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Henry K. Garson

FAMILY LAW—AVAILABILITY OF THIRD-PARTY COLLATERAL ATTACK ON ALABAMA BILATERAL DIVORCE DECREES IN NEW YORK

Plaintiff obtained an Alabama divorce from her first husband, who appeared in that action but did not challenge her allegation of domicile. Several years later plaintiff remarried. After marital discord developed, plaintiff wife filed the present action for legal separation in New York. Defendant husband counterclaimed for annulment, alleging that plaintiff's prior Alabama divorce was invalid for lack of subject-matter jurisdiction because at the time of the Alabama divorce neither plaintiff nor her first husband were Alabama domiciliaries. Defendant husband, a member of the New York bar, had signed (fourteen months before this action was filed) a stipulation recognizing that the parties were legally married. The Supreme Court, at Special Term, found the Alabama divorce decree invalid for lack of subject-matter jurisdiction and declared the subsequent marriage void. The Appellate Division modified the decree as to the support provisions, and, as modified, affirmed it without in any way challenging the lower court's holding that the Alabama divorce decree was invalid. The Court of Appeals, two judges dissenting, *held*, that the defendant husband could not attack the Alabama divorce decree collaterally in New York, and that the Alabama decree could be attacked only in the Alabama courts. *Weisner v. Weisner*, 17 N.Y.2d 799, 218 N.E.2d 300, 271 N.Y.S.2d 252 (1966).

The constitutional requirement of full faith and credit[1] demands that a sister state divorce decree be given the same effect in the forum state as it enjoys in the state of rendition.[2] In determining whether to allow collateral attack on a bi-lateral divorce decree obtained in a sister state, the forum state must examine the law of the rendering state.[3] The Supreme Court has said, "when a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union."[4] Accordingly, collateral attack will be permitted by New York courts only when the rendering state permits such attack. ". . . [New York] courts continue to look to the law of the rendering state to determine to what extent persons not parties to the original judgment are estopped from attacking domicil in divorce actions in which both parties have appeared."[5] Hence, inquiry must be directed to a determination of Alabama law.

In Alabama, the procedure for collaterally attacking a divorce decree is the filing of a "Bill in the Nature of a Bill of Review."[6] This bill is available where fraud has been committed on the court or on one of the litigants.[7]

1. U.S. Const. art. IV, § 1.
2. Sherrer v. Sherrer, 334 U.S. 343 (1948).
3. Johnson v. Muelberger, 340 U.S. 581 (1951).
4. *Id.* at 589.
5. Herzog, *Conflict of Laws*, 14 Syracuse L. Rev. 147, 151 (1962).
6. Reese, *Grounds for and Method of Setting Aside an Alabama Divorce*, 37 N.Y.S.B.J. 345, 346 (1965).
7. *Ibid.*

It should be noted that "to sustain such a bill, however, the fraud must be extrinsic and not intrinsic."[8] Where fraud has been committed upon the court (*e.g.*, by false allegation of residence) the bill is available to a third party, unless the third party is barred by the statute of limitations, estoppel, or laches.[9] The statute of limitations allows a third party to attack within three years after the rendition of the decree.[10] Where "circumstances are shown, excusing the delay, such as lack of knowledge of the fraud and other circumstances . . . the time generally is extended for a year after knowledge of the same, regardless of how long it might be."[11] The Alabama courts of equity will estop collateral attack on the divorce decree, however, if the court finds that the attacking party was either a privy,[12] or had "actuated, dominated, participated, and procured the decree that by this suit is challenged. . . ."[13] Laches will also bar the attack if the court finds that the attacking party did not use due diligence in the discovery of the fraud or in the bringing of the action.[14] Therefore, where a party knew or should have known of the fraud, but has not sued within one year of the discovery, laches will bar the action.[15]

In the recent case of *Hartigan v. Hartigan*,[16] the Supreme Court of Alabama held its courts had power to invalidate a divorce decree sua sponte when both of the original parties to that decree reappeared before the court and candidly admitted that a fraud had been committed upon it. The *Hartigan* decision appears to be limited to its unusual facts, for six months later the same court distinguished the *Hartigan* case on the grounds that in that case *both* of the original parties were before the court.[17] It seems clear that when an innocent third party (one who had no knowledge of the divorce and did not participate in obtaining the decree) marries a person who had fraudulently obtained an Alabama divorce decree, he can collaterally attack that decree within one year after the discovery of the fraud[18] and in fact stands in a better position to attack than a party to the original divorce decree.[19] Under Alabama law neither remarriage nor resulting issue will prevent the court from invalidating the divorce decree.[20] Therefore, where the requisite fraud is present, collateral attack will be permitted to third parties in Alabama courts unless the statute of limitations, laches or estoppel bar the action.

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8. *Id.* at 346.
9. See generally Reese, *supra* note 6.
10. Titus v. Nieheiser, 269 Ala. 493, 114 So. 2d 242 (1959).
11. Reese, *supra* note 6, at 351.
12. Mussey v. Mussey, 251 Ala. 439, 37 So. 2d 921 (1948).
13. Fairclough v. St. Amand, 217 Ala. 19, 21, 114 So. 472, 473 (1927).
14. Lutsky v. Lutsky, 183 So. 2d 782 (Ala. 1966); Winston v. Winston, 276 Ala. 303, 161 So. 2d 588 (1964); Aiello v. Aiello, 272 Ala. 505, 133 So. 2d 18 (1961).
15. *Ibid.*
16. 272 Ala. 67, 128 So. 2d 725 (1961).
17. Aiello v. Aiello, 272 Ala. 505, 133 So. 2d 18 (1961).
18. Lutsky v. Lutsky, 183 So. 2d 782 (Ala. 1966); Aiello v. Aiello, *supra* note 17; Reese, *supra* note 6.
19. Reese, *supra* note 6, at 347.
20. Hartigan v. Hartigan, 272 Ala. 67, 128 So. 2d 725 (1961); Davis v. Davis, 255 Ala. 488, 51 So. 2d 876 (1951).

This is the first time the New York Court of Appeals has had the opportunity to determine whether a bi-lateral Alabama divorce decree could be collaterally attacked by third parties. New York lower court opinions, attempting to follow the mandate of full faith and credit without guidance from the Court of Appeals, evidence confusion as to when Alabama courts allow attack on their divorce decrees. Two recent New York Supreme Court decisions,[21] among many, illustrate this confusion. In both cases, the husband had knowledge of the prior Alabama divorce obtained by his present wife. In fact, both husbands had participated in obtaining the decrees, by driving their present wives to the airport and picking them up on their return from Alabama. The husbands also knew of the fraud committed upon the Alabama court. One court held that the husband could collaterally attack the Alabama decree,[22] while the other declared the husband barred by Alabama law from collaterally attacking the Alabama decree.[23] The announced public policy of New York is one of supporting the continuity of marriage.[24] Therefore, when New York's courts consider whether to permit a collateral attack on a sister state divorce that would result in the annulment of a later marriage, the court places a heavy burden on the attacking party to establish that the rendering state permits such attack.[25]

The Court of Appeals, in its per curiam majority opinion, determined that in New York "collateral attack is permitted by strangers on divorce decrees . . . where it is clear that the rendering state permits such attack. . . ."[26] The Court however, concluded that under the facts of the instant case Alabama law is unclear, and hence, New York will not permit collateral attack. The Court considered Alabama to be the only available forum for attack. In weighing defendant's chances of success it is significant that he was advised by his attorney eighteen months before this action that his wife's previous Alabama divorce was invalid. The Court, in holding that Alabama law is unclear, appears to have assumed that the opinion of his attorney was not the "knowledge of the fraud" that Alabama required to bar the attack. The two dissenting judges thought the Alabama law to be clear enough to hold the defendant husband barred by laches from collaterally attacking the decree. As the New

21. Yenoff v. Yenoff, 50 Misc. 2d 798 (Sup. Ct. 1966); Parrish v. Parrish, 50 Misc. 2d 827, 271 N.Y.S.2d 792 (Sup. Ct. 1966). See also, *e.g.*, Weisner v. Weisner, 23 A.D.2d 632, 258 N.Y.S.2d 322 (1st Dep't 1965); Magowan v. Magowan, 45 Misc. 2d 972, 258 N.Y.S.2d 516 (Sup. Ct. 1964); Rosenbluth v. Rosenbluth, 34 Misc. 2d 290, 228 N.Y.S.2d 613 (Sup. Ct. 1962).

22. Yenoff v. Yenoff, *supra* note 21. The court's opinion seems to confuse comity and full faith and credit. It makes no mention of controlling Alabama law but cites cases dealing with *foreign* divorces.

23. Parrish v. Parrish, 50 Misc. 2d 827, 271 N.Y.S.2d 792 (Sup. Ct. 1966). This is a well reasoned opinion that discusses Alabama law and the requirements of full faith and credit.

24. See N.Y. Gen. Obligations Law § 5-311.

25. Wilkov v. Wilkov, 13 A.D.2d 471, 212 N.Y.S.2d 91 (1st Dep't 1961). This opinion adopts the federal policy as stated by Justice Frankfurter in Williams v. North Carolina, 325 U.S. 226 (1945).

26. Instant case at 802, 271 N.Y.S.2d at 253.

York decisions mentioned above show, the lower courts of New York are in need of direction by the Court of Appeals as to when to permit a collateral attack on the Alabama divorce decrees. The determination of this question is important to the thousands of New Yorkers who have obtained Alabama divorces and have since remarried. Before the *Hartigan*[27] decision it was fairly simple to obtain an Alabama "quickie" divorce. After that decision, the Supreme Court of Alabama began a policy of scrutinizing "quickie" Alabama divorce decrees, a policy which in effect limited their availability.[28] The post-*Hartigan* decisions reveal that the equitable safeguards against unrestrained attacks (laches and estoppel) have not been abandoned but continue to bar those who have "unclean hands" or have not acted timely.[29] However, pre-*Hartigan* Alabama divorces do have continued legal stability and most will be immune to collateral attack.

Neither the majority nor dissent state reasons for their conclusions. The assumptions underlying the dissent's reasoning seem persuasive, for if an Alabama court finds that the attacking party has remained silent for more than one year after he knew or should have known of the fraud, laches will bar his attack.[30] The majority does not tell us why it found the law of Alabama to be unclear, and hence a rare opportunity to dispel the confusion in the lower courts of New York was not realized. The practical effect of this decision is to require New York residents to litigate in Alabama an issue that the courts of New York have the power to determine.[31] Thus the decision places a heavy burden of both time and expense on the attacking party by requiring him to apply to the Alabama courts to determine the validity of the Alabama decree. To be sure, this will deter some parties from attacking Alabama divorces. This deterrence is calculated to promote New York's policy of stabilizing marriage.[32] At the same time, it tends to discriminate against those who can ill afford litigation in the courts of another state.[33]

HENRY K. GARSON

27. Hartigan v. Hartigan, 272 Ala. 67, 128 So. 2d 725 (1961).
28. Reese, *supra* note 6, at 346.
29. Lutsky v. Lutsky, 183 So. 2d 782 (Ala. 1966); Aiello v. Aiello, 272 Ala. 505, 133 So. 2d 18 (1961).
30. See generally, Reese, *supra* note 6.
31. Johnson v. Muelberger, 340 U.S. 581 (1951).
32. See N.Y. Gen. Obligations Law § 5-311.
33. In contrast to the holding in the instant case, Phillips v. Phillips, 15 Misc. 2d 884, 180 N.Y.S.2d 475 (Sup. Ct. 1958) held that the "defendant [husband] . . . having failed to establish that the divorce state would permit the defendant to attack the decree, he cannot in this State expect a contrary ruling." *Id.* at 903, 180 N.Y.S.2d at 495. This decision, being on the merits, will bar the attacking party from going to the rendering state to attack the decree as the decision would be entitled to full faith and credit.