RECENT DEVELOPMENTS

DUE PROCESS AND THE MEXICAN DIVORCE

Rosenstiel v. Rosenstiel
16 N.Y.2d 64, 209 N.E.2d 709 (1965)

In 1954 Felix Kaufman obtained a divorce from his wife, the present Mrs. Rosenstiel, in the district court at Juarez in Chihuahua, Mexico. Kaufman went to Juarez where he signed the Municipal Register in order to meet residence requirements. He then filed with the district court a certificate showing such registration and a petition for divorce based on incompatibility and ill treatment between the spouses. The next day his wife, through an attorney duly authorized to act for her, made an appearance in the Mexican court and filed an answer in which she submitted to the jurisdiction of the court and admitted the allegations in her husband's complaint. A degree of divorce was then issued. Two years later, in 1956, the Rosenstiels were married. In 1962 Louis Rosenstiel brought this action to annul their marriage, alleging that the 1954 divorce was void and that, accordingly, Mrs. Rosenstiel remained married to Kaufman.

The trial court granted Mr. Rosenstiel the annulment, refusing to recognize the Mexican divorce decree on the theory that the Mexican court was without jurisdiction to issue the decree. Neither party to the action had been domiciled in the State of Chihuahua and domicile of at least one of the parties was held to be requisite for jurisdiction to grant the divorce.

The supreme court reversed this decision and the Court of Appeals of New York, when presented with this issue for the first time, held that although no domicile of either party was shown to be within the jurisdiction, New York will give recognition to foreign divorce decrees where personal jurisdiction of one party to the marriage has been acquired by physical appearance before the court and jurisdiction of the other has been acquired by the appearance and pleading of an authorized attorney.

This court, in holding that "domicile is not intrinsically an indispensable prerequisite to jurisdiction"[1] in a divorce case, approved a series of decisions extending over a period of twenty-seven years in the New York Supreme Court at Appellate Division and at Special Term which recognized the validity of bilateral Mexican divorces.[2] This lower court history was summarized in the case of *Skolnick v. Skolnick*, as follows: "A plethora of decisions lends consistency and uniformity to the ruling by the courts that Mexican decrees of divorce will be upheld where there has been a personal

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[1] Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 73, 209 N.E.2d 709, 712 (1965).

[2] Weibel v. Weibel, 37 Misc. 2d 162, 234 N.Y.S.2d 298 (Sup. Ct. 1962); Bowen v. Bowen, 22 Misc. 2d 496, 195 N.Y.S.2d 307 (Sup. Ct. 1959); Costi v. Costi, 133 N.Y.S.2d 447 (Sup. Ct. 1954); Mitchell v. Mitchell, 194 Misc. 73, 85 N.Y.S.2d 627 (Sup. Ct. 1949); Leviton v. Leviton, 6 N.Y.S.2d 535 (Sup. Ct. 1938).

appearance by one of the parties in Mexico and an appearance by a duly authorized attorney in behalf of the other."[3]

Over this period of approximately a quarter of a century the New York courts have been presented with three distinguishable types of Mexican divorce decrees; "mail-order" decrees, "ex parte" decrees, and "bilateral" decrees. The first type of divorce decree may be obtained by the parties executing powers-of-attorney in favor of Mexican attorneys. Consequently, it is accomplished without appearance by either party in Mexico; Mexican counsel represent the parties before the Mexican court and the divorce is then forwarded to them by mail. These divorces have been held absolutely void in the United States.[4] The "ex parte" or "one party" divorce is issued when plaintiff personally appears in the Mexican court and there has been at least constructive service of process on the defendant. The defendant does not appear in the action, either personally or by duly authorized attorney, thus giving rise to the name "one party" divorce. This decree also is held void in New York.[5] To obtain a decree of the third type, a "bilateral" decree, the plaintiff must appear personally before the Mexican court, and the defendant must appear either in person or by duly authorized counsel. This is the type of decree that was presented for recognition in the principal case. Each type of decree involves the same jurisdictional question, *i.e.*, whether the domicile of either party to the action in the divorce granting jurisdiction is absent.[6]

The facts of the *Rosenstiel* case support the conclusion of the court of appeals, that "the physical contact with the Mexican jurisdiction was ephemeral."[7] Neither of the Kaufmans had domicile in Mexico in the traditional sense of the word.[8] The court was faced with the problem of determining the necessity of domicile as a prerequisite to recognition of a foreign divorce; important to the resolution of this issue was the fact that the decree presented for recognition originated in the court of a foreign country rather than in the court of a sister state. In holding that domicile was not

[3] Skolnick v. Skolnick, 24 Misc. 2d 1077, 1078, 204 N.Y.S.2d 63, 64 (Sup. Ct. 1960).

[4] Garman v. Garman, 102 F.2d 272 (D.C. Cir. 1939); Harlan v. Harlan, 70 Cal. App. 2d 657, 161 P.2d 490 (1945); Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948); Smith v. Smith, 72 Ohio App. 203, 50 N.E.2d 889 (1943).

[5] Maltese v. Maltese, 32 Misc. 2d 993, 224 N.Y.S.2d 946 (Sup. Ct. 1962).

[6] As will be indicated later in this note, it is only the bilateral decree which affords the safeguards of due process in that the proceeding is one in which the defendant appears, either personally or by duly authorized counsel, and actually litigates the issues. The defendant, rather than having his interests determined in a distant tribunal in a proceeding in which he does not appear, has a real opportunity to participate in the determination of his interests.

[7] Rosenstiel v. Rosenstiel, *supra* note 1, at 72, 209 N.E.2d at 711.

[8] Domicile has been defined as the place where a person has voluntarily fixed his abode, not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time. Black, Law Dictionary (4th ed. 1951).

required, the New York court departed from the decisions of other states that have adjudicated this issue. Whether one state must give recognition to a divorce decree issued in another state is determined by the full faith and credit clause of the Constitution, while recognition of a foreign divorce decree is governed by considerations of comity. An analysis of the problem of sister state divorce decrees and the full faith and credit clause is useful because today, there is a definite trend toward uniformity in the various areas of the law and the Supreme Court of the United States has worked out definite principles with respect to divorce jurisdiction. As indicated before, these principles are not necessarily the ones that govern the recognition of a foreign divorce. Uniformity of divorce law, however, calls for similar requirements in both cases. Since the obligations of the full faith and credit clause are mandatory upon the states, and this, in turn, has significance for any uniformity in divorce law, an understanding of the full faith and credit problem is necessary.

Today, by constitutional mandate[9] and federal statute,[10] the judicial proceedings of every state are entitled in all other states to the same full faith and credit which they enjoy in the state from which they were taken—except when it is proved the foreign court had no jurisdiction of the person or of the subject matter.[11] Whether the divorce decree of one state is to be given full faith and credit in a sister state, therefore, will depend upon a finding of requisite jurisdictional facts.

The Supreme Court of the United States, when deciding the issue of jurisdiction in early divorce cases, spoke in terms of domicile because it was always a statutory jurisdictional requirement of the state which granted the divorce. Typical of these early cases was *Bell v. Bell*,[12] which involved a divorce rendered in a state where neither party was domiciled. The defendant had only constructive service of process. The Court held that "no valid divorce . . . can be decreed [where jurisdiction is based] on constructive service by the courts of a State in which neither party is domiciled."[13] This case apparently was the basis for dicta in later cases to the effect that domicile is a prerequisite for jurisdiction to grant a divorce,[14] and that di-

[9] U.S. Const. art. IV, § 1 states: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

[10] 28 U.S.C. § 1738 (1964) provides: "Such . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

[11] Thompson v. Whitman, 85 U.S. 457 (1873).

[12] 181 U.S. 175 (1901).

[13] *Id.* at 177.

[14] Mr. Justice Frankfurter in Williams v. North Carolina, 325 U.S. 226, 229 (1945), purported to state the rule that domicile is the basis for jurisdiction of the subject matter in a matrimonial action: "Under our system of law, judicial power to grant a divorce—jurisdiction strictly speaking—is founded on domicile. . . . The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither

vorce is to be regarded not as an action in personam, but rather as resembling an action in rem, with the marital status constituting the res.[15] However, the Supreme Court, in three recent cases,[16] arguably has circumvented these early notions which have questionable constitutional basis.

The first of these cases, *Sherrer v. Sherrer*,[17] involved domiciliaries of Massachusetts. Mrs. Sherrer instituted divorce proceedings in Florida in which her husband personally appeared denying all the allegations in her complaint—including that of Florida residence. A settlement was agreed upon and, at this hearing, the issue of domicile was not raised. The settlement was later challenged by the husband in a Massachusetts proceeding on the ground that the Florida court lacked jurisdiction to render the settlement. On appeal the Supreme Court held that the jurisdictional issue in the Florida action was res judicata since the parties had full opportunity to litigate it although they did not. The facts in *Sherrer*'s companion case, *Coe v. Coe*,[18] are similar except that defendant's answer admitted plaintiff's allegation of domicile. In a subsequent Massachusetts proceeding the Nevada decree was held void for want of jurisdiction. The Supreme Court reversed holding that the decree was res judicata since the defendant had full opportunity to litigate the jurisdictional issue.[19]

The full significance of these two cases was revealed in the case of *Johnson v. Muelberger*,[20] decided three years later. This case extended the *Sherrer-Coe* doctrine to third parties. Where by the law of the divorcing state a divorce could not be attacked on jurisdictional grounds by the parties who are actually before the court, the full faith and credit clause precludes attack

this Court nor any other court in the English-speaking world has questioned it." However this issue was not before the Court and therefore the statement was not necessary to the holding in the case.

[15] The argument supporting this view was used in the case of Alton v. Alton, 207 F.2d 667, 673 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954), where the court said: "The background of divorce legislation and litigation shows that it has not been considered a simple transitory personal action. The principle said to govern is that the marriage is a matter of public concern, as well as a matter of interest to the parties involved. Because it is a matter of public concern, the public, through the state, has an interest both in its formation and in its dissolution, and the state which has the interest is the state of domicile, because it is where the party 'dwelleth and hath his home.'" As indicated, this case was vacated as moot and the Supreme Court never passed on the holding of the lower court.

[16] Johnson v. Muelberger, 340 U.S. 581 (1951); Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948).

[17] 334 U.S. 343 (1948).

[18] 334 U.S. 378 (1948).

[19] See also Davis v. Davis, 305 U.S. 32 (1938). Mrs. Davis, in an action in the District of Columbia, challenged the validity of a prior Virginia divorce decree. Mrs. Davis had appeared in the Virginia action and contested the jurisdictional issue which was decided against her. The lower court found that the Virginia court had no jurisdiction but was reversed by the Supreme Court which held the determination of this issue by the Virginia court was res judicata.

[20] 340 U.S. 581 (1951).

in every other state. Here a daughter attempted, in a New York proceeding, to attack on jurisdictional grounds her deceased father's Florida divorce. It was held that since she could not collaterally attack the divorce in Florida the decree was entitled to full faith and credit.

A careful reading reveals that more is involved in these cases than the mere holding that the parties are estopped from raising the jurisdictional issue in a subsequent proceeding in which a judgment is collaterally attacked. Underlying each decision is a determination that the requirements of due process have been met, and consequently, full faith and credit must be accorded the decree. If the defendant is personally served within the state, or enters an appearance, every safeguard inherent in due process is complied with. In other words, where both parties are before the court, neither is denied due process. The Supreme Court, in determining under these circumstances whether due process has been accorded to each of the parties, appears to be solely concerned with safeguarding the interests of the parties which would be decided by a litigation. If each party has had an opportunity to fully litigate the issues the decree will be entitled to full faith and credit irrespective of a finding of no domicile.

The Supreme Court has never held that domicile is necessary where both parties are before the court. This is partly due to the fact that almost every state requires domicile before it will grant a divorce.[21] This issue would have been decided in the case of *Alton v. Alton*,[22] however the case was vacated as moot for other reasons.[23] Parenthetically, there is no mention of domicile in the Constitution, let alone an express provision that domicile is the rule for jurisdiction to grant a divorce. If the issue is ever squarely presented to the Court, it is unlikely that it will be able to find constitutional

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[21] This simply means that as almost every state requires, by statute, that before its courts may grant a divorce the plaintiff must be domiciled in that state; the Supreme Court in review determines if this statutory requirement has been met, and does not have to decide the necessity of domicile independent of state requirement, *i.e.*, since domicile is required by statute, the Court does not have to decide the issue of whether it would be necessary for jurisdiction if there were no statute so providing.

[22] *Supra* note 15. In 1953 the Legislative Assembly of the Virgin Islands passed an act amending § 9 of the Divorce Law of 1944 by adding to it an additional subsection (a) which reads: "Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicil, *and where the defendant has been personally served within the district or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose.*" *Id.* at 669. (Emphasis added.) In considering this statute the Court would have passed on the issue of whether domicile is an indispensable prerequisite for jurisdiction to grant a divorce.

[23] While review of this decision was pending before the Supreme Court the husband obtained a final divorce in a Connecticut state court. The wife personally appeared in the action and did not contest the decision. The judgment of the district court of the Virgin Islands was accordingly vacated and the cause dismissed as moot.

support for such a doctrine. Rather, in light of these recent Supreme Court decisions, it seems likely that in personam divorces granted by non-domiciliary states will be upheld. In other words, a determination will be made that full faith and credit must be accorded divorces granted in the absence of domicile where the court has obtained jurisdiction over the defendant, either by his personal appearance or appearance by duly authorized counsel.

Divorces issued by foreign countries stand on different ground from that of sister state divorce decrees. The obligations imposed by the full faith and credit clause do not extend to decrees issued by foreign countries, and when recognition is given to such decrees, it is based on the principles of comity rather than full faith and credit. As a general rule foreign judgments and decrees of divorce are recognized; however, if the procedure or substantive divorce law of the foreign nation is repugnant to the public policy of the state then recognition is denied. Thus a foreign divorce will not be recognized where it was obtained under circumstances which offend the public policy of the state wherein recognition is sought. These public policy considerations take the form of inquiries into the following: whether the foreign court had jurisdiction of the subject matter; the presence of any collusion between the parties, *i.e.*, consensual arrangement; the grounds for divorce existing in the state where recognition is sought and what the ground for divorce was in the particular case; and finally, if the jurisdictional requirements of the state asked to give recognition have been met. Thus the court in *Rosenbaum v. Rosenbaum*, stated that "under comity—as contrasted with full faith and credit—our courts have power to deny even prima facie validity to the judgments of foreign countries for policy reasons, despite whatever allegations of jurisdiction may appear on the face of such foreign judgments."[24]

Of the four jurisdictions which have been confronted with the issue in the *Rosenstiel* case—New York, New Jersey, New Mexico, and Ohio—three have declared this type of divorce to be absolutely void. New York is presently the only state to give recognition to the Mexican "bilateral" divorce decree.

In the Ohio case of *Bobala v. Bobala*,[25] the husband instituted divorce proceedings in Chihuahua and obtained a divorce. The wife appeared through duly authorized counsel to contest the divorce and when her appeal was denied after having lost on the merits, she brought suit for divorce in Ohio. As the Mexican court had only dissolved the marriage contract, the purpose of her divorce suit in Ohio was to obtain an award of support and maintenance for herself and her child. The Ohio Supreme Court said, "Jurisdiction is prescribed by law and cannot be increased or diminished by the consent of the parties, and where there is want of jurisdiction of the subject matter a judgment is void. . . . It cannot be doubted that if the Mexican court, because of the nonresidence of the appellant, had no jurisdiction, the decree could in no case affect the marriage status of these parties in Ohio."[26] Here, because

[24] Rosenbaum v. Rosenbaum, 309 N.Y. 371, 375 130 N.E.2d 902, 903 (1955).

[25] 68 Ohio App. 63, 33 N.E.2d 845 (1940).

[26] *Id.* at 71, 33 N.E.2d at 849. When Ohio speaks of residence, the concept is

there was no residence by either party in Chihuahua, the Ohio Supreme Court determined that the Mexican court was without jurisdiction to grant the divorce. The wife's Ohio divorce decree was accordingly upheld.

The Supreme Court of New Mexico, in the case of *Golden v. Golden*,[27] when presented with a situation similar to that in *Bobala*, arrived at a similar finding. There the husband and wife drove from their home in Tucumcari, New Mexico to Juarez, Mexico. A Mexican attorney handled the entire affair, neither party at any time being required to appear for the purpose of sworn testimony. Within a few hours after their arrival they had their divorce papers and were on their way back to Tucumcari. The highest court of New Mexico refused to recognize the divorce because of the absence of domicile in Mexico on the part of either party. The court held that "neither of the parties had established a 'residence' in Juarez, under any known definition of residence. They went to Juarez, Mex., for one sole purpose, to secure a decree of divorce and then depart."[28]

Prior to New York, the most recent examination of this issue was by New Jersey in the case of *Warrender v. Warrender*,[29] decided in 1963. Husband and wife were domiciliaries of New Jersey. Plaintiff-wife flew down to Chihuahua and instituted divorce proceedings in which her husband appeared through counsel. She obtained a divorce on the day she arrived and flew back the next. The New Jersey court treated the decree as absolutely void since there was, in fact, no residence or domicile shown.[30]

New York, as indicated by *Rosenstiel*, has taken a more liberal attitude with regard to jurisdictional requirements. Since the case of *Leviton v. Leviton*,[31] in 1938, if a Mexican divorce decree has been issued under circumstances where the court had personal jurisdiction of the parties, the decree is given recognition by New York courts. This judicial policy with

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synonymous with that of domicile. "The word 'resident' . . . means one who possesses a domiciliary residence, a residence accompanied by an intention to make the State of Ohio a permanent home. A temporary residence, no matter how long it may be extended, does not meet the requirements of such statute." Saalfeld v. Saalfeld, 86 Ohio App. 225, 89 N.E.2d 165, 166 (1949).

It must be noted that in the *Bobala* case the wife personally appeared in the Mexican divorce proceedings to contest the action. The court however adhered to its domicile requirement and refused to recognize the foreign decree—despite the fact that plaintiff had contested the action in Mexico.

[27] 41 N.M. 356, 68 P.2d 928 (1937).

[28] *Id.* at 364, 68 P.2d at 933. By the term "residence," New Mexico contemplates a residence of a permanent and fixed character, as actual residence substantially like that attributable to the term domicile. The phrase "actual resident in good faith" as used in the divorce statute does not mean one who resides in the state for the time being, but one who has a residence of "a permanent and fixed character, a domicile." Allen v. Allen, 52 N.M. 174, 178, 194 P.2d 271, 273 (1948).

[29] 79 N.J. Super. 114, 190 A.2d 684 (App. Div. 1963), *aff'd*, 42 N.J. 287, 200 A.2d 123 (1964).

[30] *Id.* at 123, 190 A.2d at 689.

[31] 6 N.Y.S.2d 535 (Sup. Ct. 1938).

respect to Mexican divorces appears to be inconsistent with the state's restrictive domestic divorce policy. New York recognizes only one ground for divorce, *i.e.*, adultery, and even this must be proved by third-party testimony.[32]

This apparent inconsistency, however, may be explained in several ways. First, this decision is consistent with the recent Supreme Court decisions respecting sister state divorce cases.[33] As indicated earlier, the concern seems to be safeguarding the interests of the parties involved in litigation, in requiring that due process be accorded each party. If each party is given a full opportunity to contest the issues in a case, then each party's interest has been protected and the requirements of due process have been met. This judgment will then be accorded full faith and credit—irrespective of domicile. These same safeguards are present in the Mexican "bilateral" decree. Before New York will recognize a Mexican divorce, the defendant must appear in the action, either personally or by duly authorized counsel; thus, he is given a full opportunity to litigate the issues and is guaranteed due process. In this respect, New York is consistent with current judicial policy, whereas Ohio, New Jersey, and New Mexico are out of step. These states must give recognition to sister state decrees under similar circumstances and it would only be consistent to follow this policy in cases of foreign divorce, as New York has. It is true that a state does not have to recognize a foreign judgment under these circumstances, yet not to do so, when so required if presented with a similar decree from a sister state, only complicates the law of divorce.

A second explanation for the decision in this case may relate to a recent highly publicized study being conducted by the New York Legislature. The Joint Legislative Committee on Matrimonial and Family Laws is currently considering proposals for a modern matrimonial statute to be introduced in the 1966 session of the legislature,[34] and it is possible that one of the more liberal divorce statutes in the country may be the product of this study. It is probable that this was considered by the court and, in some part, affected the *Rosenstiel* decision.

If the underlying consideration in divorce litigation is safeguarding the interests of the parties involved through the requirements of due process, then the decision in the principle case and the New York courts are in step with current judicial policy. The courts of Ohio, New Jersey, and New Mexico, in applying the questionable test of domicile, have yet to recognize the due process justification for upholding a foreign divorce decree.

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[32] N.Y. Dom. Rel. Law § 170.

[33] See cases cited at *supra* note 16.

[34] These proposals purportedly relate to (a) aid in the reconciliation of married couples seeking divorces, (b) additional substantive grounds for divorce, and (c) minors. N.Y. Times, Oct. 28, 1965, p. 45, col. 1.