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Domestic Relations: Full Faith and Credit Permits Collateral Attack of Foreign Divorce

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that application of the third party beneficiary contract theory or joint tenancy theory is allowable under the Treasury Regulations to determine such rights; the gift theory being inapplicable. As to the inter vivos rights of the co-owners of savings bonds, if the regulations are construed as not conferring a property right on the co-owners but merely a contract right, the third party beneficiary contract theory is applicable. If they are construed as conferring property rights, then the joint tenancy theory is applicable in sustaining these rights, and application of either the gift theory or contract theory would appear to be contrary to the Treasury Regulations.

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Domestic Relations: Full Faith and Credit Permits Collateral Attack of Foreign Divorce—A wife sought a divorce a mensa et thoro in Maryland and her husband filed a motion to dismiss offering an Alabama decree of divorce as a defense. In acknowledging the defense as valid the trial court stated, ". . . the Plaintiff is estopped to now question the jurisdiction and cannot collaterally attack the jurisdiction issue because she appeared through local counsel in Alabama and filed her answer and waiver. . . ."[1] The court of appeals[2] reversed for the following reasons: (1) neither the attorney before whom she executed the waiver of notice and answer nor the attorney who appeared for her in Alabama was chosen by her; (2) the waiver of notice and answer was executed before the proceedings were filed in Alabama; and (3) the wife did not appear in person before the court or actively participate in the proceedings.

The facts showed that the husband was absent from Maryland for only two days and had no intention of becoming a domiciliary of Alabama. Therefore, the Alabama divorce was not entitled to full faith and credit because the court lacked jurisdiction:

> A decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact. The State of domiciliary origin is not bound by an unfounded recital in the record of a court of another State. . . .[3]

A brief summary of the interpretation of the full faith and credit clause[4] by the United States Supreme Court relative to divorce is essen-

[1] Brief of Appellant, Record Extract p. E4-E5, Pelle v. Pelle, 229 Md. 160, 182 A.2d 37 (1962).
[2] Pelle v. Pelle, *supra* note 1.
[3] Pelle v. Pelle, *supra* note 1 ,182 A.2d at 40, quoting Slansky v. State, 192 Md. 94, 108, 63 A.2d 599, 605 (1949).
[4] U.S. Const. art IV, §1:
Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

tial. In the first of the *Williams*[5] cases the Court held that granting the requirements of procedural due process are fulfilled, a domiciliary is entitled to have his marriage status altered by the state of domicile even if the spouse affected by such decision be absent from the state. Such a decree is not to be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of that state.

In the second *Williams*[6] case the Court held that North Carolina was not barred, under the full faith and credit clause, from attacking a decree of divorce which had been granted in a foreign jurisdiction in an ex parte proceeding.

> It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. . . .[7]

Subsequent cases in this area are usually decided by determining the meaning of the "contest" that cannot be relitigated.

In the *Sherrer*[8] case the Court held that the jurisdictional question had been adequately contested to have the full faith and credit clause bar another state from rejudging it. In this case a husband domiciled in Massachusetts, upon being notified of his wife's divorce action in Florida, went to Florida, retained counsel and filed an answer denying the allegations of the complaint, including the allegation as to the petitioner's Florida residence. He was represented by counsel throughout the entire proceeding and he even testified as a witness with respect to a stipulation concerning custody of the children. After petitioner's introduction of evidence as to her Florida residence, counsel for the respondent failed to cross-examine or to introduce evidence in rebuttal. The divorce was granted by the Florida court. At the instance of the husband the Massachusetts court held the divorce void because Florida lacked jurisdiction. The Supreme Court held that since the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated they were not subject to collateral attack in another jurisdiction. The matter had been decided in a contest and had become res judicata. The defendant's failure to contest the matter as fully as he might have was no valid objection. Relitigation in other states was barred by the full faith and credit clause.

Since the *Sherrer* case numerous recent decisions by state courts have been handed down, thus requiring a review of the meaning of the

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[5] Williams v. North Carolina, 317 U.S. 287 (1942).
[6] Williams v. North Carolina, 325 U.S. 226 (1945).
[7] *Id.* at 230.
[8] Sherrer v. Sherrer, 334 U.S. 343 (1948).

Sherrer case. The Court stated: "And where a decree of divorce is rendered by a competent court under the circumstances of this case the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered."[9] Explicitly the Court limits the decision to the facts.

The *Pelle* case can be distinguished from *Sherrer* in that the defendant never took part in the Alabama proceedings, she did not choose the attorney when she executed the waiver of notice and answer in Washington D.C., she did not choose or have any contact with the attorney who represented her, and the waiver was signed before the Alabama proceedings were initiated. The Maryland court held that on these facts a different rule of law was warranted: "But as the wife only signed a waiver of notice and answer in the District of Columbia, before these proceedings were filed, we do not feel that this is participation within the rule of these cases [*Sherrer* and *Coe*]. . . ."[10] The court does not explain the underlying reason for distinguishing this case from *Sherrer* but one might be warranted in concluding it was due to the court's failure to find that the question of jurisdiction had been determined in a bona fide contest. In the absence of contest the reason for denying relitigation of the jurisdictional issue is absent.

A bona fide contest supposedly results in the satisfying of the rights of the parties by arrival at the truth. With the truth ascertained the parties are estopped from attacking it. The distinction then between *Pelle* and *Sherrer* should also constitute the difference between a bona fide contest and the lack of a bona fide contest. The *Pelle* case would seem to warrant the conclusion that the facts of signing the waiver before the action is filed, not having an attorney of one's choice and not appearing personally in the action are sufficient to destroy the essence of a bona fide contest and thus make such decision vulnerable to collateral attack. Other recent decisions have arrived at the same conclusion on similar facts.

In the *Gherardi De Parata*[11] case the defendant wife had signed an acceptance of service and process and answer and waiver before the action had been filed. The waiver stated that the husband was "a bona fide resident of the State of Alabama." The wife also signed a letter to an Alabama lawyer, authorizing him to file the waiver in her behalf. The plaintiff, husband, was in Alabama for four or five hours during which he did those things which the wife's attorney in that city told him were necessary for the issuance of a decree. The court reasoned that since a domicile was not established the court did not have jurisdiction, and further, the parties cannot confer jurisdiction on the court

[9] *Id.* at 356.
[10] Pelle v. Pelle, *supra* note 1, 182 A.2d at 40.
[11] Gherardi De Parata v. Gherardi De Parata, 179 A.2d 723 (D.C. Munic. Ct. App. 1962).

by an admission of domicile. A divorce decree not based on the domicile of at least one of the parties is not entitled to full faith and credit in another jurisdiction. The court did not recognize any problem of estoppel arising from a litigated jurisdictional question and disposed of the case as if it were an ex parte proceeding.[12] However, it does question the effect of the signed waiver because of the falsehoods it contained and also the subsequent proceedings because of the apparent collusion between attorneys. Granted that the waiver was ineffectual and the subsequent proceedings were collusive we might rationalize the court's position by saying the case was in actuality ex parte and not controlled by the *Sherrer* case, which was a contested case.

In *Guerieri v. Guerieri*[13] the defendant, wife, had signed a waiver of notice and answer before the filing of the proceedings. At the time of the signing of the waiver the husband procured from her a written appointment of Alabama counsel, who was actually retained to represent the husband. The wife did not participate in the divorce action. After alluding to these facts the court said: "It is believed these facts mock the elements of an adversary proceeding and fall short of the actual participation which is required by New Jersey."[14] Because of the lack of a bona fide contest the court held the Alabama decree subject to collateral attack and not within the rule of the *Sherrer* case.

In *Donnell v. Howell*[15] the court upheld a collateral attack on a foreign divorce decree because of fraud on the court. In an action for a partition sale of the property of a former marriage the parties stipulated they never resided in Alabama, the state which granted the divorce. Although the husband had signed a waiver the court by-passed that fact as not being controlling. It upheld the collateral attack upon the ground that by stating that they were never residents of Alabama the parties admitted that they had fraudulently obtained a divorce from the court without jurisdiction. The decree was therefore held null and void and not entitled to full faith and credit. The court reasoned that *Sherrer* allows an attack on a decree by a foreign court if the same attack could have been made in the state granting the divorce. When the parties admit facts showing that they defrauded the court the decree so acquired is open to attack in the state which granted the decree.[16] There-

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[12] The court admitted that its decision was not conducive to clarifying the law; There is confusion aplenty as to the validity of foreign divorce decrees; and we realize that this decision may not serve to dissipate the confusion, or point the way to complete tidiness and symmetry in this field of law. But we are satisfied that it is dictated by the circumstances of this case. *Id.* at 726-727.

[13] Guerieri v. Guerieri, 75 N.J. Super. 541, 183 A.2d 499 (1962).

[14] *Id.*, 183 A.2d at 504.

[15] Donnell v. Howell, 257 N.C. 175, 125 S.E.2d 448 (1962).

[16] Hartigan v. Hartigan, 272 Ala. 67, 128 So.2d 725 (1961); Even though a judgment is valid on its face, if the parties admit facts which show that it is void, or if such facts are established without objection, the case is similar to

fore a decree becomes vulnerable in a foreign court when facts are admitted which show that the court which issued the decree was defrauded in granting it.

In light of these recent decisions what conclusion can be safely drawn as to the present meaning of the *Sherrer* rule? The principle that a foreign divorce decree is vulnerable to collateral attack if granted in an ex parte proceeding and not vulnerable to collateral attack if obtained under the factual circumstances of *Sherrer* is clear. The gray area between these two types of proceedings is still in need of analysis. If, as we have suggested, a bona fide contest is the prerequisite to collateral invulnerability the essence of bona fide contest must be explored in an attempt to determine its elements.

The *Pelle* case suggests three elements to a contest. Are all three necessary for a contest? If competent counsel who is familiar with all the factors is selected to handle the case would the court hold that personal appearance and participation are necessary to prevent collateral attack? Since the defendant through his counsel has full opportunity to defend his rights, personal absence from the action should not create the right of collateral attack.

Presence through counsel not of one's own choosing has been cited by several recent decisions[17] as indicative of absence of bona fide contest. The courts do not comment on its necessity. To universally demand personal choice of attorney as a prerequisite to a bona fide contest would seem to be too rigorous a rule. However, post factum, failure to be represented by counsel of one's choice apparently carries much weight in convincing the court that in fact the decree was entered in a proceeding which was not a bona fide contest.

The signing of a waiver of notice and answer before the proceeding is brought has been referred to in several of the cases[18] as a reason for allowing collateral attack. The courts have not elaborated on whether such a previous signing vitiates a bona fide contest. But doesn't temporal disparity destroy the idea of contest? Should the courts view a previously acquired and preserved retaliation as a sufficient and true element of a bona fide contest? A "previously-waived-case" would seem to be ineffectual to the establishment of such truth as gives rise to estoppel to its attack. None of the cases we have referred to have involved signing of the waiver after the proceedings have been filed. It would seem that the courts in such a case would be warranted in decid-

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one wherein the judgment is void on its face and is subject to collateral attack. 49 C.J.S. *Judgments* §421, p. 824 (1947).

[17] Pelle v. Pelle, *supra* note 1, 182 A.2d at 39; Gherardi De Parata v. Gherardi De Parata, *supra* note 11, at 726; Guerieri v. Guerieri, *supra* note 13, 183 A.2d at 504.

[18] Pelle v. Pelle, *supra* note 1, 182 A.2d at 39; Gherardi De Parata v. Gherardi De Parata, *supra* note 11, at 726; Guerieri v. Guerieri, *supra* note 13, 183 A.2d at 504.

ing that this is surrender by a contestant in a bona fide contest giving rise to the estoppel.

States, in their concern to control the marital status of their residents, are defining areas in which foreign divorce decrees are subject to collateral attack. Although admission of fraud on the court is effectual when the facts proving it are present, the main area of collateral attack will continue to be failure of the foreign court to determine the jurisdictional question in a bona fide contest. Among the chief reasons for finding a lack of bona fide contest will be the fact that the defendant did not have counsel of his own choosing and the fact that waiver of notice and answer was signed before the filing of the proceedings. Personal appearance as such does not seem to be of controlling importance except in so far as when it is present it will serve as strong evidentiary proof that a bona fide contest was had. In final analysis whether a bona fide contest was had will have to be determined on a case to case basis.

ROBERT H. BICHLER

Conveyancing: Interpretation of "Subject to Financing" Clauses in Interim Contracts for Sale of Realty—Walter E. Pire and his wife Emily signed an offer to purchase the property of the Gerruth Realty Co. for $30,000. Pire tendered a $5,000 down payment in the form of a promissory note, payable at the time of closing. The offer was conditioned upon Pire's buying the adjacent property for $40,000, the closing of the purchase of the two properties being scheduled to occur simultaneously. Although the Pires "thought they would have no difficulty in arranging financing," they insisted that this clause be inserted:

> This offer to purchase is further contingent upon the purchaser obtaining the proper amount of financing.[1]

Though no formal application was made, Pire was refused a $75,000 first mortgage loan against the two properties from the Second National Bank of Beloit, due to the bank's policy of not loaning any individual over $100,000 or more than 66⅔ per cent of the value of the security.[2] Gerruth and the owner of the adjacent property, Putterman, then offered to finance Pire to the extent of $45,000. This proposal was refused as being inadequate.

The trial court held the "subject to financing" clause to be a condition precedent; found that Pire attempted in good faith to fulfill it; and dismissed a suit on the earnest money note. In affirming, the Supreme Court held the whole contract void for indefiniteness, and

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[1] Gerruth Realty Co. v. Pire 17 Wis. 2d 89, 115 N.W. 2d 557 (1962).
[2] Presumably, Pike had previously borrowed at least $25,000.