Buffalo Law Review

Volume 6 | Number 2 Article 39

1-1-1957

Domestic Relations—Survival of Right to Alimony

Vincent P. Furlong

To require a showing of knowing and conscious execution as required in will contests would seem to defeat the policy rationale and place banking institutions in a position of not knowing to whom funds in a joint account are payable. While, as the dissent indicates, the application of Section 239-3 in the exceptional case may cause an inequitable result, this is essentially a legislative question, not a judicial one.

DOMESTIC RELATIONS

Survival of Right to Alimony

Section 1170-b of the New York Civil Practice Act,[1] which allows a wife to bring an action for support and maintenance after an *ex parte* divorce decree has been obtained against her, was construed for the first time by the Court of Appeals in *Vanderbilt v. Vanderbilt.*[2] In the face of a vigorous dissent, the Court held, affirming the Appellate Division,[3] that the application of section 1170-b to a situation of this sort was not a denal of full faith and credit to the foreign judgment.[4]

Williams v. North Carolina[5] has made it incumbent upon a state to give recognition to foreign *ex parte* divorce decrees where one of the parties has become a domiciliary in that foreign jurisdiction. Whether or not an *ex parte* decree which purports to deny alimony[6] to the party not personally served is entitled to full faith and credit depends upon the nature of the right to support which the wife enjoys. If this right to support is completely and inseparably annexed to the marital status in the sense that it is destroyed upon dissolution of the status, then a valid divorce decree, even though *ex parte,* would be a bar to

1. N. Y. CIV. PRAC. ACT §1170-b. In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. . . .

2. 1 N. Y. 2d 342, 135 N. E. 2d 553 (1956), *cert. granted,* 352 U. S. 820 (1956).

3. 1 A. D. 2d 3, 147 N. Y. S. 2d 125 (1st Dep't 1955).

4. U. S. CONST. art. IV, §1.

5. 317 U. S. 287 (1942). The plaintiff in the instant case also attacked the jurisdiction of Nevada over the marriage status on the grounds that defendant had not satisfied domiciliary requirements; judgment was against her upon this issue. See *Williams v. North Carolina,* 325 U. S. 226 (1945).

6. *Sweeney v. Sweeney,* 42 Nev. 431, 179 P. 638 (1919). Nevada does not have a statute preserving the right to support. Decisional law in Nevada has been to the effect that a divorce decree which does not grant alimony and does not leave the question open thereby denies it.

a further action for alimony.[7] If the right is a separate "personal right" then a court would have no jurisdiction to rule upon it in the absence of personal service on the party to whom the "right" belongs.[8]

New York statutory provisions deem it a personal right.[9] The constitutionality of such a statute hinges upon the interpretation given by the Supreme Court to the so-called doctrine of "divisible divorce" in *Estin v. Estin*.[10] If the *Estin* decision was based upon the rationale that a separation order secured prior to the divorce vests a personal right in the wife to alimony, the question as to the extent of the "divisible divorce" doctrine has been left open. However, it would seem, in view of *Armstrong v. Armstrong*,[11] that the Supreme Court has recognized the broad interpretation favored by the majority in the instant case. A final determination may be forthcoming in view of the fact that certiorari has been granted in the *Vanderbilt* case.[12]

The dissent, in taking the narrow view, has expressed a fear that New York will become a haven for non-resident wives who have had *ex parte* divorce decrees taken against them. The majority, it may be noted, took special cognizance of the fact that the plaintiff had entered New York prior to the divorce with the intent to set up a domicile, thus indicating a restrictive application of the section in question.

Reciprocal Support Statutes

The New York Uniform Support of Dependents Law[13] provides a method for a non-resident wife or child to enforce the father's duty to support his wife

7. See *Querze v. Querze*, 290 N. Y. 13, 47 N. E. 2d 423 (1943) and *Erkenbrach v. Erkenbrach*, 96 N. Y. 456 (1884). Prior to section 1170-b a valid divorce decree was a bar to a subsequent action for alimony; the right to support was not in and of itself a basis for a cause of action. But see *Lynn v. Lynn*, 302 N. Y. 193, 97 N. E. 2d 748 (1951), *cert. den.*, 342 U. S. 849 (1951) in which the severability of the right to support was alluded to. In the *Lynn* case the Nevada court had had personal jurisdiction over the wife and therefore the precise question involved here was not decided.

8. *Pennoyer v. Neff*, 95 U. S. 714 (1877). Personal service is required as a basis for a personal judgment.

9. See note 1 *supra*.

10. 296 N. Y. 308, 73 N. E. 2d 113 (1947), *aff'd*, 334 U. S. 541 (1948). The case indicated that each state has the power to make its own provisions as to the survival of the right to support but that, at least in the situation where a prior separation agreement has been obtained, an *ex parte* decree may not affect it.

11. 350 U. S. 568 (1955). The majority took the view that the Florida court had intended to leave the question open despite the specific denial of alimony rendered by that court. Though the Court thus avoided the constitutional question it is an indication that its attitude is one of agreement with the personal right doctrine. The concurring justices felt that the constitutional question had to be decided and argued in conformance wih the instant opinion. See also *Hopson v. Hopson*, 221 F. 2d 839 (D. C. Cir. 1955).

12. See note 2 *supra*.

13. McK. UNCONSOL. LAWS §§2111-2120.