Divisible Divorce in Maryland - Does It Exist? - Dackman v. Dackman

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Divisible Divorce In Maryland — Does It Exist?

Since the Supreme Court's decision in Williams v. North Carolina\(^2\) requiring that full faith and credit be accorded a foreign \textit{ex parte} divorce based on the domicile of one spouse, courts have been faced with the question of the effect of valid \textit{ex parte} divorce decrees on the support rights of the resident wife. Applying what has been termed the "unitary theory of divorce," Maryland courts have consistently held that a wife's right to support does not survive a valid dissolution of the marriage.\(^3\) Dackman v. Dackman\(^4\) indicated that in limited circumstances a Maryland court could award support payments to an ex-wife notwithstanding the existence of a valid foreign divorce decree. The court of appeals' pronouncement in Dackman represents at least an exception to the long standing Maryland rule and requires an analysis of the prior law to determine the decision's full impact.

The parties were married in 1951 and lived together in Maryland until November 1967 when defendant husband moved to Nevada. In December 1967 plaintiff wife filed a bill in Maryland asking for permanent alimony, custody and child support, alleging defendant's adultery and desertion as grounds. In January 1968 defendant filed suit for divorce in Nevada and shortly thereafter was granted a divorce decree which did not allow alimony but did provide child support.\(^5\) Defendant had been personally served in Nevada prior to his institution of the Nevada proceedings and filed a motion to dismiss for lack of jurisdiction. In March 1968 the Circuit Court No. 2 of Baltimore City overruled defendant's motion to dismiss, and from this ruling he appealed.\(^6\)

The court of appeals held that the denial of a challenge to the jurisdiction is a non-appealable order, and remanded without affirmance or reversal for further proceedings, indicating that it would affirm: "[A] suitable decree granting the wife support payable only from the property of her husband in Maryland if the wife cannot or does not choose to impeach the Nevada decree and the trial judge finds it factually appropriate to grant such a decree."

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1. 252 Md. 331, 250 A.2d 60 (1969).
2. 317 U.S. 287 (1942). "[W]hen a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter." \textit{Id.} at 303.
5. Mrs. Dackman was personally served in Maryland regarding the Nevada divorce proceedings. She elected not to appear or plead in that action. Record Extract to Appellant's Brief No. 48 at E. 24, Dackman v. Dackman, 252 Md. 331, 250 A.2d 60 (1969).
6. The defendant contended that he was not domiciled in Maryland, that the Maryland "long arm" statute does not give in personam jurisdiction in alimony cases and that the service of process in Nevada was defective. Brief for Appellant at 3, 10, Dackman v. Dackman, 252 Md. 331, 250 A.2d 60 (1969).
7. 252 Md. at 347, 250 A.2d at 68-69. This action by the court was taken under Maryland Rule 871. It should be noted that the parties on this appeal were not con-
The trial court held that the husband was domiciled in Maryland at the time he was served with process in Nevada, thus giving the court in personam jurisdiction under the Maryland "long-arm" statute. The court of appeals disagreed with this finding since the wife had not impeached the finding of fact of the Nevada court that the husband was domiciled in Nevada at the time he received service of process. The court of appeals found jurisdiction to exist, however, in "[t]he inherent right and power of a court of equity to require the sequestration or attachment of property of a nonresident husband within its jurisdiction as a source of support and maintenance to a legally and factually deserving wife. . . ."

Writing for a unanimous court, Chief Judge Hall Hammond pointed out that the traditional rule in Maryland was that once a party obtained a valid ex parte out-of-state divorce, the marital relationship no longer existed and a Maryland court lacked jurisdiction to entertain a former wife's suit for alimony, since such liability could only arise from, or be incident to, an existing marital relationship. Dackman chose to relax this rule under the specific facts involved and allowed Mrs. Dackman's claim even though it admitted that she could not sue for divorce herself unless the Nevada decree was found defective.

There are generally three different approaches to the problem presented in the Dackman litigation. The Supreme Court held in Estin v. Estin that although the full faith and credit clause of the tending that an alimony action could or could not survive the Nevada decree. Once the court ruled that there was jurisdiction over the husband, the issue on appeal was decided and the rest of the opinion was in fact unsolicited by the parties.

9. 252 Md. at 346, 250 A.2d at 68. See Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917). In addition to her bill for alimony, plaintiff wife also filed a petition for an ex parte injunction to prevent defendant from removing property from the state. The trial court issued the injunction, holding that Md. Ann. Code art. 16, § 4 (1966) authorized the seizure of property belonging to a nonresident defendant pursuant to a bill of complaint for permanent alimony. As the court of appeals noted, this section of the code was not technically applicable, since by its terms it applies in an action for divorce, not alimony without divorce. However, the court noted that "[w]here the court cannot obtain jurisdiction in personam over the husband it may award support, if the wife proves misconduct or behavior which would justify granting her a divorce, payable from property of the husband within the court's jurisdiction." 252 Md. at 345, 250 A.2d at 68. The court went on to say that this power of an equity court to sequester property of a nonresident husband within its jurisdiction is analogous to the statutory right granted in divorce cases by art. 16, § 4. Id. at 346, 250 A.2d at 68.

10. In Williams v. North Carolina, 317 U.S. 287 (1942), the Supreme Court held that the state of North Carolina must give full faith and credit to ex parte Nevada divorces in spite of the fact that the other spouse was not domiciled in Nevada, was not personally served there and the divorce was granted for a ground not recognized as a cause for divorce in North Carolina. See note 2 supra. See also Estin v. Estin, 334 U.S. 541 (1948) and Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), which indicate that all states must recognize an out-of-state ex parte divorce as far as the dissolution of the marital relationship, assuming the foreign court had bona fide jurisdiction over the complaining spouse.

11. The court pointed out that to prove the Nevada divorce decree defective the wife would have to show that the husband did not have actual domicile in Nevada.

12. Courts have in most cases allowed alimony rights to survive an ex parte divorce. In most jurisdictions this is accomplished by statute. See note 16 infra. The majority of remaining jurisdictions permit it by common law. See note 17 infra. A minority of states have denied such survival. See note 18 infra.

Constitution requires that a decree of absolute divorce from one state be honored in any other, a local support order could survive a subsequent valid \textit{ex parte} divorce if the state's law permitted such an action, thus recognizing the divisible divorce. A number of states have enacted appropriate statutes to comply with \textit{Estin} while, absent statutory provisions, a majority have allowed support rights to survive. Maryland was one of the minority of states which had heretofore not permitted such survival.

The portent of \textit{Dackman} can only be ascertained when read in the light of its predecessors. \textit{Staub v. Staub} was the first Maryland case dealing with the problem. The parties were married in Baltimore and resided there for about five months until they separated. The wife subsequently established residence in Arkansas and obtained in a court of that state an absolute divorce on the grounds of cruelty. Since the husband did not appear in that action, the Arkansas court was without authority to award alimony. In the following year the wife filed suit in Maryland seeking permanent alimony and alimony pendente lite. The lower court sustained a demurrer to the complaint and the court of appeals affirmed, pointing out that although other jurisdictions had decided that such an action could be maintained,

[it was] 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. . .

The court also said that since the plaintiff had severed that relationship voluntarily in another state, there was no reason to allow her to prevail in such an action in Maryland since, if her allegations were true, she could have sued defendant in Maryland and had the alimony question adjudicated.

\textit{Johnson v. Johnson} was one of the leading cases in Maryland prior to \textit{Dackman}. In 1948 the wife obtained an \textit{a mensa} divorce in Maryland on the grounds of cruelty. The decree included an award

20. Id. at 212, 183 A. at 610.
21. Id.
of alimony and child support. In January 1950 the husband obtained an *a vinculo* divorce in Florida. The wife participated in that litigation and appealed the decision to the Florida Supreme Court which affirmed without opinion. The wife did not seek alimony in the Florida litigation but the Florida court decree provided that "nothing in this decree shall be held or construed to relieve the plaintiff in any manner from the support and maintenance provision" of the Maryland decree. In May 1951 the wife filed an amended petition in Maryland to increase the alimony award to provide funds to appeal the Florida decision. The lower court granted the petition and the husband appealed. The court of appeals reversed, holding that in spite of the provision in the Florida decree, under Maryland law the court had no power to act once the *a vinculo* divorce was granted. The opinion cited *Staub* and held that a Maryland court had no authority to make, change or enforce a provision for alimony payments by a husband to his former wife unless that power was expressly or impliedly reserved by the court in its *a vinculo* decree. The court also commented that if Maryland law was to be changed to allow alimony rights to survive the marital status, the change would have to come from the legislature. In *Staub* and *Johnson* the factual situation was decidedly different from that presented in *Dackman*. In *Staub* the complaining wife was attempting to obtain alimony when she was the one who had instituted the proceedings and obtained the foreign divorce, and it could be argued she should not prevail on the basis of an estoppel argument. In *Johnson* the complaining wife had answered the challenge of the foreign divorce proceeding and was a party to the action which resulted in the final decree. The reasoning of the court in not allowing a further alimony action where the wife has personally litigated the matter would appear logical. However, instead of announcing a rule along such lines, the Maryland court issued the broad statement that alimony cannot survive the marital relationship.

*Brewster v. Brewster* presents another complicated set of facts. In April 1950 the husband filed suit for divorce on the ground of

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23. To insure payment of the alimony and child support decree, some shares of stock belonging to the husband were paid to the court in January 1951.
25. 202 Md. at 550, 97 A.2d at 331. It should be noted that the questions of res judicata and full faith and credit which were issues in the Florida litigation were not presented to the Maryland court. The further questions concerning contractual relations between the husband and wife, although mentioned by the court, are beyond the scope of this note.
27. Id. at 338, 86 A.2d at 524. The court is saying that if it had granted the *a vinculo* decree, then it would have retained jurisdiction. Their point was that a Florida court cannot award jurisdiction to a Maryland court over a matter which is denied jurisdiction by Maryland law.
28. Id. The husband subsequently filed a bill to have his court held stock released to the extent that it represented alimony payments, claiming that he was no longer liable under the Maryland *a mensa* decree in light of the Florida decree. The lower court dismissed the bill, but the court of appeals reversed and ordered the stock released, on the ground that the alimony provision of the Maryland *a mensa* decree did not survive the dissolution of the marriage in Florida. 202 Md. at 552, 97 A.2d at 332.
voluntary separation, and the wife filed a cross bill for an *a mensa* divorce on the ground of desertion. The proceedings were suspended while counsel for both parties attempted to work out a property settlement. In February 1951 wife's counsel submitted a settlement proposal and husband's counsel requested that the cause be held in abeyance since his client was out of town on business. The business trip happened to include a stay in Arkansas where, without the Maryland counsel's knowledge, the husband filed for a divorce in May 1951. The wife was served in Maryland by mail; she then informed the Maryland court of these facts and it enjoined the husband from proceeding in Arkansas and from transferring any assets owned or controlled by him. On the same day the court granted the wife an *a mensa* divorce, awarding $400 a month as alimony. This payment was made without question until August 1953 although in July 1951 husband was granted an absolute divorce in Arkansas which did not award any alimony. In June 1953 the husband filed a bill in Maryland requesting a reduction in alimony. No action was taken until the following fall when the wife petitioned for back alimony and sought contempt proceedings against the husband. The lower court entered judgment against the husband for $1600 notwithstanding the Arkansas divorce and held him in contempt for failure to comply with its 1951 injunction. The court of appeals reversed, indicating that until the Arkansas divorce was judicially impeached, it was entitled to full faith and credit and ended the right of a Maryland court to decree alimony. The court cited *Staub* and *Johnson* as authority for the proposition that Maryland is among those jurisdictions which hold that the power to award or enforce alimony does not survive the marital relationship. The case was remanded for proceedings to adjudicate the validity of the foreign divorce decree.

Maryland has followed its decision in *Brewster* with *Upham v. Upham.* The husband moved to an apartment in Pennsylvania for employment purposes while the wife remained in Maryland. Eight months thereafter the wife filed suit for alimony without divorce, but failed to prosecute the action. A year and a day after moving to Pennsylvania the husband filed suit for an absolute divorce. The wife was served but did not answer or appear, and the Pennsylvania court granted the husband a divorce. Shortly thereafter the wife filed a petition in Pennsylvania to open the decree but the court dismissed. She then petitioned a Maryland court for further payment of alimony pendente lite and for counsel fees. The lower court found that the husband was a bona fide resident of Pennsylvania, the divorce was valid and that the husband had only to pay counsel fees for services rendered up until the date of the divorce decree. The court of appeals reversed, indicating that until the Arkansas divorce was judicially impeached, it was entitled to full faith and credit and ended the right of a Maryland court to decree alimony. The court cited *Staub* and *Johnson* as authority for the proposition that Maryland is among those jurisdictions which hold that the power to award or enforce alimony does not survive the marital relationship. The case was remanded for proceedings to adjudicate the validity of the foreign divorce decree.

30. The wife urged that she had continually challenged the Arkansas divorce and that the mere challenge was enough to stay its operations in Maryland. The court held that the wife had the burden of proving that the Arkansas court had no jurisdiction, i.e., that her husband had not acquired a valid domicile in Arkansas and until such burden was sustained the divorce was presumed valid and entitled to full faith and credit in Maryland. *Id.* at 505, 105 A.2d at 234.


affirmed, and, citing Brewster, reiterated: "The rule in Maryland is that after the dissolution of the marital relationship, whether by the decree of this or another state, the courts of this State are precluded from awarding alimony."33

A foreign *ex parte* divorce can only be attacked on the ground that the rendering court did not have jurisdiction — that the spouse acquiring the divorce did not acquire a bona fide domicile in the rendering state and that the other spouse had no opportunity to litigate the jurisdictional issue.34 Thus, under the unitary theory of divorce in Maryland, if such an attack is unsuccessful, all rights of a Maryland court to grant or enforce an award of alimony are terminated as of the date of the divorce.35 *Dackman* modifies this general rule in Maryland when certain facts are present, and, to this extent, recognizes the theory of divisible divorce first announced in *Estin v. Estin.*36

The court in *Dackman* carefully restricted its relaxation of the existing rule in Maryland and indicated that it was appropriate to exercise jurisdiction:

... in a case in which the marital domicile was in Maryland for many years, the deserted wife continues to reside here, the adultery which is the fault which justifies support and maintenance — assuming it is proven that it occurred — took place in Maryland, there is ample property in Maryland to furnish the support, and the foreign divorce was granted without the wife being personally before the court. ... [W]e at this time limit our decision and holding to the particular facts of the case before us. ... 37

It is difficult to ascertain precisely to what extent the rule in *Johnson* has been relaxed,38 since the wife in *Johnson* vigorously participated in the out-of-state litigation. In *Staub* the wife was the party who obtained the foreign divorce by establishing residency in Arkansas, and the holding in *Dackman* could hardly apply to that situation. Judge Hammond joined in the court's decisions in *Brewster* and *Upham* which were more analogous to *Dackman,* although in both those cases there was no indication that the value of the husband's property remaining in Maryland was significant nor was there the strong marital offense of adultery. Perhaps had those elements been present, the Maryland rule would have been "relaxed" sooner. However, it seems equally possible that *Brewster* and *Upham* are still good law and would be followed in the future.39

33. 238 Md. at 265, 208 A.2d at 613.
37. 252 Md. at 346-47, 250 A.2d at 68.
38. In the course of the *Dackman* opinion Judge Hammond announced that since the legislature had not responded to the request for legislative action in his concurring opinion in *Johnson,* the rule set forth in *Johnson* should be relaxed. 252 Md. at 344-45, 250 A.2d at 67.
39. If the exact facts of *Dackman* must be present to relax the rule, then it would seem to follow that *Brewster* and *Upham* still represent Maryland law.
The first strong statement of dissatisfaction with the Maryland rule was expressed by Judge Hammond in a concurring opinion in Johnson. In that opinion it is pointed out that the Florida divorce decree expressly provided that it did not relieve the husband of the obligation of the Maryland support decree, and thus, even though the wife did appear in the action, the decree rendered did not intend to deny her the right to alimony. The opinion implies that had the Florida court denied alimony and the wife had been present—then Maryland would be precluded, by the rule of res judicata, from taking any further action. The opinion cogently presents the inherent weakness of the unitary theory of divorce:

Under the reasoning and holding of Staub v. Staub . . . if Mrs. Johnson had ignored the Florida divorce proceedings and the divorce had been granted ex parte, Maryland would have no jurisdiction to give or continue alimony. In these days of Nevada, Florida, Arkansas, and other prolific divorce States, this puts a separated wife in a real predicament . . . having the alternative of submitting to the jurisdiction of a foreign Court, where as an out-of-state defendant, she is under a disadvantage in seeking alimony, or of ignoring the foreign divorce proceeding and losing the alimony granted by her home Court entirely. Under the mores and practices of the times, it is hardly fair for Maryland to put its lady citizens in this predicament because of a narrow, artificial and unrealistic concept and judicial interpretation of alimony.

While stating that the unitary theory of divorce should be changed, based as it is on a definition of alimony which to say the least, is restricted, Judge Hammond suggested that the required change in the law should more appropriately be made by the legislature.

40. 202 Md. at 557, 97 A.2d at 277.

41. Id. at 558, 97 A.2d at 278. Judge Hammond’s quarrel with the term alimony is that the word was first used when the English Ecclesiastical Courts were granting a mensa divorces. These divorces were not considered as severing the marital relationship and the alimony provision arose from the common law duty to support a wife even though they were living apart. When the a vinculo divorce was created by statute in Maryland it provided for alimony patterned after the English version; thus, once an a vinculo divorce had been granted without alimony, the common law obligation was destroyed (there no longer being a marital relationship) and alimony could not be granted after such decree. Judge Hammond reasoned that the support award in an absolute divorce decree cannot be defined as alimony in the traditional sense since it provides for payments to be made after the marital relation is severed. He also points out that if a court does not award alimony but merely reserves jurisdiction to modify its support provision, it can at any time provide for payments in the future and this would certainly be inconsistent with the traditional concept of alimony. See also Lindey, Foreign Divorce: Where Do We Go From Here?, 17 U. Pitt. L. Rev. 125, 144 (1956), for another statement of the problem posed by Judge Hammond.

42. [A] Court would have the power to require support of a former wife at any time that the interests of justice and the parties required it, regardless of whether the divorce decree had provided for alimony or had retained jurisdiction, it would add flexibility where both parties are Maryland residents, or where, as in the instant case, the wife and the property of the husband are in Maryland. The result which could have been achieved and which I would have urged in the present case, if the proposed change had been the law, would be far more fair and just than the result which had to come under the present state of the law.

202 Md. at 561–62, 97 A.2d at 279.
The change in the law was not forthcoming, however, and the court of appeals continued to adhere to the general rule in \textit{Brewster} and \textit{Upham}.\textsuperscript{43} The \textit{Dackman} situation, however, was sufficiently shocking to jolt the court into a reassessment of the rule and to justify the limited modification which resulted. The husband, an attorney, was obviously well aware of the Maryland law which would allow him to escape the burden of alimony. He was wealthy enough to be able to go to Nevada and start a new life with no need ever to return to Maryland. Also, he would probably not be financially burdened by even a generous alimony award, and yet Mrs. Dackman under Maryland law had no remedy. Additionally, the husband had committed what is considered the most grievous marital offense which would have entitled the wife to an absolute divorce in Maryland had she wanted one. The situation was just too much for a court steeped in traditions of morality, religion, and the sanctity of marriage.

The court, in order to effect the desired change in Maryland law, focused on the term alimony in its traditional sense\textsuperscript{44} and redefined it in terms of support.\textsuperscript{45} To accomplish this change the court turned to its 1963 decision in \textit{Clayton v. Clayton}.\textsuperscript{46} There the wife filed for a divorce on the ground that at the time of their marriage the husband was already legally married to someone else. An absolute divorce may be awarded for a cause which by the laws of Maryland render a marriage null and void \textit{ab initio}.\textsuperscript{47} Alimony was also awarded, and the husband appealed, contending that if the marriage was void, then a marital relationship had never existed and since alimony can only arise incident to such a relationship, a court cannot award alimony when it has judicially determined that there has been no marriage. The appropriate Maryland divorce statute\textsuperscript{48} enlarged the powers of an equity court to award absolute divorces and provided that in any decree of divorce alimony may be granted. The court reasoned that alimony had by statute been changed from its traditional definition\textsuperscript{49} to a term which in reality was "commensurate with 'support'"\textsuperscript{50} thus indicating a legislative intent to permit alimony in a proper case even though the underlying marriage is a nullity.\textsuperscript{51} The \textit{Dackman} court decided that the change in the technical meaning of the term alimony was the answer to its problem.

The Legislature has not seen fit to respond to the suggestions in the concurring opinion in the second \textit{Johnson} case or to those in \textit{Clayton} and we now take the view that the rule of the \textit{Johnson} cases restating the earlier cases should be reexamined and relaxed, since in \textit{Clayton} we did change the established concept

\textsuperscript{43} It is interesting to note that the lower courts in \textit{Brewster} and \textit{Johnson} seemed more than willing to change the law since both those decisions were in favor of the wife.
\textsuperscript{44} \textit{See} note 41 \textit{supra}.
\textsuperscript{45} 252 Md. at 343, 250 A.2d at 67.
\textsuperscript{46} 231 Md. 74, 188 A.2d 550 (1963).
\textsuperscript{47} MD. ANN. CODE art. 16, § 24 (Supp. 1969).
\textsuperscript{48} MD. ANN. CODE art. 16, §§ 2, 3 (1966).
\textsuperscript{49} \textit{See} note 41 \textit{supra}.
\textsuperscript{50} 231 Md. at 77, 188 A.2d at 552.
\textsuperscript{51} \textit{Id}.
of alimony in cases of absolute divorce by reading "alimony" in § 3 of Art. 16 of the Code as commensurate with "support" and allowable where there never was the legal relation of husband and wife and thereby changed the concept of statutory alimony which underlay the rule of the Johnson cases and the earlier cases on which they relied. 52

The court went on to say that a court of equity, independent of its authority to grant a divorce, can grant alimony where the husband is at fault and that if the court could not obtain in personam jurisdiction over the ex-husband it could award support from his property within the court's jurisdiction provided the wife could prove misconduct which would be grounds for divorce. 53 Under this reasoning and the new rule regarding alimony the court held that Mrs. Dackman could be awarded "support" from her ex-husband's property in Maryland.

The application of the new rule solely to the carefully outlined situation in Dackman 54 leaves many questions unanswered as to the effect the decision will have on Maryland divorce law. Seemingly, whenever one element of the Dackman situation is changed or missing, the court would be free to decide for itself whether to restrict or extend the Dackman holding. Perhaps the court's narrow ruling is a plea for the legislature to provide guidance for further situations.

To predict what effect Dackman may be expected to have, Estin v. Estin 55 requires closer scrutiny since Maryland seems to have adopted, if only very narrowly, the concept of divisible divorce. In Estin the wife was granted a decree of separation by a New York court and an award of $180 per month as permanent alimony. The husband subsequently went to Nevada, established domicile there, and obtained an absolute divorce decree which made no provision for alimony. The wife was served but did not appear or answer. When the husband failed to make alimony payments, the wife brought an action for arrears, and the New York courts granted judgment in her favor. The Supreme Court affirmed, holding that while the Nevada divorce decree was entitled to full faith and credit, it was not effective as to the wife's support rights. The court phrased the question as "whether Nevada could under any circumstances adjudicate rights of respondent [wife] under the New York judgment when she was not personally served or did not appear in the proceeding." 56 The court reasoned that the New York judgment was a property interest created by New York in a proceeding where both parties were present and held that Nevada had no power to adjudicate the wife's rights thereto and New York did not have to give full faith and credit to a court having no jurisdiction. Thus the part of the Nevada judgment as to support was not entitled to full faith and credit and could not alter the wife's support rights under the New York judgment. 57

52. 252 Md. at 344-45, 250 A.2d at 67.
53. Id. at 345, 250 A.2d at 67-68. See note 9 supra and accompanying text.
54. See note 37 supra and accompanying text.
55. 334 U.S. 541 (1948).
56. Id. at 547.
57. Justice Jackson's dissent in Estin points out that under New York law if the husband had attained a divorce in New York it would terminate the wife's right
Estin left an obvious question of whether the fact that the wife's claim had been reduced to judgment before the divorce was the controlling factor which allowed the decree to survive the divorce. Following Estin, New York passed a statute which in substance stated that a wife could maintain an action for maintenance even if a foreign divorce had been granted as long as personal jurisdiction over the wife was not obtained by the foreign court. In Vanderbilt v. Vanderbilt this statute was contested and upheld. The parties had been living in California. They separated there in 1952, and in February 1953 the wife moved to New York where she remained. In June 1953 the husband obtained an absolute divorce in Nevada. In April 1954 the wife filed suit for separation and alimony in New York, and that court under the statute awarded her designated support payments. The husband argued that the New York statute was unconstitutional. The Supreme Court upheld the statute and answered the question left by Estin as to whether the maintenance decree must precede the divorce:

In our opinion this difference is not material on the question before us. Since the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish any right which she had under the law of New York to financial support from her husband. It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

While answering this question directly, Vanderbilt raised another which is pointed out in Justice Harlan's dissent. His dispute with the majority was not based on his opposition to divisible divorce, but was rather based on his view that the majority was overbroad in its holding. The opinion would limit the power of a state to refuse to give full faith and credit to support decrees rendered \textit{ex parte} by a sister state where the wife was domiciled in the refusing state at the time the \textit{ex parte} decree was entered.

Factually, Dackman lies between Estin and Vanderbilt. Mrs. Dackman's claim for alimony had not been reduced to judgment to alimony and that to give the Nevada decree full faith and credit it should have the same effect a New York decree would have. Id. at 554.

60. Id. at 418.
61. Id. at 428–35. Justice Frankfurter dissented also but his argument was that the full faith and credit clause required New York to recognize the Nevada ruling in its entirety.
62. The point of view of Justice Harlan in Vanderbilt would pose more of a problem to the Maryland court. Mrs. Dackman was a domiciliary of Maryland at the time of the divorce, but the court also gave weight to the fact that the marital domicile was in Maryland and the marital offense occurred there. It is impossible from the court's opinion to determine how important such elements are. What would the court do, for example, if the marital domicile had been in Maryland the minimum time for residency? It is difficult to imagine a court denying her relief on this ground if the court felt that she would remain domiciled in Maryland even though the court in Dackman placed reliance on Maryland being the situs of the marital domicile and marital offense. For a more detailed discussion of the wife who moves away after a divorce and establishes domicile in a state which would allow her to sue for support after divorce, see Note, Divisible Divorce, 76 Harv. L. Rev. 1233, 1242 (1963).
although it had been instituted. It is arguable that since she made the claim before the divorce, it became somewhat of a legal property right that could not be adjudicated by Nevada. This question is really moot, however, since *Vanderbilt* held that it was immaterial that the support action was instituted after the divorce decree became final. 63 In light of the court's reasoning in *Dackman* the concern for the stay-at-home wife seems to be the overriding factor and, consistent with *Vanderbilt*, the fact that a wife had not instituted a suit before the divorce should not preclude her doing so afterward.

Still another problem arises when the wife obtains the foreign *ex parte* divorce as in *Staub v. Staub*. 64 The Arkansas court in that case did not have jurisdiction to award alimony, but the Maryland court, after holding that alimony was not divisible from the divorce action, also hinted at an estoppel argument. Since the wife had alleged facts sufficient to procure a Maryland divorce but had chosen another forum, the Maryland courts would not entertain a claim for alimony after the judgment of the foreign court. 65 Although it is arguable that Mrs. Staub never had the opportunity to litigate the question of alimony and therefore she should not be prevented by some form of res judicata, it is not difficult to foresee that Maryland, although it has recognized divisible divorce to some extent, will not give the wife two forums to adjudicate first the marriage and then the support when she is the one who left the state to obtain a divorce. 66 The *Dackman* court indicated that one of the bases for its ruling was the fact that the wife was never personally before the Nevada court. 67 Thus, when read together, *Dackman* and *Staub* seem to say that a wife who chooses a "quickie" divorce forum in which the court is precluded from awarding alimony because of lack of personal jurisdiction will be forever barred from obtaining alimony.

One last factor mentioned by the *Dackman* court as persuading it that the exercise of jurisdiction was appropriate was that the

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63. 354 U.S. at 418.
65. Id. at 212, 183 A.2d at 610. See also Annot., 28 A.L.R.2d 1378, 1414 (1953).
66. See Hudson v. Hudson, 52 Cal. 2d 735, 344 P.2d 295 (1959); McCoy v. McCoy, 191 Iowa 973, 183 N.W. 377 (1921). In Paulson, *Support Rights and an Out-of-State Divorce*, 38 Minn. L. Rev. 709, 727 (1954), *Staub* is said to represent the application of "waiver" on the part of the wife if she chooses to institute out-of-state divorce proceedings. It is argued that this application "requires a wife entitled to a divorce (presumably because of some misconduct of the husband) to choose between (1) the maintenance of rights of support together with a distressing marriage relationship, or (2) a divorce with consequent loss of support." Id. at 727. This argument seems weakened, however, since if the wife is faced with such a situation and the husband is the guilty party, she can always sue for divorce and alimony in the home state (assuming she can obtain jurisdiction over the husband). If the husband's offense is not recognized in the home state as a ground for divorce a Maryland court may well argue that although they must recognize the foreign decree they should not have to award alimony for a divorce the ground of which Maryland does not recognize. See also Morris, *Divisible Divorce*, 64 Harv. L. Rev. 1287, 1301 (1951). There is also a choice of law problem when a wife obtains a foreign *ex parte* divorce. Should the court apply Maryland law, the law of the divorcing forum, the law of husband's present residence, or the law of the matrimonial domicile? The latter would seem to be the simplest and the fairest. See Note, *State Law Problems in Adopting the Divisible Divorce Theory*, 12 St. L. Rev. 848, 853 (1960).
67. 252 Md. at 346, 350 A.2d at 68.
husband had "ample" property in Maryland. Should a Dackman situation arise again, with the modification that all but a negligible amount of the husband's property had been transferred out of the state, would the court refuse to apply the Dackman modification? It is submitted that this question should be answered in the negative. The existence of property owned by the husband within the forum state should only be important as to whether the court has jurisdiction in the wife's action for alimony. If the husband is no longer domiciled in Maryland, and the wife has not impeached the jurisdiction of the divorce rendering state, there is no in personam jurisdiction over the husband. Assuming the husband keeps himself out of Maryland, the only other basis of jurisdiction is in rem jurisdiction based on the presence within Maryland of property belonging to the husband. The amount of this property should be of no consequence (other than that the judgment is a charge only on the property); Maryland has an interest in protecting the rights of its domiciliaries, and the presence of property within Maryland is a sufficient basis for jurisdiction to enforce those rights.

CONCLUSION

The court of appeals' holding in Dackman represents an exception to the unitary theory of divorce which had previously been rigorously adhered to by the Maryland court. The court carefully chose its language and expressly stated that the opinion was to be limited to the fact situation presented. When so read, the exception carved out by Dackman is so narrow as to leave the previous law practically unscathed. It is difficult to perceive whether the court's language is an expression that the factual situation in Dackman is the point beyond which the principle cannot be bent or whether the narrow holding is a renewed plea for legislative action which had heretofore fallen on deaf ears. In light of the fact that the issue was raised by the court and not the parties, the latter assertion may well be correct.

In either event, there is no compelling reason that either the court or the legislature cannot go beyond Dackman. The Supreme Court long ago decided in Estin that support rights in the state of the marital domicile can survive a valid ex parte divorce decree in another jurisdiction. Such survival has been permitted in numerous states by either court decision or statute. Perhaps the easiest solution

69. 252 Md. at 346, 250 A.2d at 68.
70. See text accompanying note 9 supra. In Vanderbilt v. Vanderbilt, 354 U.S. 416, 417 (1957), the Supreme Court noted that "[t]he New York court did not have personal jurisdiction over him, but in order to satisfy his obligations, if any, to Mrs. Vanderbilt, it sequestered his property within the State." (footnotes omitted). The court also stated the general rule to be that "... a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." Id. In a footnote to this statement, however, the Court states that "... [i]f a defendant has property in a State it can adjudicate his obligations, but only to the extent of his interest in that property." Id. n.6 (footnotes omitted).
to the problem would be a statutory enactment specifying in which situations support rights could survive an *ex parte* divorce.

In reaching its decision, the *Dackman* court pointed to several factors which justified a departure from the general rule: the marital domicile was in Maryland, the deserted wife continued to reside in Maryland, the adulterous conduct occurred in Maryland, the husband had ample property in Maryland, and the Nevada decree was rendered without the wife being personally before the court. The presence of these factors in order to permit survival of support rights is not mandated by any Supreme Court decision. In fact, the court in *Estin* was clear that the states were free to act in this area as they chose. The court would be free in the future to discard any of these factors that it chooses. Should the legislature fail to act, an erosion of the factors relied on in *Dackman* would not be surprising. Though the precise holding in *Dackman* is extremely narrow it is suggested that it is a catalysis which will, either by legislative action or court decision, precipitate a further change in the unitary theory of divorce in Maryland. The extent of this change will only be known with the passage of time.