Marquette Law Review

Volume 46
Issue 4 *Spring 1963*

Article 10

General Appearance Bars Collateral Attack

Robert H. Bichler

RECENT DECISIONS

Domestic Relations: General Appearance Bars Collateral Attack—A wife brought an action in a Wisconsin court to set aside a Nevada divorce decree. She alleged that her husband had deceitfully induced her to seek a divorce in Nevada. Allegedly having relied on his misrepresentations she had gone to Nevada for six weeks and then sued for divorce. The wife appeared in the action with her attorney and the husband appeared generally by his attorney. The Nevada court found that the the plaintiff "was and now is, a bona fide and actual resident and domiciliary of the County of Clark, state of Nevada . . . " and granted the wife a divorce. Immediately after obtaining the divorce she returned to Wisconsin.

She contended that the Nevada decree should not be accorded full faith and credit in this action for two reasons: (1) both parties were domiciled in Wisconsin at the time the Nevada divorce action was commenced and thus the Nevada court lacked jurisdiction to grant a divorce; (2) the Nevada decree was procured as a result of the husband's fraud and coercion. The husband demurred to the wife's complaint. The court overruled the demurrer and the husband appealed to the supreme court.[1]

Relative to the jurisdictional issue the court took notice of the fact that both parties were subject to the jurisdiction of the Nevada court; the wife was there personally and the husband was represented by counsel. Since both parties were in the law suit, the court held that the issue of domicile in Nevada had become res judicata in Nevada. The full faith and credit clause demanded that it also be res judicata in this state, *Hartenstein v. Hartenstein*.[2] Counsel for the wife argued that the court was precluded from finding that the wife was domiciled in Nevada by virtue of sec. 247.22 of the Wisconsin Statutes.[3] The

[1] The husband had remarried about a year and two months after the divorce decree was granted. His second wife was made a party to this action. She answered the complaint and moved for summary judgment dismissing the complaint on its merits. In support of her motion she filed an affidavit and attached an authenticated copy of the Nevada decree of divorce to her motion for summary judgment. The court denied her motion for summary judgment. She appealed this order together with the husband's appeal from the order overruling his demurrer to the complaint.

[2] 18 Wis. 2d 505, 118 N.W. 2d 881 (1963).

[3] "UNIFORM DIVORCE RECOGNITION ACT. (1) A divorce obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceedings for the divorce was commenced. (2) Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within 12 months prior to the commencement of the proceeding therefore, and resumed residence in this state within 18 months after the date of his departure therefrom, or (b) at all times after his departure from this state, and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced." WIS STAT. §247.22 (1961).

court held that the statute is merely an evidentiary one creating a rebuttable presumption when the issue of domicile is open for determination. The statute did not apply in this case because the issue of domicile in Nevada had become res judicata.[4]

The leading case on the issue of when divorce decrees are barred from collateral attack by the full faith and credit clause is *Sherrer v. Sherrer*,[5] which held that since the finding of domicile, needed to confer jurisdiction on the court, was made in proceedings in which the defendant appeared and participated, it was not subject to collateral attack in another jurisdiction. One is inclined to conclude from the *Sherrer* case that the mere fact of a general appearance by the defendant will entitle the decree to the protection of the full faith and credit clause. However, the Court seems to limit the breadth of the rule to the facts.[6]

Wisconsin law prior to *Hartenstein* was stated in *Davis v. Davis*.[7] The defendant wife had appeared specially in the divorce action in another state. She later brought an action in Wisconsin to annul the divorce. The court upheld a literal "personal appearance test." After explaining that it was aware of the meaning of general and special appearance but that the meaning of personal appearance remained enigmatic, the court held that until the higher court decided otherwise, appearance must be personal or physical before a state cannot challenge a decree of another state affecting the marital status of its citizens.

Since the adoption by Wisconsin in 1949 of the Uniform Divorce Recognition Act, sec. 247.22,[8] there have been no cases expounding its meaning. The commissioner in the Uniform Law Annotations expresses his belief that there is no conflict between the provisions of the act stating the rule for presumption of domicile and the holding of the *Sherrer* case because the act gives a principle of evidence for cases

---

[4] The court also refused to accept as valid the wife's argument that the divorce was not entitled to full faith and credit because she had procured it as a result of her husband's fraud and coercion. The court reasoned that since Wisconsin courts must accord the Nevada divorce decree such faith and credit as it has "by law or usage in the courts" of Nevada, the issue of whether a person can collaterally attack a divorce decree depends upon the principle of res judicata in force in the state granting the divorce. Nevada holds that intrinsic fraud is not a basis for vacating a divorce decree. Since the fraud and coercion as alleged in the complaint was of the type called intrinsic by the Nevada courts, such fraud would not sustain an action to set aside a decree in Nevada and therefore the decree was not subject to attack in Wisconsin.

[5] 334 U.S. 343 (1948).

[6] "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." *Id.* at 356.

[7] 259 Wis. 1, 47 N.W. 2d 338 (1951).

[8] See statute cited note 3 *supra*.

which are not decided whereas the *Sherrer* rule is based on res judicata.[9]

The *Hartenstein* case appears to go beyond the holding of the the *Sherrer* case[10] in that it seems to hold that if a defendant appears by counsel in a divorce case, the issues tried by the court become res judicata as to the parties and are not subject to attack in another jurisdiction unless subject to attack in the jurisdiction which granted the decree. The Wisconsin court has extended Sherrer to its logical conclusion. Whether the United States Supreme Court will extend the *Sherrer* holding to the same conclusion will be seen when the proper fact situation is contested.

Although the court in the *Hartenstein* case did not formally overrule the holding of the *Davis* case[11] it has thoroughly repudiated its reasoning. The court rejects the idea that physical appearance by the defendant is required before the decree is entitled to full faith and credit. Whether a person is physically before the court has no bearing on whether the matter has become res judicata. The court holds that jurisdiction over the parties is the test. If the court has jurisdiction over both parties the issue of domicile which is decided in an action between them becomes res judicata.

Where the defendant makes only a special appearance he goes before the court to contest the jurisdictional issue. In a divorce case this is to contest the domicile of the plaintiff. Both parties are before the court in the trying of this issue. When the decision is rendered it becomes res judicata, appealable but not subject to collateral attack. If the court decides that the plaintiff is domiciled in the jurisdiction and the defendant does not see fit to appeal, the question of the existence of domicile is closed. The plaintiff who then obtains a divorce judgment, providing he has met all the procedural requirements of due process, is not subject to having the decree attacked on

---

[9] But the commissioner expresses his doubts whether the two rules are totally unrelated:

> There is also the possibility that the Supreme Court of the United States may not extend the doctrine of the Sherrer and Coe cases to bar the re-examination of the validity of a divorce obtained even after an actual contest over the jurisdictional requirement of domicile where this rule of evidence is applicable. The majority of the court in those cases relied heavily upon the principle of res judicata. The facts upon which this rule of evidence rests arise subsequent to the decree of divorce in the foreign jurisdiction. Consequently, the principle of res judicata ought not to apply since it would be impossible to litigate in the original suit the issue presented by them. This may be regarded by the Supreme Court as a differentiating circumstance. 9A UNIFORM LAWS ANN. 285.

[10] The test of *Sherrer* might be phrased like this: did the defendant personally appear and participate to the extent of the facts present in this case? The test of any appearance through counsel is much broader.

[11] *Davis v. Davis, supra* note 7.

jurisdictional grounds. The court by way of a footnote to the *Hartenstein* decision[12] admits that the *Davis* case was decided wrongly.

If anyone was hopeful that subsection 2 of the Uniform Divorce Recognition Act, sec. 247.22 of the Wisconsin Statutes,[13] would have the effect of barring recognition by Wisconsin courts of divorces obtained in "quickie states," the *Hartenstein* decision no doubt has had the effect of shattering this hope. The decision makes it clear that sec. 247.22 (2) has no application in a case where the jurisdictional issue has become res judicata. Therefore the application of this evidentiary principle is limited to cases where the foreign divorce was obtained from a court which decided the jurisdictional question in an ex parte proceeding.

In weighing the effect of this decision on the Family Code[14] one has to distinguish whether the parties living in Wisconsin and wanting a divorce are willing to travel and "establish a foreign domicile" or not. Concededly Wisconsin law is meant for Wisconsin residents. And as long as neither of the parties travels, their marriage is subject to the Family Code with its many provisions aimed at preserving marriages and discouraging divorces.

The Family Code has made the obtaining of a divorce in Wisconsin a procedurally drawn out affair. Sixty days are required between the serving of the summons and the serving of the complaint as a "cooling off period."[15] The family court commissioner is directed to cause an effort to be made to effect a reconciliation.[16] In ordinary circumstances it takes over three months to get a divorce in Wisconsin. And even when it is granted it does not become effective in separating the marital status for one year. To the spouse who wants a divorce

---

[12] *Hartenstein v. Hartenstein supra* note 2 at 511 by way of footnote the court stated: In Davis v. Davis (1951), 259 Wis. 1, 47 N.W. 2d 338, this court held that a special appearance by the nonresident's wife for the purpose of objecting to the foreign court's jurisdiction was insufficient appearance to entitle the resulting divorce decree to full faith and credit. The opinion stressed the fact that in the Sherrer and Coe cases the defendant spouses had been "physically present." Dean Griswold states flatly that an appearance "through an attorney" by the defendant spouse is sufficient to entitle the decree to full faith and credit. 65 Harvard Law Review, at p. 216. For a critical comment on Davis v. Davis, see Anno. 28 A.L.R. 2d 1303, 1325, and Note, 69 Harvard Law Review (1956), 1325, 1327. The latter note points out that the official transcript in Johnson v. Muelberger, supra, disclosed that the appearance by the defendant spouse was by counsel only. The U.S. supreme court in Cook v. Cook (1951), 342 U.S. 126, 127, 72 S.Ct. 157, 96 L.Ed. 146, decided after Davis v. Davis, *supra,* has now made it clear that a special appearance entered by counsel for defendant spouse in the divorce action in the foreign state to contest the issue of plaintiff's domicile is sufficient appearance to entitle the divorce decree to full faith and credit.

[13] See statute cited note 3 *supra.*

[14] The 1959 Wisconsin Legislature made far reaching changes in the laws governing marriage and divorce in Wisconsin. This codification is known as the Wisconsin Family Code.

[15] WIS. STAT. §247.061 (1) (a) (1961).

[16] WIS. STAT. §247.081 (1961).

badly the question will arise, "Why 'cool off' for sixty days in Wisconsin and be subjected to all this procrastination of reconciliation attempts when by living for forty-two days in Nevada I can have my divorce? All I have to do is have my spouse make a general appearance in the action through an attorney and the divorce is final and there is nothing that Wisconsin can do about it."

Chapter 247.21 of the Wisconsin Statutes[17] attempts to render void any divorce which was "shopped for" in another state. It would seem that the *Hartenstein* case will make this statute practically ineffective. The staute says "no person domiciled in this state." If the parties go to a different state and get their divorce while both are under the court's personal jurisdiction and the court finds that they are domiciled there, the fact of their domicile in Nevada becomes res judicata and entitled to full faith and credit. Since they were domiciled in Nevada they must have ceased to be "domiciled in this state" and therefore this statute does not apply to them.

The only control that Wisconsin would seem to have now over a divorce granted in another state is the case of an ex parte divorce. Then the court is free to challege the jurisdiction of the foreign court and thus collaterally attack the divorce. Whether the proceeding in the foreign court will be ex parte or not is entirely up to the parties of the threatened marriage. It is axiomatic in domestic relation law that the parties of themselves cannot confer jurisdiction of the subject on the court. The axiom still holds. Yet if the parties can convince a court of one state that it has jurisdiction over their marriage they can effectively bar any other state from challenging that court's jurisdiction to grant a divorce.[18]

Since the motive of divorce is often remarriage, "shopping" for a divorce loses much of its appeal when the Family Code restrictions on remarriage after divorce are considered. One seeking to remarry who has children by a former marraige must show to the satisfaction of the court that the minor children are adequately provided for.[19] Remarriage in Wisconsin within a year of being a party to a divorce is prohibited and void.[20] A remarriage anywhere within one year after

---

[17] "No person domiciled in this state shall go into another state, territory or country for the purpose of obtaining a judgment of annulment, divorce or legal separation for a cause which occurred while the parties resided in this state, or for a cause which is not ground for annulment, divorce or legal separation under the laws of this state and a judgment so obtained shall be of no effect in this state." WIS. STAT. §247.21 (1961).

[18] There is a trend in some states to easily find flaws in the previous divorce action of a foreign state so as to justify collateral attack of such a decree. For a discussion of several recent decisions in point, see 46 MARQ. L. REV. 383.

[19] WIS. STAT. §245.10 (1961).

[20] WIS. STAT. §245.03 (2) (1961).

obtaining a divorce, wherever granted, is void if a party resides and intends to continue to reside in this state.[21]

ROBERT H. BICHLER

Admiralty: Apportionment of Damages According to Fault—Libelant's steamship, the Torondoc, while navigating the Chicago River, collided with a bridge owned and operated by the City of Chicago. The Federal District Court found that the acts of both parties were proximate causes of the collision and apportioned one-third of the negligence and damages to the City of Chicago and two-thirds to the libelant. The facts constituting libelant's fault include: (1) inability of the ship to stop because of excessive speed and (2) libelant's employment of a ship's master who was inexperienced in maneuvering a large vessel down a river spanned by a number of independent bridges closely spaced. The facts constituting fault on the part of the City of Chicago include (1) negligent maintenance of the electrical control system of the bridge (span failed to open properly) (2) the bridgetender's failure to show a red lantern when the span would not operate. *N. M. Patterson & Sons, Ltd. v. City of Chicago.*[1]

After judgment both parties appeared and moved for amendment of the damages on grounds that the court was bound by a settled rule of maritime law to divide damages equally in the case of a collision arising from mutual fault. Overruling the motion, the court summed up its reasons saying:

> In view of the fact that our Supreme Court has never ordered equal division of damages in any case where the findings were specific that the respective degrees of contributing fault were unequal, this court is free in this case to apportion damages unequally, based upon the specific unequal degrees of contributing fault of which it has found each party to have been guilty. It has always been the policy of the Supreme Court that a court of admiralty has the discretion, flexibility and duty to do the complete justice inherent in the historical role of the maritime court.[2]

The court attempted to distinguish the original United States Supreme Court decision on the subject of apportionment of damages, *The Catherine,*[3] on the grounds that that case did not purport to govern collisions occuring under other than "usual" circumstances. Thus, in *The Catherine,* the United States Supreme Court said:

> The question we believe has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide

[21] WIS. STAT. §245.04 (1) (1961).
[1] 209 F. Supp. 576 (N.D.Ill., E.D. 1962).
[2] *Id.* at 591.
[3] 58 U.S. (17 How.) 170 (1854).