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## ALIMONY IN AN EX PARTE PROCEEDING

Before a court can render an order directing a payment of alimony in a divorce action, it must have personal jurisdiction of the parties to the action, or personal jurisdiction over the plaintiff plus control of the property of the defendant, if he is the party against whom the alimony decree is sought. To obtain personal jurisdiction over the defendant, he may either be personally served with process in the court's jurisdiction, or make an appearance therein. Such appearance may either be in person or by representation of counsel.<sup>1</sup> This note deals with the elements essential to confer jurisdiction upon a court so far as the defendant is concerned in order that it may enter a valid decree of alimony upon service of process other than personal, and without an appearance; that is to say, in what is usually called an ex parte proceeding.

Alimony, which signifies literally nourishment or sustenance, is the allowance which a husband may be compelled to pay his wife for her maintenance when she is living apart from him, or has been divorced. Like the "alimentum" of the civil law, from which the word was evidently derived, it has for its sole object the provision of food, clothing, habitation, and other necessities for the support of the wife. Consequently, every provision in a judgment for divorce or separation relating to property is to be regarded as alimony, whether expressly designated as such or not.<sup>2</sup> This allowance is usually made out of her husband's estate or income,<sup>3</sup> however, this may vary in community property jurisdictions where such awards are generally controlled by statute.<sup>4</sup>

The courts have placed the entitlement to alimony on a number of different bases. A husband has the legal duty, as well as a moral obligation, to maintain his former wife if he is the cause of the marriage severance in the sense of being at fault.<sup>5</sup> The Utah Supreme Court has recognized that if there has been real brutality or real cruelty, punitive elements enter into the making of the award.<sup>6</sup> Other courts have avoided the tort approach and have turned to contract. Thus in one jurisdiction, it has been suggested that alimony is an assessment of damages in favor of the wife for breach of the marriage contract.<sup>7</sup> Hence, the concept of alimony against a husband at fault may rest upon moral obligation arising out of the marriage, tort theories, or contract theories. It will be assumed in this article that alimony is being sought from a spouse who has been found by the court to be at fault, and furthermore it will be assumed that the court has the necessary jurisdiction of the plaintiff as well as the marital res itself, which ordinarily accompanies jurisdiction over the plaintiff.

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1. *Johnson v. Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552 (1951).
  2. *Boudwin v. Boudwin*, 162 Wash. 142, 298 Pac. 337 (1931).
  3. *Tayian v. Tayian*, 64 Cal.App. 632, 222 Pac. 377 (1923).
  4. E.g., *Ariz. Rev. Stat. § 25-318A* (1956).
  5. *Dayton v. Dayton*, 290 Ky. 418, 161 S.W.2d 618 (1942).
  6. *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265 (1937).
  7. *Driskill v. Driskill*, 181 S.W.2d 1001 (Mo. 1944).

It is a general rule that in the absence of a statute to the contrary,<sup>8</sup> the *husband* is not entitled to alimony since alimony is designed to fulfill the husband's common law duty to support his wife and children.<sup>9</sup> Nevertheless, there are some jurisdictions having statutes permitting the award of alimony to the husband.<sup>10</sup>

Wyoming has statutory provisions both for permanent alimony and for temporary alimony during the pendency of the divorce proceeding.<sup>11</sup> The permanent alimony statute provides for the disposition of the property of the parties as the court shall deem just and equitable. Permanent alimony may be revised from time to time upon petition to the court.<sup>12</sup>

Since the power to grant a divorce rests solely on constitutional and statutory authority, it follows that the power to grant alimony rests on the same basis.<sup>13</sup> However, a decree for alimony differs from that of a divorce in that it is a judgment in personam.<sup>14</sup> This being the case, to entitle a court to render a decree for alimony against a non-resident defendant there must either be personal service of process within the jurisdiction of the court,<sup>15</sup> voluntary appearance<sup>16</sup> or some sort of seizure of property of the defendant within the jurisdiction;<sup>17</sup> otherwise such a decree would be void not only in the state where rendered, but also in sister states and the Federal courts.<sup>18</sup> Such decrees, being void for want of jurisdiction, are not protected by either the due process clause or the full faith and credit clause of the Federal Constitution.<sup>19</sup>

The guaranty of due process of law does not necessarily require personal service of process on parties either resident or non-resident. There are many proceedings in which even as against a non-resident defendant, personal service of process is not essential in obtaining valid judgments. Service in such proceedings may be had either constructively or by substitution, provided, however, the method of imparting notice to the defendant is reasonable and has been strictly followed. As an example: a court may obtain the necessary jurisdiction to render a valid divorce affecting the marriage tie only, by constructive or substituted service when the statute so provides, even though there has been no actual service upon or an appearance by the defendant.<sup>20</sup> Constructive service includes service of

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8 Wyoming has no such statute.

9. *Bartunek v. Bartunek*, 109 Neb. 437, 191 N.W. 671 (1922).

10. E.g., Code of Iowa § 213-5 (1954).

11. Wyo. Comp. Stat. §§ 3-5913, 3-5916 (1945).

12. Wyo. Comp. Stat. § 3-5922 (1945).

13. *Loomis v. Loomis*, 47 Wash.2d 468, 288 P.2d 235 (1955).

14. *Hekking v. Pfaff*, 91 Fed. 60, 43 L.R.A. 618 (1st Cir. 1898).

15. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877); see *Closson v. Closson*, 30 Wyo. 1, 17, 215 Pac. 485, 29 A.L.R. 1317, 6 Wyo. L.J. 277 (1923).

16. *Northcutt v. Northcutt*, 262 Ala. 98, 77 So.2d 336 (1954).

17. *Closson v. Closson*, 30 Wyo. 1, 215 Pac. 485, 29 A.L.R. 1317, 6 Wyo. L.J. 277 (1923); *Pennington v. Fourth National Bank of Cincinnati*, 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713 (1917); see *McGuinness*, 72 N.J.Eq. 381, 68 Atl. 768 (1908).

18. See note 14 *supra*.

19. *Laing v. Rigney*, 160 U.S. 531, 16 S.Ct. 366, 40 L.Ed. 525 (1896).

20. See *Williams v. North Carolina*, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 270, 143 A.L.R. 1273 (1942).

notice by either publication in the newspaper or its relative equivalent which is personal service on the defendant outside of the state. Substituted service is the type of service made at the defendant's usual place of abode, residence, etc. Wyoming statutes have provisions for both constructive<sup>21</sup> and substituted<sup>22</sup> service. The following deal with the validity of decrees of alimony entered after jurisdiction is obtained by such service.

### 1. *Jurisdiction of Non-Resident Defendants*

Wyoming Rules of Civil Procedure Rule 4 (e) provides that service by publication may be had in suits for divorce, or for alimony, when the defendant is a non-resident of the State. However, should a wife try to obtain a personal judgment of alimony from her non-resident husband on service by publication as so provided in Rule 4 (e), it would be void and unenforceable. The Wyoming Supreme Court, in the case of *Kimbel v. Osborne*,<sup>23</sup> stated that where constructive service only is had on a non-resident defendant, it is unavailing to give jurisdiction in an action against him personally for money. The process of a court of one state cannot run into another and summon a party there domiciled to respond to a proceeding against him.

For all of these reasons, it is submitted that the provision for service by publication in this statute is unconstitutional so far as a personal decree for alimony is concerned. Since the non-resident defendant does not have residence in Wyoming, substituted service could not be made at his usual residence within the state. Likewise, if the defendant is personally served without the State it too would be of no avail.<sup>24</sup>

But if the non-resident has property within the State of Wyoming, a Wyoming court may obtain jurisdiction to render a valid and enforceable decree of alimony binding on that property even with constructive service.<sup>25</sup>

It therefore appears that, as to a non-resident defendant, a decree for alimony will only be effective as to the property the defendant may have in Wyoming, otherwise service by publication will not give a Wyoming court the jurisdiction to render a valid alimony decree.

### 2. *Jurisdiction of Resident Defendants*

Service by publication may be had in actions where the defendant, being a resident of this state, has departed from the county of his residence to avoid service of summons, or keeps himself concealed with like intent.<sup>26</sup>

Where the defendant has departed to avoid service of summons it

21. Wyo. Rules of Civil Proc. Rule 4 (e).

22. Wyo. Rules of Civil. Proc. Rule 4 (d) (1). This statute provides for service by leaving a copy of the summons at the defendant's place of abode with either a member of his family or person in his employ provided that person is over the age of 14 years, or at defendant's usual place of business.

23. 61 Wyo. 89, 101, 156 P.2d 279 (1945).

24. See note 15 supra.

25. See note 17 supra.

26. See note 21 supra.

would appear that the Wyoming Supreme Court would follow the dictum in the case of *Milliken v. Meyer*.<sup>27</sup> The Supreme Court of the United States, in that case, after approving the method of constructive service in Wyoming, indicated that the authority of a state is not terminated by the mere fact that the resident is absent from the state. Jurisdiction continues in view of the privileges and protection the state accords his person and property, thus subjecting him to a judgment in personam by either substituted service at his abode<sup>28</sup> or service by publication.<sup>29</sup>

The Supreme Court of Minnesota has held that if the defendant husband conceals himself to avoid service of process, his wife may obtain a valid judgment for alimony by either substituted or constructive service by publication.<sup>30</sup>

However, if the defendant *can* be found in the state and is only served by publication, a decree for alimony would be invalid. The Wyoming Supreme Court, in the case of *In re Bergman's Survivorship*,<sup>31</sup> stated:

"We think it would be a surprise to the bench and bar of the country if it should be held that a process or summons in ordinary civil actions might be served on defendants, present and capable of being found within the jurisdiction of the court, merely by publication in a newspaper. Service by publication under such circumstances is not due process of law and therefore any statute assuming to authorize it is unconstitutional."

Substituted service in such a case would be adequate as long as it is reasonably calculated to give the absent defendant notice of the proceedings and an opportunity to be heard.

A difficult problem would arise when a resident is merely outside of the state temporarily.<sup>32</sup> Wyoming statutes do not authorize service by publication in this situation,<sup>33</sup> but service of summons can be made at his usual place of residence.<sup>34</sup> The great weight of authority sustains the validity of a personal judgment rendered against a resident served at his usual place of abode,<sup>35</sup> as well as where he was personally served without the state.<sup>36</sup> The rationale here is that the domicile in the state is sufficient to bring an absent defendant within the reach of the state's jurisdiction for the purpose of a personal judgment by means of appropriate substituted service. It might then be possible for a spouse in Wyoming to obtain a divorce and alimony with *substituted* service if it can be shown that there

27. 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357 (1940).

28. See note 22 *supra*.

29. See note 21 *supra*.

30. *Roberts v. Roberts*, 135 Minn. 395, 161 N.W. 148 (1917).

31. 60 Wyo. 355, 151 P.2d 360, 365 (1944).

32. *Mace v. Mace*, 7 Mass. 212 (1810). The Supreme Court of Massachusetts would not allow an action for divorce on service by publication where the defendant husband was merely absent on a voyage.

33. See note 21 *supra*.

34. See note 28 *supra*.

35. E.g., *Hurlbut v. Thomas*, 55 Conn. 181, 10 Atl. 556, 3 Am.St.Rep. 43 (1887); *Harryman v. Roberts*, 52 Md. 64 (1879); A.L.I. Restatement, Conflict of Laws § 79 (1934).

36. *Re Hendrickson*, 40 S.D. 211, 167 N.W. 172 (1918).

has been strict compliance with the procedure of substituted service, since it is reasonably calculated to give the defendant notice and opportunity to be heard.

If the plaintiff has fraudulently induced the defendant's absence from the forum state, however, the result will be different. For example in a Louisiana case a husband sent his wife out of the state on a trip and shortly thereafter obtained a divorce by substituted service.<sup>37</sup> The divorce was held invalid.

As to allowing alimony to a wife whose husband is temporarily without the State (but not as a result of plaintiff's fraud), it is submitted that the Wyoming Supreme Court might not allow it on *constructive* service. Although this question has never been decided in Wyoming, the Court has stated that a party affected by a personal judgment must have a day in court or an opportunity to be heard,<sup>38</sup> furthermore, the Court has indicated that for a notice, as provided by statute, to be in conformity with due process, it must be fair, just, and calculated to reach him.<sup>39</sup>

Therefore, it appears that a wife may obtain both a divorce and alimony in an *ex parte* proceeding against her resident husband if he leaves the State (or secretes himself in the State) to avoid service of process, or even if he is temporarily outside of the State, provided that the appropriate *substituted* (or *constructive*) service is had. Furthermore, a wife may obtain alimony from her non-resident husband with service by publication if he has property in Wyoming. However, a decree of alimony against a non-resident husband who has no property here, and service is made by publication, is void and unenforceable.

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37. Spence v. Spence, 158 La. 961, 105 So. 28 (1925).

38. L. C. Jones Trucking Co. v. Superior Oil Co., 68 Wyo., 384, 234 P.2d 802 (1951).

39. See Williams v. North Carolina, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 270, 143 A.L.R. 1273 (1942), in which the Supreme Court observed that "There is no constitutional barrier if the form and the nature of the substituted service meet the requirements of due process." Milliken v. Meyer, *supra*, was cited in support.