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Award of Alimony Subsequent to a Decree of Divorce

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AWARD OF ALIMONY SUBSEQUENT TO A DECREE OF DIVORCE

The general rule is that where the decree of absolute divorce, without provision for alimony, has been entered, a subsequent action for alimony cannot be instituted.[1] However, perplexing problems often arise wherein the courts are asked to relax the general rule stated above. Five situations seem to arise, and it is these situations and their treatment by the courts which will be discussed in this note.

First; there are cases in which a divorce decree is obtained and alimony is not asked although there has been personal service on the defendant husband within the jurisdiction of the court. It is held generally that alimony will not be awarded thereafter.[2] If the decree of divorce specifically reserves the question of alimony for later adjudication,[3] or if it can be shown that the omission of the reservation of the right to later adjudicate the question of alimony was due to the perpetration of a fraud on the part of the husband, the case may be reopened.[4] In a recent Kentucky case[5] it is interesting to note that subsequent to the divorce decree in which alimony was neither asked nor awarded, the wife was allowed to seek alimony through a counterclaim to a petition by the husband for the return of property deeded to the wife during the marriage. Apparently such a situation would not arise except in a suit for the restitution of property deeded by the husband to the wife as a result of the marriage relationship as provided by the Kentucky Code.[6] Citing the above case as an exception to the general rule in Kentucky, the United States Circuit Court of Appeals said, in the case of *In Re Potts*,[7] "Subject to one exception the rule prevails in Kentucky, that where a decree of absolute divorce has been entered without reservation of the right thereafter to make an allowance for alimony, the decree is final and the wife will not be allowed alimony in any subsequent action." The few jurisdictions permitting an action for alimony by the wife after the decree of

[1] Long v. Long, 39 Ariz. 271, 5 P. (2d) 1047 (1931); Hall v. Hall, 141 Ga. 361, 80 S. E. 992 (1914); Mack v. Mack, 283 Mich. 365, 278 N. W. 99 (1938).

[2] Spain v. Spain, 177 Iowa 249, 158 N. W. 529 (1916); Herbert v Herbert, 221 Mo. App. 201, 299 S. W. 840 (1927).

[3] Lyon v. Lyon, 243 Ky. 236, 47 S. W. (2d) 1072 (1932).

[4] Asher v. Asher, 249 Ky. 215, 60 S. W. (2d) 592 (1933) (Statute and Code provision to this effect); Rush v. Rush, 58 Wyo. 406, 133 P. (2d) 366 (1943).

[5] Hanks v. Hanks, 282 Ky. 236, 138 S. W. (2d) 362 (1940).

[6] Kentucky Code (Carroll, 1938) Sec. 425.

[7] 142 F. (2d) 883, 890 (C. C. A. 6th, 1944).

divorce has been entered, irrespective of whether or not the decree reserved the question of alimony for future adjudication, do so under the authority of a statute.[8]

Second; there are cases in which a divorce is obtained by the wife on constructive service of process in state A and later the defendant comes within the jurisdiction of the court in state A and is personally served in a subsequent action for alimony. Under this situation the majority of the courts hold that a subsequent suit for alimony cannot be instituted by the wife.[9] There is, however, a strong minority view that a subsequent suit for alimony can be maintained if personal service within the jurisdiction can be had upon the defendant husband.[10] In reaching this result the Ohio Court[11] said, "It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed. On appeal, alimony may be decreed by the district court, notwithstanding the subsisting divorce pronounced by the Court of Common Pleas. It is true the statute speaks of the allowance as being made to the wife. But the term 'wife' may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony." Likewise, some jurisdictions allow a suit for alimony under these circumstances if the question of alimony was reserved for later adjudication.[12]

Third; there are also cases in which a divorce is obtained by the husband on constructive service of process in state A and the wife later comes within the jurisdiction of the court in state A and institutes a subsequent suit for alimony with personal service upon the husband in state A. A subsequent action for alimony will be allowed in this type of case if it can be shown that the husband perpetrated a fraud upon the court in securing the divorce.[13] Generally the courts will not avoid the decree of divorce already granted but will permit the reopening of the case for the purpose of determining the question of alimony only.[14] However, the Virginia Court, by way of *dictum*, indicated that it might be possible for the prior decree of divorce to be set aside and in a

[8] Noel v. Noel, 15 N. J. Misc. 716, 193 Atl. 558 (1937).

[9] Doekson v. Doekson, 202 Iowa 489, 210 N. W. 545 (1926); Darby v. Darby, 152 Tenn. 287, 277 S. W. 894 (1925).

[10] Stephenson v. Stephenson, 54 Ohio App. 239, 6 N. E. (2d) 1005 (1936); Hutton v. Dodge, 58 Utah 228, 198 Pac. 165 (1921) (Statute provision).

[11] Stephenson v. Stephenson, 54 Ohio App. 239, 6 N. E. (2d) 1005, 1006 (1936).

[12] Karcher v. Karcher, 204 Ill. App. 210 (1917).

[13] Honaker v. Honaker, 218 Ky. 212, 291 S. W. 42 (1927); Cralle v. Cralle, 79 Va. 182 1884).

[14] Honaker v. Honaker, 218 Ky. 212, 291 S. W. 42 (1927).

subsequent suit by the wife the question of divorce as well as alimony might be adjudicated.[15]

Fourth; there are also cases in which the matrimonial domicile is in state A and the wife goes to state B and obtains a divorce, with constructive service of process upon the defendant husband in the suit for divorce in state B, and in which the wife returns to state A and institutes a subsequent action for alimony, obtaining personal service upon the husband in state A. This situation is governed by the general rule, which forbids a subsequent action for alimony in the majority of the jurisdictions.[16] However, there are jurisdictions which will allow a subsequent action, if the decree of divorce reserved the question of alimony for future adjudication in a state in which personal service could be had upon the defendant husband.[17]

Fifth; there are cases in which the matrimonial domicile is in state A and the husband goes to state B and obtains a divorce with constructive service of process upon the wife, and he then returns to state A and the wife institutes an action for alimony, with personal service upon the husband. The majority of the jurisdictions will permit the wife to institute a subsequent action for alimony when personal service can be had upon the husband upon his return to the matrimonial domicile.[18] Since the action for alimony is *in personam* although the action for divorce is *in rem,* the alimony decree requires personal service whereas the divorce decree may be had upon constructive service. Therefore it may seem that unless the courts allow the wife to institute the subsequent action, she would be unable to prosecute her right to maintenance. The minority view which does not permit the wife to prosecute the subsequent action for alimony refuses it upon the ground that the divorce decree destroyed the marital relationship upon which the subsequent action for alimony must be based.[19]

In conclusion it is believed that the majority of the jurisdictions reach a logical result in adhering to the general rule and refusing to allow a subsequent suit for alimony after a final decree of divorce has been entered, in the first, third, and fourth situations; and by permitting the subsequent action in the fifth situation. However, the exceptions which are allowed are based upon justice, and arrive at a logical disposition of the financial problem which the wife

[15] *See* Cralle v. Cralle, 79 Va. 182 at 187 (1884).

[16] McCoy v. McCoy, 191 Iowa 973, 183 N. W. 377 (1921); Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340 (1901).

[17] Darnell v. Darnell, 212 Ill. App. 601 (1918); Woods v. Waddle, 44 Ohio State 449, 8 N. E. 297 (1886).

[18] Davis v. Davis, 70 Colo. 37, 197 Pac. 241 (1921); Searles v. Searles, 140 Minn. 385, 168 N. W. 135 (1918).

[19] Shaw v. Shaw, 92 Iowa 722; 61 N. W. 368 (1894).

encounters after divorce. The majority rule governing the second situation which denies the wife the right to reopen the decree of divorce for the question of alimony where she has obtained a divorce with constructive service of process in the matrimonial domicile and thereafter the husband returns to the jurisdiction is not supportable. It places a premium on trickery and fraud by the husband. He may give the wife ample grounds for divorce but may escape his responsibilities by the simple expedient of "skipping out," crossing the state line and keeping himself conspicuously absent for a short period. By this procedure he has prevented an admittedly wronged wife from securing her legal right to support. It is fortunate that a strong and rapidly growing minority is working to correct this situation. It is hoped that this well reasoned minority view will soon become the majority rule.

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