Land & Water Law Review

Volume 1 | Issue 1 Article 9

January 1966

# Judicial Separation

Jack A. Holst

# JUDICIAL SEPARATION*

A judicial separation, also known as a divorce *a mensa et thoro,* legal separation and limited divorce "does not remove the vinculum of marriage as does an absolute divorce."[1] The marriage ties remain. The parties cannot marry again under the decree, nor do they have to remarry to return to their original married status. The rights, duties and obligations which accompany marriage all remain, except those which are withdrawn by the decree.[2] The decree itself withdraws the duty, in fact the legal right to demand cohabitation;[3] however, the parties remain husband and wife.[4] This new limited divorce differs from a mere separation agreement in that the latter represents only a voluntary act of the parties, while the former puts a formal, judicial stamp of approval on an existing separation. The judgment becomes the measure of the rights and duties of the marriage.[5] Generally, it is a mere authorization to discontinue cohabitation for an indefinite time.[6] It entitles the successful party to live apart from the offending spouse without concern of later reprisals for desertion.[7]

## HISTORY

Divorce from bed and board was originally a product of the Roman Catholic Church which found its way into the divorce law after the Council of Trent, in 1563, proclaimed that a consummated marriage was indissoluble. The Church, however, recognized that one spouse might commit such a serious offense against the other that cohabitation would be intolerable. Thus, the institution of limited divorce, when the parties separated under official sanction but remained husband and wife, came into being.[8]

The limited divorce was finally introduced in England and became part of its ecclesiastical law. The time it was in-

* Wyo. Laws 1965, ch. 122, § 1-4, WYO. STAT. §§ 20-47.1 to .4 (Supp. 1965).
1. McWilliams v. McWilliams, 216 Ala. 16, 112 So. 318, 319 (1927).
2. Drake v. Drake, 262 Ala. 609, 80 So. 2d 268, 270 (1955).
3. Scholz v. Scholz, 172 Neb. 184, 109 N.W.2d 156, 159 (1961).
4. Drake v. Drake, *supra* note 2.
5. See generally 27A C.J.S. *Absolute and Limited Divorce* § 160 (1959) for a discussion of the characteristics of a limited divorce.
6. Williams v. Williams, 33 Ariz. 367, 265 Pac. 87, 90, 61 A.L.R. 1264 (1928).
7. Darden v. Darden, 249 Ala. 551, 29 So. 2d 409 (1947).
8. 1 BISHOP, MARRIAGE AND DIVORCE §§ 23-30 (6th ed. 1881).

troduced is not certain, but it was recognized in the Canon Law in 1603. Canons 107 and 108 required the party bringing the action for limited divorce to post bond in guaranty that he or she would not marry again while separated.[9]

Being ecclesiastical law, it was not adopted as common law in any of the United States and is purely statutory today. There are thirty states, including Wyoming, that have statutes which provide for a limited divorce.[10]

## THE NEW LAW

This new addition to Wyoming's divorce law is contained in four sections.[11] The new statutes are mere additions to the present statutory divorce law neither amending nor repealing existing laws.

The first section deals with the circumstances under which an action for judicial separation will lie and the manner of beginning the proceeding. This section provides that when any grounds for absolute divorce exist, the party may, instead of praying for an absolute divorce, pray that he or she be allowed to live separate and apart from the offending party. The one seeking the judicial separation institutes the proceeding in the same manner as does a person seeking an absolute divorce under existing Wyoming Law.[12]

The second section of the act provides that an absolute divorce may be sought after a decree of judicial separation has been issued. One who later desires an absolute divorce may seek that remedy on any grounds for divorce that existed at the time the judicial separation decree was issued and, with two exceptions, upon any ground which thereafter accrues. These exceptions, desertion and two-year separation, can be used for a later absolute divorce only if they existed before the rendering of the decree of judicial separation.[13]

9. 2 BISHOP, MARRIAGE AND DIVORCE § 728 (6th ed. 1881).
10. The states today which have limited divorce in some form are: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Hawaii, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin and Wyoming.
11. WYO. STAT. §§ 20-47.1 to .4 (Supp. 1965).
12. WYO. STAT. § 20-47.1 (Supp. 1965).
13. WYO. STAT. § 20-47.2 (Supp. 1965).

The third section provides that the same procedure shall be followed as though one were seeking an absolute divorce. The court is given the power to render the same decrees which are available in absolute divorce, including property division, and it is also within the discretion of the court to make the legal separation perpetual or for a limited period of time. The parties may at any time move the court to be discharged from the decree.[14]

The last section provides that the same defenses shall be available in an action for judicial separation as are available in an action for absolute divorce.[15]

### PURPOSE AND EFFECT

The purported purpose of the legislation is to allow the injured party to obtain relief while still giving the offending party an opportunity to make amends and re-establish the marriage.[16] The subject matter dealt with in the judgment may be so extensive as to approach that of an absolute divorce, but if reconciliation takes place the parties need only have the court vacate the decree, on motion, to resume normal legal marital relations. Since the decree does not operate as a cancellation of the marriage itself, it does not preclude the parties from resuming the marital relation without a second ceremony;[17] however, subsequent cohabitation alone will not render the decree a nullity. Before this legislation was enacted, the only legal means of relief, other than absolute divorce, was an action for separate maintenance. The new remedy is a marked departure from the decree of separate maintenance under which resumption of normal married life usually abrogates the decree without further judicial action.[18]

Generally, where the statutes provide the method by which the parties may have the decree of judicial separation vacated, nothing short of such action will suffice to render it a nullity.[19] Thus, the decree will not be altered by mere

14. WYO. STAT. § 20-47.3 (Supp. 1965).
15. WYO. STAT. § 20-47.4 (Supp. 1965).
16. Letter from Hugh M. Duncan, the drafter of the bill, dated October 8, 1965. Mr. Duncan was an Assistant Senate Attorney during the 1965 session of the Legislature.
17. *In re* Smith's Estate, 243 App. Div. 348, 276 N.Y. Supp. 646, 650 (1935).
18. Van Dolman v. Van Dolman, 378 Ill. 98, 37 N.E.2d 850, 853 (1941).
19. See 27A C.J.S. *Grounds for Relief* § 169 (1959) for material relating to termination of a limited divorce decree.

reconciliation and resumption of married life because the new Wyoming statute provides that the parties must submit a written declaration to the court to have the decree vacated.[20] The Arizona statute is similar to that of Wyoming and contemplates joint application for nullifying the decree.[21] The Arizona Supreme Court has held that nothing short of such joint application will effectuate nullification of the decree.[22] New Jersey's similar statute was formulated on the same premise of joint application for any nullification of the decree.[23] The statute was the product of early New Jersey case law which, in applying New York law, held that a decree of judicial separation remains in effect notwithstanding temporary reconciliation and cohabitation.[24]

Wyoming's new statute contemplates a motion by both parties to be discharged from the decree.[25] It appears that nothing short of such action will suffice. The only exception under this statute would be the expiration of the time limit of the decree if the separation is decreed for a limited duration.

### ADVANTAGES AND DISADVANTAGES

The decree of judicial separation has certain qualities that are absent in the decrees of absolute divorce and separate maintenance. These qualities may increase attempts at saving broken marriages, or at least afford the opportunity if the parties so elect.

While such a decree is in effect, the parties concerned are free to attempt a reconciliation without the non-offending spouse being guilty of condonation and thus precluding a later action for absolute divorce. This is given its efficacy by two principles. First, nothing short of action by the court can alter the decree, therefore if the attempt fails, the party may still rely on the original decree of limited divorce. Secondly, the statute explicitly provides that any grounds for

20. Paille v. Paille, 91 N.H. 249, 17 A.2d 445, 448 (1941).
21. ARIZ. REV. STAT. ANN. § 25-333(c) (1956).
22. Williams v. Williams, *supra* note 6, at 89.
23. N. J. REV. STAT. § 2A:34-5 (1951).
24. Jones v. Jones, 29 Atl. 502, 503 (N.J. Ch. 1894).
25. WYO. STAT. § 20-47.3 (Supp. 1965).

divorce existing at the time the decree was rendered remain as valid grounds for a later action for absolute divorce.[26]

This quality is not without its antithetical aspect however. It not only allows the offended spouse to seek a divorce later without fear of the defense of condonation if an attempted reconciliation has failed, but it also allows the same spouse to again separate and bring an action for divorce even if the attempt by the party at fault was sincere and his or her ways were completely mended. The second separation might be at the mere whim or caprice of the originally offended spouse and still receive court protection.

There is another aspect of the new remedy that provides added protection for the injured spouse. The injured spouse may refuse an offer from the offending spouse to mend his or her ways and reconcile without being guilty of constructive desertion.[27] The decree itself is a measure of the duties of the parties, and under the decree there is no duty or right to cohabitation.[28] The separation may be maintained under legal protection. This differs substantially from a mere decree of separate maintenance, where it is possible for the non-offending spouse to be guilty of constructive desertion if he or she continues to live apart after there has been a bona fide offer to mend ways and resume cohabitation.[29] Thus, a wife who chooses to get a separate maintenance decree instead of a limited divorce does so at the peril of being obliged to accept such an offer or be put in the position of a deserting wife.[30] Wyoming, in addition to the effect of the decree itself, expressly eliminates the ground of desertion from arising as a ground for absolute divorce after the decree of judicial separation has been rendered.[31] Desertion under such circumstances becomes a legal impossibility.[32]

This "quality," as stated above, is not without reproach. The purported purpose of the law is to aid in reconciliation. If this is true, the question arises whether a party should

26. WYO. STAT. § 20-47.2 (Supp. 1965).
27. Darden v. Darden, *supra* note 7, at 410.
28. Scholz v. Schloz, *supra* note 3.
29. Malouf v. Malouf, 54 Wyo. 233, 90 P.2d 277 (1939) citing Rylee v. Rylee, 142 Miss. 832, 108 So. 161 (1926).
30. 35 CALIF. L. REV. 154, 156 (1947).
31. WYO. STAT. § 20-47.2 (Supp. 1965).
32. Boger v. Boger, 86 W.Va. 590, 104 S.E. 49, 50 (1920).

be allowed to refuse or ignore a bona fide offer to reconcile. If answered in the negative, it would appear to be in derogation of the alleged purpose of the new law; however, under the judicial separation law of Wyoming, this is not only permitted, but court protected. The separate maintenance remedy gives one spouse the power to force a reconciliation upon the unwilling spouse, under penalty of becoming guilty of desertion. The philosophy of the limited divorce, on the other hand, is that it takes mutual consent to bring about a reconciliation.

An advantage stemming from the survival of the decree during attempted reconciliation is the co-survival of the support provisions. Reconciliation and resumption of marital relations abrogate a prior decree of separate maintenance,[33] but they do not affect such provisions in a judicial separation. Thus, a wife can perform her part of an attempt to save the marriage and need not take further legal action for support if the attempt fails and she again desires to live apart from her spouse. The wife, however, is precluded from demanding payments due under the decree which accrue during the period of cohabitation.[34]

The survival of support provisions after failure of an attempt to reconcile also has its ominous side. It appears that it might have an adverse affect on the motive or sincerity of an attempt at reconciliation, the spouse knowing that if it fails, no further legal action need be taken to return to the original separated status.

## VARIATIONS

There are two different classes of statutes that provide both limited divorce and absolute divorce. One allows judicial separation for grounds less severe than for an absolute divorce, or at least provides different or enumerated grounds.[35] The other, like Wyoming's contemplates the same

33. Van Dolman v. Van Dolman, *supra* note 18.
34. Sommer v. Sommer, 248 App. Div. 827, 289 N.Y. Supp. 18 (1936).
35. DEL. CODE ANN. tit. 13, § 1521 (1953); D. C. CODE ANN. § 16-403 (1961); IND. ANN. STAT. § 3-1230 (1946); LA. CIV. CODE art. 138 (Dainow 1961); ME. REV. STAT. ANN. tit. 19, § 581, 582 (1964); MD. ANN. CODE art. 16, § 25 (1957); MASS. ANN. LAWS ch. 208, § 20A and ch. 209, § 32 (1955) (in essence provide for a legal separation); MICH. STAT. ANN. § 25.87

grounds and same action for a limited divorce as for an absolute divorce.[36] This has the effect, in Wyoming, of giving the petitioners a mere election as to remedy. Since the grounds for a judicial separation are the same as for an absolute divorce, the proof requirements also remain the same, even though the remedy is of a different nature.[37]

There are two other major variations in statutory law in the states allowing limited divorce on the same grounds, but in lieu of absolute divorce. Arizona allows a limited divorce not only on the same grounds as an absolute divorce, but on any circumstances the court feels would make cohabitation unsafe.[38] Rhode Island[39] and Kentucky[40] statutes provide the same grounds for limited as absolute divorce, plus any other grounds the court deems sufficient. Provisions of the latter type provide an offended spouse an additional remedy where the misconduct is not sufficient to support an action for absolute divorce and there are no grounds for a support action. This seems to be in keeping with the fact that a limited divorce is less final than an absolute divorce and does not abrogate the marriage. In contrast, under the rigid requirements of the new Wyoming law there is, in essence, no new relief provided. This new legislation merely changes the nature of the old remedy.

The decree may be rendered as perpetual or for a limited time. If perpetual, the only means of nullification is to motion the court to have it vacated or proceed with a new action for absolute divorce. If the decree is issued for a limited time, it will cease to exist at the expiration of that time and the parties will be returned to their original married status.

(1957); NEB. REV. STAT. § 42-302 (1943); N.J. REV. STAT. § 2A:34-2 (1951); N.M. STAT. ANN. § 22-7-2 (1953); N.Y. DOM. REL. LAW § 200; N.C. GEN. STAT. § 50-7 (1950); ORE. REV. STAT. § 107.210 (1963); PA. STAT. ANN. tit. 23, § 11 (1955); TENN. CODE ANN. § 36-802 (1955); VA. CODE ANN. § 20-95 (1950).

36. ALA. CODE tit. 34 § 36 (1958); ARIZ. REV. STAT. ANN. § 25-332 (1956); ARK. STAT. ANN. § 34-1202 (1947); CONN. GEN. STAT. REV. § 46-29 (1958); HAWAII REV. LAWS § 324-60 (1955); KY. REV. STAT. § 403.050 (1962); MONT. REV. CODES ANN. § 21-103 (1947); N.H. REV. STAT. ANN. § 458:26 (1955); N.D. CENT. CODE § 14-06-01 (1960); R.I. GEN. LAWS ANN. § 15-5-9 (1956); VT. STAT. ANN. tit. 15, § 554 (1958); WIS. STAT. § 247.07 (1963); WYO. STAT. § 20-47.1 (Supp. 1965).
37. Caine v. Caine, 262 Ala. 454, 79 So.2d 546, 548 (1955).
38. ARIZ. REV. STAT. ANN. § 25-332 (1956).
39. R.I. GEN. LAWS ANN. § 15-5-9 (1956).
40. KY. REV. STAT. § 403.050 (1962).

Under the Wyoming statute the option as to time is left to the discretion of the court.[41] Of the thirteen states providing judicial separation on the same grounds as divorce,[42] four provide a similar perpetual or limited option.[43] The others, with one exception, are silent on the subject, eliminating the power of the court to decree a judicial separation for a limited time.[44] The exception is Hawaii, where a limited divorce can be decreed for a maximum of two years.[45]

In one of the four states providing an option as to time limit of the decree, the power of the option is vested in the court as it is in Wyoming.[46]

### PROPERTY DIVISION

Wyoming's new statute gives the court the power to make any decree of property division upon granting a limited divorce.[47] This, of course, is an anomaly to common law. Where the common law is in force a limited divorce does not change the property rights of the parties.[48] Unless the statute or decree provides otherwise the property rights and interests of the parties usually remain unchanged.[49] Since a limited divorce does not remove the vinculum of marriage, the spouses' inheritance rights and homestead rights remain.[50] In light of a later reconciliation a large property division could be quite cumbersome. Generally when a limited divorce is annulled because of reconciliation, all the decrees are annulled except for property division.[51] If the separation were to remain perpetual, the property division might prove to be unjust and burdensome in view of the spouses' remaining rights.

A few states have considered the property aspect specifically in their judicial separation statutes instead of using a mere incorporation by reference of absolute divorce pro-

41. WYO. STAT. § 20-47.3 (Supp. 1965).
42. See statutes cited noted 36 *supra.*
43. Arizona, North Dakota, Vermont and Wisconsin.
44. Alabama, Arkansas, Connecticut, Kentucky, Montana, New Hampshire and Rhode Island.
45. HAWAII REV. LAWS § 324-60 (1955).
46. WIS. STAT. § 247.07 (1963).
47. WYO. STAT. § 20-47.3 (Supp. 1965).
48. Rudin v. Rudin, 104 N.J.Eq. 524, 146 Atl. 351, 352 (1929).
49. *Ibid.*
50. McWilliams v. McWilliams, *supra* note 1.
51. Paille v. Paille, 91 N.H. 249, 17 A.2d 445, 448 (1941).

visions. Arizona's statute provides for support out of the husband's property, but does not contemplate division,[52] and Rhode Island's provides that support may be assigned out of the property or estate as necessary.[53] Hawaii's provision is similar.[54] Vermont provides for property division as in an absolute divorce,[55] but also provides that the laws of descent applicable to absolute divorce shall apply.[56] Wisconsin provides that, if there is a final division of property in a legal separation, dower and curtesy rights will be relinquished.[57] In absence of such a provision, however, the spouses' property rights remain unchanged. The effect of the wife electing a perpetual limited divorce is an election to retain interest in the husband's estate if he predeceases her and the right to share and participate in division of his personal property and homestead.[58] Even where statutes authorize final property division, some courts have used restraint in exercising the power in view of the dynamic character of the decree of limited divorce. In Nebraska, for example, where the court also has power to make a permanent property division,[59] it has been held that property interests in a limited divorce will not be adjusted any further than is necessary to effect a proper separation under the facts.[60] This judicial restraint seems wise.

The argument is that a separation agreement does not establish a permanent status of the parties, and thus permanent property division should be declined.[61] The Wyoming legislature recognized the unchanged status in a separation and did not provide permanent property division under its separate maintenance law,[62] nor did the courts desire to furnish it by interpretation.[63] Similarly, a limited divorce does

52. ARIZ. REV. STAT. ANN. § 25-333(B) (1956).
53. R.I. GEN. LAWS ANN. § 15-5-9 (1956); Accardi v. Accardi, 197 A.2d 755, 758 (R.I. 1964). (Statute held not to create a charge on the husband's property).
54. HAWAII REV. LAWS § 324-63 (1955).
55. VT. STAT. ANN. tit. 15, § 556 (1958).
56. VT. STAT. ANN. tit. 15, § 753 (1958).
57. WIS. STAT. § 247.36 (1963).
58. Adair v. Adair, 258 Ala. 293, 62 So.2d. 437, 443 (1952).
59. NEB. REV. STAT. § 42-302 (1943).
60. Scholz v. Scholz, *supra* note 3.
61. Doole v. Doole, 144 Mass. 278, 10 N.E. 811, 814 (1887).
62. WYO. STAT. § 20-36 (1957).
63. Brown v. Brown, 23 Wyo. 1, 146 Pac. 231, 233 (1915).

not effectuate a permanent status of the parties, but under Wyoming statute a permanent property division is within the power of the court.

### VACATE OR MERGER

The Wyoming statute provides a method whereby the decree may be vacated, but it does not provide a means for merging the decree into one of absolute divorce in event the alleged purpose of reconciliation fails.[64] It appears that a new action must be initiated. Since the allegations have once been proved and the action once litigated under the same requirements as for an absolute divorce, it would appear sensible that the parties might, by mere motion, have the decree merged into one for absolute divorce. Such merger might even be automatic after a certain specified time, as in the case of interlocutory decrees.

Of the thirteen states providing a limited decree in lieu of the absolute, for the same grounds and in the same type of action,[65] five have provided for such a contingency. Alabama provides that either party may petition the court to have the decree made absolute if the parties have lived under the limited decree and apart for four years.[66] Wisconsin requires five years and a similar petition.[67] Connecticut provides for the merger of a limited decree into one of absolute divorce on petition of either party and proof that there has been no reconciliation, no time limit being required.[68] Kentucky provides for a merger, again with no time limit, upon joint application of the parties similar to Wyoming's provision for motion to vacate.[69] Hawaii, which limits a judicial separation to two years, provides that upon expiration of that time either party may, upon application and proof of no reconciliation, have the decree merged into one for absolute divorce.[70] Such provisions for merger are in keeping with the idea that one of the purposes of the limited divorce

64. WYO. STAT. § 20-47.3 (Supp. 1965).
65. See statutes cited note 36 *supra*.
66. ALA. CODE tit. 34 § 22(1) (1958).
67. WIS. STAT. § 247-07 (1963).
68. CONN. GEN. STAT. REV. § 46-30 (1958).
69. KY. REV. STAT. § 403.050 (1962).
70. HAWAII REV. LAWS § 324-80 (1955).

is to provide a remedy for an aggrieved party while still keeping the doors of forgiveness open, but that the decree itself is unsavory as a permanent remedy.

## CONCLUSION

Whether the new judicial separation law will serve its purported purpose of encouraging attempts at reconciliation must be determined by time. It has been shown that many features might aid accomplishment of this purpose. These are: (1) the parties are free to attempt reconciliation without fear of being accused of condonation; (2) the offended party is free to leave the other spouse if an attempt to reconcile fails, without fear of being accused of desertion; (3) the original grounds of divorce will survive the decree for a later action for absolute divorce if the marriage is irreparable; (4) if an attempt to reconcile fails, no further litigation is necessary to reacquire the benefits of the original decree; (5) no new ceremony is required to place the parties back in their original married status, as they need only to have the court vacate the decree; and, (6) the power of the court is practically unlimited and any degree of relief may be ordered by the court.

It has also been shown, however, that there are certain latent features which are not quite so appealing. Those most obvious are: (1) the originally offended spouse may cohabit intermittently at his or her will without fear of reprisals of desertion under sanction of the court; (2) the offended spouse may refuse a bona fide offer of reconciliation under the protection of the decree; and, (3) the property rights as to descent remain unchanged, yet the court may impose any property division at its discretion. Whether these features outweigh those of value is a matter of conjecture.

There is a line of thought severely questioning the limited divorce as a remedy for domestic strife. It has been professed that a limited divorce is inherently against social policy and betterment. The remedy has been considered hazardous to the morals of the parties as it places them back upon society as a husband without a wife and a wife without a husband.[71]

71. KEEZER, MARRIAGE AND DIVORCE 305, 306 (Morland 3d ed. 1946).

"[I]t places them [the parties] in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity, or more virtue than generally falls to the share of human beings."[72] Another author has put it that, "A limited divorce makes them dead to each other and a menace to society."[73] This line of thought undoubtedly holds some truth.

Wyoming's new judicial separation law leaves little room for interpretation. The petition, action, grounds, defenses and the powers of the court are, by reference, identical to those of the absolute divorce. Two major additions were made to complete the scheme of judicial separation: (1) the grounds upon which a limited divorce is granted are preserved for a later action for absolute divorce and (2) the parties are given the right to have the divorce decree nullified.

Presently there are no recorded cases on judicial separation in Wyoming.

JACK A. HOLST

72. Mr. Justice Swift in Swift's System of Laws (Conn.) 193 as cited in KEEZER, MARRIAGE AND DIVORCE 306, (Morland 3d ed. 1946).
73. 43 KY. L.J. 322, 324 (1955).