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DIVISIBLE DIVORCE AND SUBTRACTABLE SUPPORT

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The opinion of Mr. Justice Douglas, speaking for the majority in *Estin v. Estin*,[1] gave Supreme Court sanction to the now familiar concept of divisible divorce. The Court held in that case that the alimony provisions of a New York separation decree survived an *ex parte* divorce subsequently granted to the husband in Nevada. Thus the court neatly dissolved the Estin marital bonds without severing the family purse strings. By dividing the divorce, the Court prevented the husband from subtracting the support previously decreed to the wife in another jurisdiction. It was noted in the opinion that the result might have been different if the wife had been personally served, or if she had appeared in the divorce proceedings.[2]

Our present purpose is to explore the effect of migratory divorces upon pre-existing alimony or support decrees made in favor of the wife in proceedings for separate maintenance, separation, limited divorce, divorce *a mensa,* and the like. The authorities do not indicate that the exact character or form of such initial proceeding is significant. In the interests of brevity we shall use the tem "support decree" as including all forms of decress, orders or judgments for the support of a wife, made in any such initial proceedings. By "migratory" divorces we mean those granted in jurisdictions other than that in which the original support decree was entered.[3] *"Ex parte"* proceedings, as the term will be employed herein, are proceedings in which there is no personal service of process upon the defendant within the forum State, nor any appearance by the defendant, either personally or by attorney, in such proceedings. In our analysis we shall assume that the support decree is a valid *in personam* judgment against the husband, and that the *ex parte* divorce decree is valid insofar as the dissolution of the marriage is concerned—referring only incidentally to such jurisdictional problems as were presented by *Williams II*.[4]

1. WHEN THE SUBSEQUENT DIVORCE IS EX PARTE

Joseph and Gertrude Estin were married in 1937 and lived in New York as man and wife until April 1942, when Mr. Estin left his wife. In 1943, in a New York State court, Mrs. Estin obtained a judgment of separa-

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1. 334 U.S. 541 (1948).
2. Id. at 544.
3. F_1 represents the jurisdiction which has granted a support decree, F_2 the jurisdiction in which the divorce is subsequently granted. The terminology is adapted from CHEATHAM, DOWLING, GOODRICH AND GRISWOLD, CASES AND MATERIALS ON CONFLICT OF LAWS 12 (2d ed. 1942). Cf. Paulsen, *Migratory Divorce*: Chapters III and IV, 24 Ind. L. J. 25 (1948).
4. Williams v. North Carolina, 325 U.S. 226 (1945).

tion, which included an award of $180 per month permanent alimony. In 1944 he went to Nevada, and in 1945 obtained an *ex parte* divorce against her in a Nevada court, with no award of alimony, on the grounds of three years' continual separation without cohabitation—a ground of divorce not recognized in New York. Thereafter, he discontinued payments under the New York support decree. In 1946, Mrs. Estin sought a supplementary judgment in the New York proceeding for the amount of arrears under the support decree. Mr. Estin appeared in the action and moved to eliminate the alimony provisions of the separation decree by reason of the Nevada divorce. Thus, the question of the validity and effect of the Nevada divorce was raised in F_1. The issue of Mr. Estin's bona fide domicile in Nevada was litigated, in the *Williams II* manner, and was found in favor of Mr. Estin. The New York Court of Appeals held that the Nevada decree was valid to dissolve the marriage, but that it did not affect the pre-existing support decree.[5] Thus Mrs. Estin was successful in obtaining her supplementary judgment for arrears of support money.

The Supreme Court of the United States affirmed by a majority of seven to two, Justices Frankfurter and Jackson dissenting.[6] In the course of the majority opinion, Mr. Justice Douglas held that the Full Faith and Credit clause required only that New York recognize the Nevada decree as a dissolution of the marriage.[7] As to its effect upon the prior support decree, he observed:[8]

> "Petitioner's argument therefore is that the tail must go with the hide—that since by the Nevada decree, recognized in New York, he and respondent are no longer husband and wife, no legal incidence of the marriage remains. We are given a detailed analysis of New York law to show that the New York courts have no power either by statute or by common law to compel a man to support his ex-wife, that alimony is payable only so long as the relation of husband and wife exists, that in New York, as in some other states, see Esenwein v. Pennsylvania, supra, 325 U.S. page 280, 65 S. Ct. 1118, 89 L. Ed. 1608, 157 A.L.R. 1396, a support order does not survive divorce.
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> "The difficulty with that argument is that the highest court in New York has held in this case that a support order can survive divorce and that this one has survived petitioner's divorce. . . . The New York court, having jurisdiction over both parties, undertook to protect her by granting her a judgment of permanent alimony. Nevada, however, apparently follows the rule that dissolution of the marriage puts an end to a support order. See Herrick v. Herrick, 55 Nev. 59, 68, 25 P.2d 378, 380."

5. Estin v. Estin, 296 N. Y. 308, 73 N. E. 2d 113 (1947). The lower New York courts have continued to follow this rule: Gittleman v. Gittleman, 80 N.Y.S. 2d 695 (1948) (dictum); Morton v. Morton, 99 N.Y.S. 2d 155 (1950); Duckworth v. Duckworth, 105 N.Y.S. 2d 617 (1951).
6. Estin v. Estin, 334 U.S. 541 (1948).
7. Id. at 549.
8. Id. at 544.

The opinion further reasons that since the wife's right to payments under the support decree is a property right, it can be extinguished only by an *in personam* judgment against her, which could be obtained only by personal service upon her within Nevada or by her appearance in the suit.[9] Thus the *res judicata* aspect of the Nevada decree did not extend to the prior support order.

It seems evident from the quoted statements from the majority opinion that whether a subsequent *ex parte* divorce will extinguish a pre-existing support decree depends entirely upon the public policy of F_1 as expressed in its statutes and court decisions. What the policy of F_2 may be is immaterial. Such is the conflict of laws rule of the *Estin* case.

There have been a number of state court decisions subsequent to *Estin* which disclose interesting reactions to the permission, granted to the states by *Estin,* to adopt their own policies respecting the effect of a subsequent *ex parte* divorce upon a pre-existing support decree. It would hardly be sound to assume that cases decided by state courts prior to the *Estin* case are still law, since such decisions were reached without knowledge of what the Supreme Court, as the final authority on the Full Faith and Credit clause, might rule with respect to the effect of that clause on the state's freedom of choice.

Following *Estin,* there have been decisions in Oregon[10] and Pennsylvania[11] adopting a rule opposite to that of New York. Two Maryland decisions seem to lean in that direction.[12] Arkansas[13] and New Jersey[14] have chosen the New York rule. Florida[15] and Nevada[16] in F_2 proceedings have honored New York policy as expressed in the *Estin* case. These recent decisions will now be examined in some detail.

The Supreme Court of Oregon has given the problem exhaustive treatment, as evidenced by the eight page majority opinion and 19 pages of dissent in the *Rodda* case. The facts were almost identical with those of the *Estin* case. Husband and wife had lived in Oregon. In 1945 the wife obtained a decree of separate maintenance in Oregon, the decree including $100 per month for her support. The following year the husband secured an *ex parte* divorce in Nevada. He then moved in Oregon to have the separate maintenance decree vacated, on the ground that the Nevada divorce had extinguished it. In this he was successful. The court characterized the *Estin* rule as follows:[17]

9. Id. at 548.
10. Rodda v. Rodda, 185 Ore. 140, 200 P. 2d 616 (1948), cert. denied, 337 U.S. 946 (1949).
11. Commonwealth ex rel. McCormack v. McCormack, 164 Pa. 553, 67 A.2d 603 (1949).
12. Millar v. Millar, 87 A. 2d 838 (Md. 1952); Johnson v. Johnson, 86 A. 2d 520 (Md. 1952).
13. Rice v. Rice, 213 Ark. 981, 214 S.W.2d 235 (1948).
14. Brown v. Brown, 88 A. 2d 650 (N.J. 1952).
15. Kruvand v. Kruvand, 59 So. 2d 857 (Fla. 1952).
16. Summers v. Summers, 241 P. 2d 1097 (Nev. 1952).
17. Rodda v. Rodda, 185 Ore. 140, 200 P. 2d 616, 619 (1948).

> "But the 'full faith and credit' which Oregon must give to the Nevada decree does not compel a decision that the separate maintenance decree has been wiped out. That is a question of Oregon law. Such is the effect of Estin v. Estin."

The heart of the opinion is the statement that:[18]

> "In short, the marriage relation constitutes the foundation of the (separate maintenance) order, and, upon the dissolution of that relation. . . . it must be held that the order has lost all vitality."

Such a statement sums up the basic reasoning of the cases which adopt this rule. Here again, it will be noted, the question was raised in F_1.

The facts in the *McCormack* case[19] were substantially the same, with Pennsylvania in the role of F_1 and Alabama as F_2. The former husband obtained a modification in Pennsylvania of his wife's pre-existing support decree, to eliminate all provisions for her support contained therein. She was unsuccessful in her attempt to prove that the husband had not gained a bona fide domicile for divorce purposes in Alabama. The Superior Court of Pennsylvania put in that:[20]

> "It is well settled in this Commonwealth that a valid divorce decree terminates the duty of a husband to support his wife, because of the severance of the marital relationship."

This language is reminiscent of the statement of Pennsylvania law made by Mr. Justice Douglas in the *Estin* opinion, and the observation of Mr. Justice Frankfurter in his dissent, that:[21]

> ". . . if the respondent had obtained her separate maintenance decree in Pennsylvania—which treats such decrees as terminated by any valid divorce, see Esenwein v. Commonwealth . . . and had subsequently moved to New York and there brought a suit based upon the Pennsylvania decree . . . New York would be required to refer to the law of Pennsylvania to determine whether the maintenance decree of that Commonwealth had survived the Nevada decree, and, finding that it had not, the New York courts could not enforce it."

In *Millar v. Millar*,[22] husband and wife had lived in Maryland until the former moved to California and in 1929 obtained an *ex parte* divorce there. He later married again, and died in California in 1950. His second wife sued his first wife in Maryland to partition Maryland realty which had been owned by H and W1 as tenants by the entireties. W2 contended that the effect of the divorce was to terminate the tenancy by the entireties and convert it into tenancy in common. The court agreed, observing briefly that tenancy by the entireties is "founded upon the unity of husband and wife." Thus the *ex parte* migratory divorce produced an effect upon the

18. 200 P. 2d at 621.
19. Commonwealth ex rel. McCormack v. McCormack, 164 Pa. 553, 67 A.2d 603 (1949).
20. 67 A. 2d at 604.
21. Estin v. Estin, 334 U.S. 541, 551.
22. 87 A.2d 838 (Md. 1952).

economic aspects of the marriage, in addition to severing the marital bonds. The *Johnson* case[23] is similar.

Contra to the Oregon and Pennsylvania rule is the Arkansas case of *Rice v. Rice*.[24] Husband and wife had lived in New York and the wife had obtained a separate maintenance decree in that State, which ordered the husband to pay her $15 per week for her support. Mr. Rice moved to Arkansas in 1945, and the following year obtained an *ex parte* divorce in Arkansas, containing no provision for alimony. Thereafter, his former wife (upon notice to him) had judgment in New York for arrears of support money and brought suit in Arkansas to enforce the judgment. It will be noted that in the *Rice* case the question of survival of the support decree was presented in F_2, not in F_1 as in *Estin, Rodda* and *McCormack*. Holding that by giving notice the wife had avoided the constitutional infirmity which existed in *Griffin v. Griffin*,[25] the Supreme Court of Arkansas then stated:[26]

> "Under the laws of this State, as announced in the case of Wagster v. Wagster, 193 Ark. 902, 103 S.W.2d 638, this decree upon constructive service (the Arkansas divorce) did not destroy appellee's right to the support money under the decree of another jurisdiction. But this is a question which is governed by the decisions of the Supreme Court of the United States, and is concluded by the opinion of that court in the case of Estin v. Estin. . . ."

Then, after copious quotation from the majority opinion in the *Estin* case, but without otherwise analyzing New York law, the court concluded[27] that:

> ". . . the only effect (of the divorce decree) would be to grant appellant a divorce without discharging the decree of the Supreme Court of New York requiring him to pay the maintenance allowance. This is the point decided in the Estin case, supra."

It is submitted that although the result was correct, under New York law, a careful reading of the opinion indicates that the Arkansas court reached this result by applying Arkansas law, rather than New York law; and that if such is the case the Supreme Court of Arkansas was incorrect in resting its decision upon the law of F_2 rather than that of F_1. At all events, the opinion makes it clear that Arkansas is disposed to follow the New York rule.

New Jersey in *Brown v. Brown*[28] chose the *Estin* rule. A New Jersey support decree entered in 1939 had awarded $35 per week to a wife and three minor children for their support. H obtained a Nevada divorce in 1948, *ex parte,* and ceased support payments soon thereafter. In the wife's

23. Johnson v. Johnson, 86 A. 2d 520 (Md. 1952).
24. 213 Ark. 981, 214 S. W. 2d 235 (1948).
25. 327 U.S. 220 (1946).
26. 214 S.W. 2d at 239.
27. 214 S.W. 2d at 240.
28. 88 A. 2d 650 (N.J. 1952).

New Jersey action for arrears of weekly payments she prevailed, the court holding very briefly and without discussion that plaintiff was entitled to weekly payments of $35 each nothwithstanding the Nevada decree.

Regardless of the domestic policy of F_2, the courts of that jurisdiction should, as we have previously observed, follow the law of F_1 in deciding whether a subsequent *ex parte* divorce extinguishes a pior support decree. This is well illustrated by cases decided in Florida[29] and Nevada[30] during the current year. In the *Kruvand* case a New York support decree was followed by an *ex parte* Florida divorce. Unlike the Arkansas court, the Supreme Court of Florida rested its decision squarely upon New York law, with the opinion writer referring unsympathetically to the husband's legal strategy[31] as a:

> "shenanigan to shrug off his duty to his wife and children, not to mention his responsibility to a court that had jurisdiction of his person and the subject matter of the suit."

The basic facts were the same in *Summers v. Summers,*[32] except that here the husband asked the Nevada court to include in its divorce decree a provision reducing the amount of support money awarded to the wife by the New York Court. In denying this relief the Supreme Court of Nevada observed that New York must recognize that the Nevada divorce severs the matrimonial bonds, and that:[33]

> "Nevada, contrary to its own policy, must likewise give full faith and credit to the continuing effect of New York's separate maintenance decree."

2. When the Defendant Is Personally Served or Appears In the Divorce Proceedings

Mr. Justice Douglas intimated in the *Estin* opinion[34] that if Mrs. Estin had been personally served in the divorce case, or if she had appeared therein, her pre-existing support order might have been extinguished by the divorce decree. Such a result was reached in *Lynn v. Lynn,*[35] decided by the New York Court of Appeals in 1951. The Lynns, husband and wife, lived together in New York from 1926 until sometime prior to 1942, when she obtained a decree of separation in New York upon grounds of willful abandonment. The decree provided for an allowance of $85 per week for her support and that of a minor child. Fifteen months later, Mr. Lynn sued his wife for divorce in Nevada on grounds of extreme cruelty. She appeared in the suit, personally and by attorney, unsuccessfully disputed

29. Kruvand v. Kruvand, 59 So. 2d 857 (Fla. 1952).
30. Summers v. Summers, 241 P. 2d 1097 (Nev. 1952).
31. 59 So. 2d at 858.
32. 241 P. 2d 1097 (Nev. 1952).
33. 241 P. 2d at 1102.
34. See note 2, supra.
35. 302 N.Y. 193, 97 N.E. 2d 748 (1951), cert. den. 342 U.S. 849, 72 S. Ct. 72, 96 L. Ed. 42 (1951).

his Nevada domicile and resisted on the merits as well. The Nevada court found cruelty subsequent to the separation decree and gave the husband a divorce. The decree recited that the wife had made no claim for alimony or support, but was otherwise silent on that subject. Mr. Lynn returned to New York and remarried, but continued his $85 a week payments until his first wife in 1948 applied for an order in the separation proceedings increasing her weekly payments to $200. In resisting the application, Lynn contended that the Nevada divorce decree wiped out the former New York support decree.

The Court of Appeals agreed with his contention. *Estin* was distinguished on the grounds that the wife's personal appearance in the Nevada case subjected her to an *in personam* judgment; that under such circumstances alimony and support are issues in the case, and that the failure of the divorce court to make any provision for alimony or support is equivalent to denying same. Since the wife had in Nevada litigated the issue of the husband's Nevada domicile, it could not be relitigated in New York. He was not estopped by his voluntary payments made after the Nevada decree was rendered. The only ray of hope which the New York court left to the divorced wife was the possibility that the recitals in the Nevada decree were equivalent to a reservation of jurisdiction re alimony and support.

On the main point the Court of Appeals said:[36]

> "In the present case, however, the Nevada court had jurisdiction of the wife's person by reason of her appearance and consequently, it did have power to determine her right to alimony. If that tribunal had expressly passed upon the matter of alimony . . . there would be no doubt that the Nevada decree would be controlling over the inconsistent provision of the New York judgment. Since that would be the effect given in Nevada to such a judgment when rendered by a court having jurisdiction of the wife's person (citing Nevada cases) the command of the full faith and credit clause, as implemented by congressional legislation, would require us to give it like effect in this State. . . .
>
> "As long as the court in the divorce action had personal jurisdiction of both parties, its decree . . . must be taken to determine the husband's obligation of support, and the failure to grant alimony is properly treated as the equivalent of a denial of such relief. . . . It follows, then, that the alimony provision of a prior judgment of separation must yield to the overriding effect of the divorce decree."

The result of such a case rests squarely upon the *res judicata* principle; thus the law of F_2 governs rather than that of F_1 as in the case of an *ex parte* divorce.

The *Lynn* situation seems to be occurring in New York with increas-

36. 97 N.E. 2d at 752.

ing frequency ,and the lower courts appear to have no difficulty in applying the *Lynn* rule.[37]

Illinois[38] and Nevada[39] are in accord with the *Lynn* rule, and appear to be the only other jurisdictions which have been confronted with the problem subsequent to the *Estin* case.

Absent the element of a pre-existing support decree, cases such as *Sherrer v. Sherrer,*[40] *Coe v. Coe,*[41] and *Johnson v. Muelberger,*[42] tell us that when the defendant in a divorce case has been personally served within the forum state, or has appeared and participated either personally or by attorney, the decree is *res judicata* of all issues which were in fact raised or could have been raised in the proceeding, including the issue of plaintiff's bona fide domicile in the forum state. *Williams II*[43] held that in the absence of such personal service, appearance, or participation, full faith and credit does not bind a sister state to recognize a divorce decree of the forum. The *Lynn* rule is the logical extension of the *Sherrer* doctrine. In terms of geometric proportion it may therefore be put that *Lynn* is to *Estin* as *Sherrer* is to *Williams II.*

Such is the present state of the law on divisible divorce and subtractable support. The deserted wife who keeps the wolf from the door with the proceeds of a support decree, and against whom a later *ex parte* divorce has been granted, will have troubled sleep o'nights. She must first determine whether she is still married, within the rule of *Williams II.* If she satisfies herself that she is not, then she must determine what is the F_1 policy toward the support decree, within the *Estin* rule. The judge who hears her case will have his slumbers disturbed, as well, by the disquieting dreams roused up by Mr. Justice Frankfurter's dissents in *Sherrer* and *Coe,*[44] and by the ghost of Mr. Haddock.[45]

37. Berkowitz v. Berkowitz, 92 N.Y.S. 2d 363 (1949); Polk v. Polk, 98 N.Y.S. 2d 36 (1950); Wickett v. Wickett, 98 N.Y.S. 2d 849 (1950); Hettich v. Hettich, 105 N.Y.S. 2d 500 (1951); Ehrenpreis v. Ehrenpreis, 106 N.Y.S. 2d 568 (1951); Marx v. Marx, 106 N.Y.S. 2d 633 (1951); Correll v. Correll, 109 N.Y.S. 2d 531 (1951); and Marshall v. Marshall, 113 N.Y.S. 2d 602 (1952). In two cases the *wife* procured an *ex parte* migratory divorce subsequent to a New York support decree. The lower New York courts held that by so doing she became estopped to assert the prior support decree: Glennan v. Glennan, 97 N.Y.S. 2d 666 (1950) and (with a strong dissent) McKay v. McKay, 110 N.Y.S. 2d 82 (1952).
38. Buck v. Buck, 337 Ill. App. 520, 86 N.E. 2d 415 (1949).
39. Lagemann v. Lagemann, 65 Nev. 373, 196 P. 2d 1018 (1948).
40. 334 U.S. 343 (1948).
41. 334 U.S. 378 (1948).
42. 340 U.S. 581 (1951). Cf. Cook v. Cook, 72 S. Ct. 157 (1951).
43. Williams v. North Carolina, 325 U.S. 226 (1945).
44. Sherrer v. Sherrer, 334 U.S. 343 (1948).
45. See Rodman, *The Last of Mr. and Mrs. Haddock?* 31 Calif. L. Rev. 167 (1943); Holt, *The Bones of Haddock v. Haddock,* 41 Mich. L. Rev. 1013 (1943).