife, because of the relationship of husband and wife, one who is not a wife is not entitled to such allowances."

[21] 170 Md. 202, 212.

[22] *Supra*, n. 5.

[23] *Supra*, n. 1, 552; his argument, among others, being that New York has not made it clear whether it holds that *no ex parte* divorce decree will terminate a prior New York separate maintenance award, or whether it merely decides that no *ex parte* divorce decree of *another state* will terminate a prior New York separate maintenance award. He would send the case back for clarification. "New York," he says, "may legitimately decline to allow any *ex parte* divorce to dissolve its prior separate maintenance decree, but it may not, consistently with Williams v. North Carolina, 317 U. S. 287, discriminate against a Nevada decree granted to one there domiciled, and afford it less effect than it gives to a decree of its own with similar jurisdictional foundation. I cannot be sure which it has done."

be no question of "divisible divorce" as long as the *Staub* case remains unquestioned. Nonetheless, it should be observed that in none of the cases repudiating the "divisible divorce" doctrine was there an appeal to the Supreme Court of the United States on the ground of denial of due process. Such a case would have to be spelled out by arguing that upon marriage certain legal incidences arose from the contract itself, and one of them is a property right in the wife to support by the husband. Ergo this right, being an intangible, cannot be dissolved by judgment of a court without personal jurisdiction over the possessor thereof, and any decree purporting so to dissolve this right is of no effect. It should be interesting indeed to see how much argument could be met by a husband sued in a state which refused to give recognition to "divisible divorce".

Despite the as yet unsolved problems in this field we can see that there are certain definite rules which will serve to guide future conduct in the matter of divorce strategy. They may be perhaps the more clearly set forth by a rationale of the instant case itself. From it we find that F-1 may decree an *ex parte* divorce which is entitled to full faith and credit in all states, and which completely dissolves the marriage *vinculum;* yet this very divorce will not dissolve a prior support decree of F-2 if F-2 has a policy of "divisible divorce", unless the wife is before the court in F-1. To state the rule of the case is to state the advice to be given those seeking divorce and freedom from prior support decrees, the advice being to secure personal service on the wife in F-1 where the divorce is being sought. Without this the husband is not absolutely sure that he will be freed of the support order.

This decision may be regarded as another point on Holmes's shadowy but pragmatic "line which has to be worked out between cases differing only in degree". We are only too well aware that this field of the law is one of the most strife-torn of all, and yet before too violently criticizing it for an absence of a touchstone, or lack of consistency, it would be well to call to mind some further words of this same great jurist. "The truth is," he says, "that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."[24]

[24] Missouri, Kansas & Texas Ry. Co. v. May, 194 U. S. 267 (1904).