DIVORCE AND ALIMONY DENIED FOR LACK OF MARITAL DOMICILE

Loeb v. Loeb,
4 N.Y.2d 542, 152 N.E.2d 36 (1958)

Plaintiff and defendant were married in Connecticut in 1942. In 1944 the couple established their home in the state of Vermont, where they maintained their marital domicile until 1951, when defendant husband left plaintiff and subsequently obtained an ex parte divorce in Nevada in July, 1952. The wife was not personally served and did not appear in the action. The decree made no provision for her support.

In November, 1952, plaintiff challenged the validity of the Nevada divorce in the Vermont County Court and petitioned that court for support. Affirming a ruling that defendant's Nevada divorce decree was entitled to full faith and credit, the Vermont Supreme Court in May, 1955, reversed the lower court's award of support to plaintiff, holding that it did not have jurisdiction, in the absence of statute, to make such an award for support to a person who had been validly divorced in another jurisdiction.[1]

In August, 1953, plaintiff sold the Vermont home and has resided in New York since October, 1953, when, she maintained, she formed the intention of becoming a New York resident. While the Vermont action was pending, plaintiff instituted an action under Section 1170-b of the Civil Practice Act[2] in the New York courts, seeking a divorce or separation from defendant and provision for her support. She secured a sequestration order against defendant who appeared generally in the action. The trial court dismissed her complaint in all respects and the court of appeals affirmed, holding the issues relating to the validity of the Nevada divorce had been resolved against her in the Vermont proceeding which she instituted, and that Mrs. Loeb, having first declared her intention to become a New York resident over a year after her husband secured the Nevada divorce, and having pursued her marital rights in Vermont after announcing her intention to become a resident of New York, could not be regarded as a "New York wife" entitled to relief under Section 1170-b of the Civil Practice Act.[3]

Section 1170-b permits the New York courts to grant, "as justice may require," maintenance to a wife in cases where it is not possible to grant a divorce, separation or annulment because the marriage has already

[1] Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518 (1955). The Vermont court relies on Thompson v. Thompson, 226 U.S. 551 (1912), subsequently overruled in Vanderbilt v. Vanderbilt, 354 U.S. 416, 419 (1956), insofar as it held that an ex parte divorce destroyed alimony rights. See Armstrong v. Armstrong, 162 Ohio St. 406, 123 N.E.2d 267, *aff'd,* 350 U.S. 568 (1955). See generally Annot., 28 A.L.R.2d 1378 (1953).

[2] N.Y. Civ. Prac. Act § 1170-b (Nichols-Cahill Supp. 1958).

[3] 4 N.Y.2d 542, 152 N.E.2d 36 (1958).

been dissolved by the courts of another state, at the instance of the husband, in an action in which personal service over the wife was not obtained. The idea that a divorce decree may terminate the marital status without affecting related property rights has been given expression by the United States Supreme Court in the concept of "divisible divorce."[4] A 1957 decision of that court,[5] upholding the constitutionality of Section 1170-b, applied this concept to establish that the full faith and credit clause of the federal constitution and its implementing statute[6] do not require the state of a wife's domicile to recognize, as determinative of her right to alimony, an otherwise valid ex parte divorce decree rendered by another state, but that it is a personal right which exists separate and apart from any divorce judgment, and of which the wife cannot therefore be deprived by any court acting without jurisdiction over her person.[7]

Although by grounding its decision in the *Vanderbilt* case on the invalidity of the foreign decree insofar as it purported to affect property rights the Court makes it unnecessary any longer to weigh the competing interests of two states when the question is whether a wife's support rights have been affected by an ex parte divorce, it left open the question of the interest the state court must have in the divorced wife before it may adjudicate her rights to support. The New York court's ruling in the instant case limits the state's interest in the protection of her support rights to a wife who was domiciled in New York at the time the foreign forum granted the divorce. The rationale implicit in this ruling was earlier set forth by Mr. Justice Harlan as requiring such a result on constitutional grounds:

> Where a wife becomes a domiciliary of New York after the ex parte divorce and is then granted support . . . New York could not pretend to be assuring the wife the . . . survival of a pre-existing right, because the wife could have had no pre-divorce rights in New York at all. . . . And . . . at the time of the divorce New York would have had no interest in the situation. . . . I should think New York would be forced to look to the law of a state which had substantial contact with these parties at the time of the divorce. . . .[8]

The New York court avoids the constitutional questions thus posed and chooses to dismiss Mrs. Loeb's claim by asserting her Vermont domicile at the time of the divorce and her pursuit of her marital rights in that state as factors disqualifying her as a "New York wife" (that class of parties to which it presupposes the legislature intended to afford protection under Section 1170-b). The language of the statute is not, however, free from ambiguity, speaking simply in terms of "wives,"

---

[4] Estin v. Estin, 334 U.S. 541 (1947).

[5] Vanderbilt v. Vanderbilt, *supra* note 1.

[6] 28 U.S.C. § 1738 (1950).

[7] Pennoyer v. Neff, 95 U.S. 714, 726-27 (1877).

[8] Vanderbilt v. Vanderbilt, *supra* note 1, at 433-34 (dissenting opinion).

without specifying what group of wives or where such wives were to be located when the husband obtained his divorce. It seems quite rightly within the province of the New York court to construe the statute in terms of an expressed legislative purpose "to protect a *New York wife* whose right to support from her husband may be completely cut off by an ex parte foreign divorce decree, in the absence of a previous New York separation decree with provision for maintenance."[9] This seems to assume a wife deserted *in New York*, however, and it becomes difficult to justify the distinction made in the *Vanderbilt* case, the facts of which show Mrs. Vanderbilt fortuitously to have timed her arrival in New York state after her husband had left her in Connecticut but before the Nevada decree was awarded him.[10]

The refusal to grant Mrs. Loeb standing before the New York court can be reconciled with the recognition of standing in Mrs. Vanderbilt only if it is assumed that New York accepts the Vermont court's definition of the term "wife" as designating an actual existing relation and not the person enjoying or, in these cases, involuntarily relieved from the status conferred by that relation.[11] The Vermont court denied alimony on the basis of the view that with the dissolution of a marriage relation there is no longer any "wife", and therefore the subject matter which forms the basis for a separate maintenance action, only as an incident of which alimony can be awarded under the Vermont statute,[12] is extinguished.[13] The New York court does not, however, announce this reasoning as an expression of the conflicts rule it holds applicable, but merely assumes that the only proper construction of the statute does not permit its application to women who were not still married at the time they came to live in New York.

Though sidestepped by the New York court, it seems obvious that the constitutional arguments advanced by Mr. Justice Harlan as a barrier to the result in *Vanderbilt* would prove an even greater obstacle to policy considerations favoring an opposite result in *Loeb*. It might well be argued that full faith and credit must be accorded the adjudication of plaintiff's right to alimony, not by the Nevada court which awarded the ex parte divorce, but by the Supreme Court of Vermont.[14] Vermont was certainly the state which had the most substantial contact with the marriage, and no question is raised as to its jurisdiction over the parties. It could, however, be questioned whether the Vermont judgment, holding in essence that Mrs. Loeb had failed to state a cause of action under the

[9] N.Y. LAW REV. COMM. REPORT 468 (1953).

[10] Vanderbilt v. Vanderbilt, *supra* note 1.

[11] *Contra,* Cox v. Cox, 19 Ohio St. 502, 2 Am. Rep. 415 (1869).

[12] VT. STAT. § 3256 (1947).

[13] Loeb v. Loeb, *supra* note 1.

[14] *Cf.* Yarborough v. Yarborough, 290 U.S. 202 (1933). A Georgia decree fixing the amount of support to which a child was entitled as part of a general divorce judgment was held to be entitled to full faith and credit so as to bar a subsequent award of support to the child by a South Carolina court.

laws of that state, was such as could be deemed a valid and binding final determination on the merits of the interests of the parties. A foreign judgment not on the merits is not conclusive to a subsequent action,[15] as, for example, a judgment for defendant on demurrer is no bar when the declaration in a second suit properly alleges a cause of action.[16]

The New York ruling, as proposed above, could as well have been reached by the application of a *conflicts* rule precluding an adjudication under its *domestic* rule regarding awards of alimony subsequent to ex parte divorces, and requiring a decision against Mrs. Loeb's claim in accord with the Vermont law on the subject. Had New York analyzed the question in this manner and interpreted its conflicts rule as permitting a determination under its own domestic law, however, of rights and obligations arising out of the marriage contract which had been dissolved before Mrs. Loeb became domiciled in New York, such determination might be attacked as an erroneous application of the *lex fori* instead of looking to the foreign rule by which the matter should have been determined.[17] Such errors by a state court in a choice of law problem have been held to constitute a violation of due process of law within the meaning of the fourteenth amendment.[18]

It is far from settled, however, in approaching such questions as choice of law problems, with which law the choice properly lies. The courts do not question the propriety of decisions in the state of "matrimonial domicile",[19] but these words have not been legally defined in a way that attaches to them any import beyond their ordinary meaning, the domicile of the parties living together as man and wife. Mr. Justice Holmes early maintained that it is difficult to "see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicile and that . . . in a domicile later acquired."[20] The rule of law supported by reliance upon the term "matrimonial domicile" as it affected jurisdiction to grant binding divorce decrees has been overruled,[21] but the concept seems still with us regarding the award of alimony.[22] A more

[15] Warner v. Buffalo Dry Dock Co., 67 F.2d 540 (1933); RESTATEMENT, JUDGMENTS § 49 (1942).

[16] Wilson & Co. v. Hartford Fire Ins. Co., 300 Mo. 1, 254 S.W. 266 (1923); RESTATEMENT, JUDGMENTS § 50 and comments (1942).

[17] Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934), held that a valid choice of the *lex fori* will depend upon the relative weight and number of forum contacts.

[18] *Ibid.* Home Ins. Co. v. Dick, 281 U.S. 397, 407-08 (1929), held that a state may not enlarge the obligations of the parties to a contract to accord with local statutory policy solely on the ground that one of the parties is its own citizen; Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924).

[19] See Goodrich, *Matrimonial Domicile,* 27 YALE L.J. 49 (1917).

[20] Haddock v. Haddock, 201 U.S. 562, 631 (1906) (dissenting opinion).

[21] Vanderbilt v. Vanderbilt, *supra* note 1.

[22] Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 351, 135 N.E.2d 553, 557 (1955), held Mrs. Vanderbilt had "a right to . . . bring the matrimonial domicile to New York with her . . ." and that when she exercised this right after separation

logical basis for deciding the choice of law issue would seem to be the state's interest in its domiciliaries as it outweighs or fails to outweigh conflicting interests, and thus allows or precludes the application of local policy.

The question has been widely argued as to how much latitude on grounds of local policy a state should have in according full faith and credit to a sister state's judgments or when a state court's mistake in its choice of law becomes serious enough that the Supreme Court will reverse on the ground of due process.[23] Expositing the many situations in which the Supreme Court has recognized judgments valid in the state where rendered but to which the full faith and credit clause gives no force elsewhere, Mr. Justice Stone and Mr. Justice Cardozo[24] have expressed the social policy warranting such exceptions. The policy may apply as well when the constitutional due process provision is in issue.[25]

> In the assertion of rights, defined by a judgment of one state, within the territory of another there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other. That point may vary with the circumstances of the case, and in the absence of provisions more specific than the general terms of the congressional enactment this Court must determine for itself the extent to which one state may qualify or deny rights claimed under proceedings of other states.[26]

The "legitimate domestic interest" of the second state justifying the "divisible divorce" theory is the deep concern of the state where the deserted wife is domiciled in the welfare of the family deserted by the head of the household.[27]

Returning to examine with a constitutionally unprejudiced eye the language of Section 1170-b, one fails to find therein any indication whether the legislature's purpose was (1) to lay down a procedural rule with reference to New York maintenance actions or (2) substantively to establish a policy protecting New York married women from impoverishment after possible desertion by their husbands. The answer being by no means clear from the statutory language, it is therefore open to a court not bound by precedent to construe it as intended to accomplish the

---

but prior to the grant of the Nevada divorce she could avail herself of the provisions of Section 1170-b.

[23] GOODRICH, CONFLICT OF LAWS 31-32 n.80 (3rd ed. 1949) and articles cited therein.

[24] Yarborough v. Yarborough, *supra* note 14 (dissenting opinion).

[25] N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1913).

[26] Yarborough v. Yarborough, *supra* note 14, at 214-15.

[27] *Supra* note 4, at 547. "New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is a matter in which her community had a legitimate interest."

second purpose only, and thus as a matter of construction to limit the operation of the statute to women domiciled within the state during the lives of their marriages. The way would thus be open for the court to hold that its own conflicts rule refers the rights of "wives" domiciled elsewhere, and so not covered by the statute, to the tests laid down in their home states, as applied by the New York courts under whose jurisdiction such parties had come through domicile acquired subsequent to their married lives.

A consideration of the public policy underlying the meaning and purpose of Section 1170-b, affording the state's protection as warranted by the interest *of the state* in having a *quondam* husband continue his obligation to support his deserted wife, seems nevertheless just as validly to permit a construction allowing the protection of alimony rights to a divorced wife who comes to live in the state after a foreign divorce. The reasoning Mr. Justice Stone and Mr. Justice Cardozo applied to the facts of the *Yarborough* case[28] seems applicable here. Applying their views to the facts of the instant case, Vermont's interest in her support ceased when the plaintiff became a domiciled resident of New York, and "a new interest came into being, the interest of the State [of the new domicile] as a measure of self-preservation to secure the adequate protection and maintenance of . . . members of its own community. . . ."[29]

The facts of the instant case—that Mrs. Loeb's move to New York was pursuant to an earlier agreement with her husband, her purchase of a home, her duration of residence in excess of New York's one-year jurisdictional residency requirement—should provide New York with at least as great an interest in her continuing support as it would have in a wife long domiciled and deserted in New York who intended to remain only long enough to benefit from its statutory protection of her support rights and then to move elsewhere to begin her life as a single woman. This indeed was plaintiff's position under the jurisdiction of the Vermont courts when she had abandoned her intent to maintain her domicile in that state and moved to New York, intending to establish her home there. Mrs. Loeb is not asking anything from the state of New York except that its courts secure her support by her ex-husband in order to ensure that she and her child not become charges of the state of New York—a reason surely in conformity with the social policy and with the legislative intent manifested by this statute, to prevent pauperized ex-wives and children from becoming wards of the state.

The factual history of Mrs. Loeb's acquisition of New York domicile should further dispel in her case the court's expressed concern over an influx of "forum-shoppers".[30] Setting aside the question of the unfairness of laws which leave husbands free to forum-shop for quick

[28] *Supra* note 14.

[29] *Id.* at 227.

[30] 4 N.Y.2d at 548, 152 N.E.2d at 39.

and easy divorces, but deny their wives a similar shopping spree to seek the re-establishment of support rights of which they have been deprived at the same time they were unwillingly, indeed often unwittingly, shorn of their marital status, there remains a serious policy inconsistency. For when ex-wives become legally domiciled in New York with the intent to make it their home, and legitimately so even though their *motive* be only a preference for the climate of its laws over those of their home states,[31] it is by refusing to allow these women to assert under those laws their rights to support that New York threatens itself with incurring the very obligations of relief maintenance such support actions are devised to prevent. Regardless of the attitude assumed on the question of "forum-shopping", however, Judge Desmond's dissent[32] negatives this argument by pointing out that a contrary result in this or any one case would in no way limit New York's discretion to determine on the facts of each individual case "what justice may require."

Ruth S. Harwitz

---

[31] Matter of Newcomb, 192 N.Y. 238, 252, 84 N.E. 950, 955 (1908), held that "[Mrs. Newcomb] could make the change because she preferred the laws of Louisiana to those of New York . . . ."; see Note, 20 COLUM. L. REV. 87 (1920).

[32] *Supra* note 30, at 552, 152 N.E.2d at 41.