Wyoming Law Journal

Volume 2 | Number 2 Article 6

December 2019

Divorce on the Ground of Living Apart

Charles G. Kepler

RECENT CASES

DIVORCE ON THE GROUND OF LIVING APART

In an action for divorce on the grounds of living apart for two consecutive years without cohabitation the trial court denied the petition. On appeal the Wyoming Supreme Court found sufficient evidence to reverse the trial court and order a decree of divorce. The 1939 Wyoming Legislature had provided that a divorce might be obtained where the "husband and wife have lived apart for two consecutive years without cohabitation".[1] This was amended in 1941 by adding "but not upon such grounds if such separation has been induced or justified by cause chargeable in whole or material part to the party seeking divorce".[2] *Held,* "that the fault of the plaintiff is the nature of an exception which must be proven by the defendant". *Dawson v. Dawson,* 177 P. (2d) 200 (Wyo. 1947).[3]

The *Dawson* case calls attention to a relatively new and extremely liberal ground for divorce. Although similar statutes have existed in a few states for many year,[4] it has been only recently that any sizeable number of states have had such provisions.[5] The social policy motivating these statutes is a comparatively new concept in divorce law.[6] It is declared that the better interests of both the parties and the state are served to legally end marriages that have ceased in fact to exist.[7] In spite of a general accord of the social policy behind the statutes, the variations in form and inconsistency of interpretations manifest the disagreement as to the extent this policy should be carried. The main contention centers on whether the grounds should be available to both spouses or limited to the so-called innocent party.

---

1. Wyo. Sess. Laws 1939 c. 106.
2. Wyo. Sess. Laws 1941 c. 2; See Wyo. Comp. Stat. 1945 sec. 3-5906 for statute as amended.
3. In the trial court the plaintiff (the husband) based his case on (1) indignities that rendered his condition intolerable and (2) living apart for more than two years. The trial court denied the divorce on the grounds that the allegations in the petition were not corroborated as required by law. The Supreme Court pointed out that if the ruling were under Wyo. Comp. Stat. 1945 sec. 3-5906 that it did not expressly require corroboration of testimony and in the absence of such specific requirement that it is only a rule of practice and not inflexible to require corroboration of testimony. In overruling the trial court the Supreme Court relied heavily on the fact that both parties testified to the separation existing for over eight years and accordingly was fully proven.
4. Davis v. Davis, 102 Ky. 440, 43 S. W. 168, 39 L. R. A. (1897); N. C. Consol. Stat. 1919 sec. 1659.
5. 2 Vernier, American Family Laws 70 (1st. ed. 1932) lists only seven states as of January 1, 1931. Rodell, *Divorce Muddle,* Life p. 80 (Sept. 3, 1945) lists sixteen states and the District of Columbia. Keezer, Marriage and Divorce sec. 455 (3rd ed. 1946) lists nineteen states, the District of Columbia and Puerto Rico a total of twenty-one jurisdictions.
6. Herrick v. Herrick, 55 Nev. 59, 25 P. (2d) 378 (1933); See Note, 51 A. L. R. 763 (1927).
   2 Vernier, American Family Laws 65 (1st ed. 1932) points out that in reality these statutes permit divorce for incompatibility of temper but are confined to such cases where the parties are unable to live together happily after a bona fide effort extending over a reasonable time.
7. Dawson v. Dawson, 177 P. (2d) 200 (Wyo. 1947); Jegendorf v. Jegendorf, 157 P. (2d) 280 (Wyo. 1945); Rozboril v. Rozboril, 60 Ariz. 247, 135 P. (2d) 221 (1943); Otis v. Bahan, 209 La. 1082; 26 So. (2d) 146, 166 A. L. R. 498 (1946); Keezer, Marriage and Divorce sec. 455 (3rd ed. 1946); See Notes, 97 A. L. R. 986 (1935); 111 A. L. R. 867 (1937); 166 A. L. R. 498 (1947).

A few courts have limited the action to the party not at fault.[8] These decesions are predicated on a reluctance to permit the party at fault to take advantage of his own wrong.[9] The majority of courts, however, have construed the statutes to permit either party to sue.[10] This construction is justified on the policy giving birth to the statutes.[11] If the marriage has ceased to exist in fact and the parties are irreconcilable (presumed after the statutory period of separation), it makes little difference at whose feet the blame lies; society is benefited to legally end it. In a few instances the state legislatures have relieved the courts of this decision by permitting or denying the party at fault to sue.[12] The construction Wyoming might have placed on the 1939 act is unanswered since the Supreme Court has never ruled under it. The 1941 amendment limiting the action to the party not chargeable in whole or material part for the separation presumably avoids this controversy. A close reading of the statute would certainly seem to place Wyoming with the minority. However, the only two decisions interpreting the amendment renders this conclusion doubtful.

The first case, *Jegendorf v. Jegendorf*,[13] decided in 1945, held, that the cause of separation in the 1941 amendment did not refer to other grounds of divorce already existent in the state, but was a question to be determined by the trial court in the exercise of sound discretion and after considering all the circumstances. The reported case leaves the impression: that this separation was caused more by the incompatibility of both of the parties than it was by the conduct of either alone; that the plaintiff's conduct at the best was a contributing factor acusing the separation; that her failing health was about all she possessed to recommend her innocence to the court.[14] The court decided the evidence (that the plaintiff's health was endangered by a further continuance of the marital

8. Campbell v. Campbell, 174 Md. 229, 198 Atl. 414, 116 A. L. R. 939 (1938); Pharr v. Pharr, 223 N. C. 115, 25 S. E. (2d) 471 (1943); McGarry v. McGarry, 181 Wash. 689, 44 P. (2d) 816 (1935); Jakubhe v. Jakubhe, 125 Wis. 635, 104 N .W. 704 (1905).
9. The doctrine of recrimination enters into these dicesions to a large extent. Pharr v. Pharr, 223 N. C. 115, 25 S. E. (2d) 471 (1943); See Note, 17 Am. Jur. 231 (1938).
10. Knabe v. Berman, 234 Ala. 433, 175 So. 354, 111 A. L. R. 864 (1937); Ryland v. Ryland, 174 P. (2d) 741 (Ariz. 1946); Larsen v. Larsen, 207 Ark. 543, 181 S. W. (2d) 683 (1944); Parks v. Parks, 116 F. (2d) 556 (App. D. C. 1940); Colston v. Colston, 297 Ky. 250, 179 S. W. (2d) 893 (1944); Otis v. Baham, 209 La. 1082, 26 So. (2d) 146, 166 A. L. R. 494 (1946); Gerdts v. Gerdts, 196 Minn. 599, 265 N. W. 811 (1936); Kohlsaat v. Kohlsaat, 62 Nev. 485, 155 P. (2d) 474 (1945); Root v. Root, 57 R. I. 436, 190 Atl. 450 (1937).
11. "Not to punish vice or reward virtue, but to permit termination of marriages that have ceased to exist in fact." Buford v. Buford, 156 F. (2d) 567 (App. D. C. 1946).
12. Ark Digest Stat. 1945 Supp. sec. 4381 (follows majority) N. H. Pub. Laws 1926 c. 287 par. 6; Ver. Pub. Laws 1941 par. 3117; Wyo. Comp. Stat. 1945 sec. 3-5906 (follow minority. New Hampshire and Vermont have no interpretations on the statute from the court of last resort.)
13. 157 P. (2d) 280 (Wyo. 1945).
14. "While the immediate cause of the separation was a disagreement concerning an apparently trivial matter yet during the whole eight years of their married life her testimony was that she was miserable; that she and her husband were not compatible in the more intimate associations of married life; that the results of it all was that her health failed and she suffered a nervous breakdown; that it became absolutely necessary for her to submit herself to a doctor's care and treatment. (This was corroborated by a medical practioner.) If the health of one of the parties to the marital tie is jeopardized by longer continuance thereof, and after eight years of endeavor to make a success of the relationship we see nothing amiss in a conclusion on the part of the trier of fact that the parties whose health is thus affected was not at fault in withdrawing from cohabitation." 157 P. (2d) 280, 283 (Wyo. 1945).

relations) was sufficient to support the finding that the plaintiff was not the cause of the separation within the meaning of the amendment. Although this was a liberal view as to the sufficiency of the evidence to sustain the burden of proof, there was no indication by the court that the burden was elsewhere than with the plaintiff. The decision hardly pointed the way to the *Dawson* case.

In the instant case the Wyoming Court was guided in its conclusion by *Pierce v. Pierce,*[15] a Washington decision. In 1893 the Washington Court had determined that their statute permitted only the innocent spouse to sue.[16] In 1921 the legislature changed the statute by adding, "In all such cases, the divorce may be granted on the application of either husband or wife and either husband or wife shall be considered the injured party. . . ." The Washington Court held the amendment to be nothing more than a rule of prima facie proof so that the plaintiff need only plead and show that there has been a separation for a period of more than five years.[17] The Wyoming Court concluded that since our statute was meant to liberalize the grounds for divorce that they would not be justified in making a stricter interpretation than did the Washington Court. It is interesting to note that the courts in the two cases are dealing with what appear to be antithetical amendments yet they reach the same results. As has already been pointed out the Wyoming Court held on this point that "the fault of the plaintiff is the nature of an exception which must be proven by the defendant." Since the District Court had failed to determine the issue from this light the Supreme Court decided that the defendant's testimony (that the plainiff was a "perfect husband") did not sustain this burden of proof and that the plaintiff was therefore not the cause of the separation within the meaning of the statute.[18]

---

15. 120 Wash. 411, 208 Pac. 49 (1922).
16. McDougall v. McDougall, 5 Wash. 802, 32 Pac. 749 (1893); Bickford v. Bickford, 57 Wash. 639, 107 Pac. 837 (1910).
17. Under Wash. Laws 1917 c. 106 which read "Where the parties are estranged and have lived separate and apart for eight years or more and the court shall be satisfied that the parties can no longer live together" the parties may be granted a divorce, these same parties had been denied a divorce on the grounds that the plaintiff was the cause of the separation. Wash. Laws 1921 c. 109 amended the 1917 act to the effect that "A divorce may be granted to either or both parties in all cases where *they heretofore lived or shall hereafter live separate and apart for a period of five* consecutive years or more. In all such cases the divorce may be granted on the application of either husband or wife and either husband or wife shall be considered the injured party and the period of five years or more shall be computed for the time the separation took place." The court decided that the legislature did not intend to permit either party to sue but that it meant to (1) change the law so that the statute would be retroactive in that the period of separation contemplated by the statute did not have to be prospective as indicated in the first Pierce case, and (2) that a rule of prima facie evidence was established to the effect that the plaintiff was presumed to be the injured party.

    But cf. Evans v. Evans, 182 Wash. 297, 46 P. (2d) 730 (1935) (the court found both parties at fault in the separation instead of the plaintiff alone as in the Pierce case).
18. As was noted in footnote one the plaintiff in addition to seeking a divorce on grounds of living apart also relied on indignities that rendered his condition intolerable. He offered evdence (mostly his own testimony) that the defendant brow beat him continually and made life a burden for him. Evidently in rebuttal of this evidence and *these particular grounds the defendant testified that they had never fussed and denied* the disagreements testified to by the plaintiff. She also said, "I had a wonderful husband; he was perfect". It is on this evidence that the court decided the case instead of remanding it for retrial in light of the new interpretation they placed on the statute.

In summing up the *Dawson* case the Supreme Court gives what appears to be the real reason behind the decision. They say, "We are unable to see how the defendant or society will in any way be benefited by denying the plaintiff a divorce. There seems to be no possible hope of any reconciliation. The parties have now been separated for over ten years, either of which apparently with the acquiescence of the defendant. If the aim of the statute is, as has been held, to legally end a marriage which no longer exists in fact, then this, we think, is an appropriate case to carry that aim into effect."[19] This position is reminiscent of the view taken by the majority of courts who find the fault of the plaintiff no bar to the action.

Regardless of whether this decision is termed a misconstruction of the 1941 amendment or not, it places Wyoming in a hazy ground between the majority and the minority views. It no longer would seem necessary for the plaintiff to plead or prove he was not the cause of the separation. Thus in a non-contested case the question of whether the plaintiff was responsible for the separation will not arise, and Wyoming is no different than the state that opening permits either party to sue. Only where the defendant raises the issue and then sustains the burden of proof (which may be difficult in view of the *Jegendorf* case) will Wyoming bar the plaintiff from maintaining the action. Since so few divorces are contested, this would seem to place Wyoming with the majority.

CHARLES G. KEPLER.

APPLICATION OF F.L.S.A. TO PART TIME EMPLOYEES UNDER MOTOR CARRIER ACT

Levinson, an employee whose chief duty was that of a foreman of loaders of freight for a trucking concern which carried freight in interstate commerce, brought action to recover overtime compensation, liquidated damages, and attorney fees under the provisions of the Fair Labor Standards Act of 1938. Recovery was allowed in the Municipal Court of Chicago. On appeal the Appelate Court of Illinois reversed the judgment.[1] The Supreme Court of Illinois affirmed[2] and the United States Supreme Court granted certiorari. *Held,* by a six to three decision, that where a substantial part of an employee's activities affected safety of operation he was subject to the Interstate Commerce Commission's jurisdiction and deprived of protection of the Fair Labor Standards Act. *Levinson v. Spector Motor Service,* 330 U. S. 649, 67 Sup. Ct. 931 (1947).

Section 207 of the Fair Labor Standards Act limits the work week at the normal rate of pay of all employees subject to its terms and provides for overtime compensation. Certain employees are excepted from its terms by Section 213 (b) (1)[3] including any employee with respect to whom the Interstate Commerce

19. 177 P. (2d) 200, 203 (Wyo. 1947).

1. Levinson v. Spector Motor Service, 323 Ill. App. 505, 56 N. E. (2d) 142 (1944).
2. Levinson v. Spector Motor Service, 389 Ill. 466, 59 N. E. (2d) 817 (1945).
3. 52 Stat. 1060, 29 U. S. C .A. Sec. 213 (b) (1).