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Article 11

The Effects of Support Orders on Subsequent Marriages

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Domestic Relations—The Effect of Support Orders on Subsequent Marriages—The deceased and the appellant, his first wife, were divorced in Wisconsin, January, 1961. The court awarded the custody of the minor son to the appellant and ordered the deceased to pay monthly support. At the time of the divorce the deceased was a resident of Wisconsin and remained such until his death in July, 1962. Prior thereto, in March of 1962, the deceased married the respondent in Michigan. After the marriage, the couple returned to reside in Wisconsin. The deceased faithfully continued the support payments up until the time of his death.

The first wife in the case of *In re Fergusen's Estate*,[1] petitioned the court to declare that the respondent was not the widow of the deceased, to remove the respondent as administratrix, and to order an accounting of the respondent's administration.

The appellant based her petition on section 245.10 of the Wisconsin statutes,[2] which in effect declares that a person who has been divorced and ordered by the court to support minor issue of a prior marriage, may not be remarried without the permission of the court. The appellant's former husband, the deceased, failed to obtain such permission prior to his second marriage in Michigan.

The trial court held that the second marriage of the deceased was not void but voidable and therefore not subject to collateral attack after the death of one of the parties. The Supreme Court of Wisconsin affirmed, with one dissenting vote, the lower court's decision on the ground that section 245.10 had no extraterritorial effect and did not apply to the Michigan marriage.

The court's decision is only the second instance of an interpretation of section 245.10 as amended in 1961, the first being an opinion with

[1] 25 Wis. 2d 75, 130 N.W. 2d 300 (1964).

[2] WIS. STAT. §245.10 (1963): "When either applicant has minor issue of a prior marriage not in his custody and which he is under obligation to support by court order or judgment, no license shall be issued without the order of a court having divorce jurisdiction in the county of application. The court, within 5 days after such permission is sought by verified petition in a special proceeding, shall either grant such order or direct a court hearing to be held in the matter to allow said applicant to submit proof of his compliance with such prior court obligation. No such order shall be granted, or hearing held, unless both applicants for such license appear, and unless the person, agency, institution, welfare department or other entity having the legal or the actual custody of such minor issue is given notice of such proceeding by personal service of a copy of such petition at least 5 days prior to the court order of hearing, unless such appearance or notice has been waived by the court upon good cause shown. Upon the hearing, if said applicant submits such proof and makes a showing that such children are not and are not likely to become public charges, the court shall grant such order, a copy of which shall be filed in any prior divorce action of such applicant in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted and such showing is made, but any court order withholding such permission is an appealable order. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

reasoning similar to the lower court's by the Wisconsin Attorney General.[3]

The reasoning of the court may be divided into four principal parts: (1) Section 245.10, as created in its basic form in 1959, was merely prohibitory. It did not declare a marriage in violation of its terms void, but only declared that a marriage license should not be granted if the proposed marriage did not comply with the terms of the various statutes. Therefore, it could properly be compared with section 245.02, the minimum age for marriage provision, and section 245.06, requiring antenuptial examinations. All of these statutes were addressed to license availability, that is, they were prohibitions placed upon the issuance of marriage licenses by the county clerks, and not directed to the parties themselves. Due to such a similarity, the court held it was proper to apply the rule of *Lyannes v. Lyannes*[4] to section 245.10. In *Lyannes,* the Wisconsin Supreme Court held that the minimum age statute and the antenuptial examination statute, being addressed to the county clerks of Wisconsin, were non-extraterritorial in effect.

(2) The court, while apparently recognizing some similarity in the wording of 245.03(2),[5] the one year waiting period statute, to section 245.10, was quick to point out that the provisions of the two statutes were completely different in their effect. Thus, the court was able, with consistency, to affirm *Lanham v. Lanham,*[6] which declared that section 245.03(2) should be given extraterritorial effect in voiding marriages entered into by Wisconsin residents within a year from a prior divorce.

(3) The court then addressed itself to the problem of how to treat and dispose of the statutory words "or elsewhere." They accomplished this by merely stating that such statutory words could not be construed as requiring compliance in another state.

(4) After arriving at the conclusion that section 245.10 should not be given extraterritorial effect, the decision tried to explain why section 245.04, the marriage evasion act,[7] should not be construed so as to give section 245.10 extraterritorial effect. This was accomplished by simply holding that the marriage evasion act applied only to statutes which have extraterritorial effect. The court again relied on the *Lyannes* case,

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[3] 52 A.G. 175 (Wis. 1963).

[4] 171 Wis. 381, 177 N.W. 683 (1920).

[5] WIS. STAT. §245.03(2) (1963) provides: "It is unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to marry again until one year after judgment of divorce is granted, and the marriage of any such person solemnized before the expiration of one year from the date of the granting of judgment of divorce shall be void."

[6] 136 Wis. 360, 117 N.W. 787 (1908).

[7] WIS. STAT. §245.04(1) (1963): "If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state."

and held that statutes which only prohibit marriages and do not void them, should not be given extraterritorial effect under the marriage evasion act.[8]

I. Statutory Amendment

Section 245.10 in its 1959 version, could properly be compared with section 245.02, the minimum age for marriage provision and section 245.06, the antenuptial examination statute. Until 1961, the statute was purely prohibitory and directed only to the county clerks. Therefore, it was proper to contend that the statute should be considered limited in its application to the state of Wisconsin. It would have been unreasonable to hold that a Wisconsin law directed to the county clerks, should be considered applicable to the licensing agencies of other states. However, the majority's application of the *Lyannes* rule after the 1961 amendment of section 245.10 seems improper. In 1961 the legislature added the sentence, "Any marriage contracted without compliance with this section where such compliance is required *shall be void,* whether entered into in this state *or elsewhere."*[9] [Emphasis added.] Thus, the statute is no longer merely a prohibition directed to the county clerk, but is now also directed to the parties of such intended marriage by a declaration that attempts at such marriages will be void. This amendment would seem to render inappropriate the court's reliance on the *Lyannes* case which dealt with statutes having no provision for any effect outside the boundaries of Wisconsin, nor for holding marriages in violation thereof void.

II. Comparison With the One Year Waiting Period Statute

It is certainly true that section 245.10 and section 245.03, the one year waiting period provision, are different in substance. The recognition of the extraterritorial effect of the one year waiting period statute seems to flow inevitably from the nature of the provision. In effect, a divorce in Wisconsin does not dissolve the marriage until one year after its judicial obtainment. For this reason, it makes no difference where the divorced persons wander, for they cannot be validly married under the laws of any state within the one year period. Even though section 245.10 does not have such an innate reason for being given effect outside of Wisconsin, it should be pointed out that the wording of these two statutes is very similar. While it is true as the court declared, that section 245.03(2) is directed only to the parties themselves and 245.10's greater bulk is directed to the marriage licensing agency: it should be noted that the 1961 amendment is not directed to the county clerk but to the parties and remains the only other marriage statute besides 245.03(2) to use the words "void" and "or elsewhere." Because

[8] 171 Wis. 381, 177 N.W. 683 (1920), *supra* note 6.

[9] Prior to 1959, 245.10 dealt with prenuptial examinations, but in 1959 the statute was repealed and recreated by Wis. Laws 1959, ch. 595, §17. In 1961 the section was repealed and recreated by Wis. Laws 1961, ch. 505, §11.

of this obvious resemblance it would not be unreasonable to contend that the legislature intended both statutes to have the same extent of enforcement, that is, extraterritorial force.

III. Statutory Construction

The court in holding section 245.10 inapplicable to marriages performed outside of Wisconsin, was confronted with the problem of construing the statutory terms "or elsewhere" as not being intended to have extraterritorial effect. The court accomplished this feat, by merely holding that you cannot read the terms as requiring compliance in another state. Certainly such a course of reasoning runs contra to well established rules of statutory construction.

In *U.S.F.G. Co. v. Smith*[10] the court declared:

> Although it is the primary rule of construction to give effect to the legislative intent, yet if a statute is plain and unambiguous then interpretation is unnecessary. It is not the function of the court to add language to a statute or to add exceptions because the statute may to the court seem unwise.

IV. Application of the Marriage Evasion Act

The court having introduced a construction of section 245.10 which rendered it non-extraterritorial in effect, was faced with the task of determining whether section 245.04, the marriage evasion act, rendered marriages performed outside of Wisconsin in violation of 245.10, void. The act provides in effect that marriages celebrated outside of Wisconsin by persons intending to reside in Wisconsin are void for all purposes in Wisconsin if such a marriage is *"prohibited or declared void"* under Wisconsin law. The argument that the marriage evasion act has no application to section 245.10, because the act applies only to statutes which have extraterritorial effect seems to beg the question. The court's concept of the nature of the marriage evasion act was expressly borrowed from the *Lyannes* case. At the time the *Lyannes* case was decided, the marriage evasion act provided:[11]

> [A]ny person residing or intending to reside in this state . . . who goes into another state and there contracts a marriage prohibited *and* declared void under the laws of this state, such marriage shall be void for all purposes in this state. . . . [Emphasis added.]

Therefore, the statute as worded at the time of tht *Lyannes* case held void only these marriages by Wisconsin residents performed outside of Wisconsin which were both prohibited *and* declared void by Wisconsin law. But chapter 595, section 9, of the Laws of Wisconsin 1959 changed the "and" to "or." Such a change would seem to indicate all marriages now contracted in violation of any of the Wisconsin mar-

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[10] 184 Wis. 309, 199 N.W. 954 (1924).
[11] Wis. Stat. §2330(m)(1) (1919).

riage statutes i.e., prohibited marriages, are void under the marriage evasion act if entered into by Wisconsin residents in another state.

V. Void and Voidable Marriages

The trial court, by a mysterious semantical technique, reached the conclusion that the term "void" in section 245.10 means voidable. While the supreme court did not openly espouse such a construction, it affirmed the decision without any attack upon the trial court's definition of "void." It might be argued that the silence of the court upon such matter is in effect an affirmation of the reasoning of the trial court. If the court's silence is not treated as a confirmation of such a construction of the term void, its failure to comment on the matter certainly leaves the issue awkwardly hanging in mid-air. The trial court's construction of the meaning of the unambiguous term "void" is but another example of statutory construction by courts to produce a desired result.

Once it is admitted that the marriage is only voidable and not void, it is a rule of law that the marriage can be attacked only directly and while the parties thereto are alive.[12] Under such an interpretation, the appellant could not properly have brought her action since it only attacked the marriage collaterally and then only after one of the parties to the marriage was deceased.

The construction of the term voidable by the trial court is contrary to the express provision of section 245.002(3) of the Wisconsin statutes, which declares, "In this title 'void' means null and void and not voidable." Therefore the lower court by its decision tends to promote that which section 245.002(3) was created to prevent, namely, confusion of the use and meaning of the terms void and voidable.

VI. Public Policy

Even though the supreme court declared that it was not denying that the public policy expressed in section 245.10 might be promoted by non-recognition of foreign marriages in violation of the section and that its decision was based solely on the inadequacy of the statutory language to accomplish such; it would be reasonable to contend that the court's reasoning came about in reality to promote the public interest as they saw it. It is extremely doubtful whether section 245.10 would be operational and given effect in all foreign jurisdictions. It also seems inappropriate to void a marriage under the facts of the *Ferguson* case. The father had faithfully supported the child and a stipulation was made that the child was not likely to become a public charge. The public policy which the legislature sought to adhere to finds expression in the specific purpose for the creation of the statute—to protect the children

[12] *In re* Romano's Estate, 40 Wash. 2d 796, 246 P. 2d 501 (1952); Christensen, 144 Neb. 763, 14 N.W. 2d 613 (1944); Patey v. Peaslee, 99 N.H. 335, 111 A. 2d 194 (1955).

of a previous marriage and to "emphasize the responsibility of support of the present family before new obligations are incurred."[13] Therefore, it would seem appropriate, if not essential, that the legislature should make specific provisions for a father who performs his obligations or for situations where the child is, for other reasons, not likely to become a public charge.

VII. Conclusion

While the majority's motive for its holding that "void" means "voidable" and its assertion that "or elsewhere" means anything but a reference to states other than Wisconsin, may be laudable, its method of action seems improper. Admitted, the statute as created, is apparently too harsh for application in a case such as here, and possibly not operational in some jurisdictions; it is not the function of the judiciary to construe statutes contrary to their express provisions. It is the function of the legislature and not the judiciary to create and revise statutes. If a statute does not constitute an expression of public policy, it is for the legislature to rectify the situation by modifying or deleting such legislative creations. The court has gone far beyond the order of section 245.001 which declares that chapter 245 "be liberally construed to effect the objectives of . . . stability and best interest of marriage and the family. . . ."

It would therefore seem imperative that the legislature should make a reevaluation of section 245.10 so as to determine whether the statute as created should stand or be transformed so as to tend to foster results such as in this case. In such a reevaluation the legislature must determine whether the price for violation of the section should properly be a void or only a voidable marriage. It must also be determined whether harsh sanctions should apply where there is no danger the child will become a public charge. Perhaps the other means of insuring the support of the child, such as the support decree with its means of judicial enforcement, the Uniform Reciprocal Enforcement of Support Act,[14] and the penalties provided under section 245.30(1)(f)[15] are adequate safeguards without resort to a section such as 245.10. The legislature should also consider the practical question of whether the procedural arrangement of the statute will be given operational effect in other jurisdictions, and if not, the effect of only partial recognition by other jurisdictions upon the fulfillment of the statutory purpose.

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[13] Bill No. 151 A., proposed 1959 by The Legislative Council of Wisconsin—Note p. 14.

[14] Wis. Stat. §52.10 (1963).

[15] Wis. Stat. §245.30(1)(f) (1963) provides a fine of not less than $200 nor more than $1,000, or imprisonment for not more than one year, or both for "Any person who obtains a marriage license contrary to or in violation of §245.10, whether such license is obtained by misrepresentation or otherwise, or whether such marriage is entered into in this state or elsewhere."