Marquette Law Review

Volume 30
Issue 2 *September 1946*

Article 4

Marriage Within the Statutory Prohibited Period After Divorce

Norris Nordahl

MARRIAGE WITHIN THE STATUTORY PROHIBITED PERIOD AFTER DIVORCE

The problem of the legal consequences of subsequent marriage by parties to a divorce action within the restricted period after the granting of an interlocutory or absolute decree of divorce is one that often confronts the practicing attorney. The laws of various states relating to such prohibition can be classified into two general groups: those that postpone the dissolution for a period of time after an interlocutory degree[1] and those that make it a penal offense to marry after the granting of an absolute degree.[2] Not only the period of time that such restriction continues[3] but which of the parties is affected materially differs from state to state.[4] This diversity of statutory enactments among the states is possible because a state is fully sovereign in its control of marriage and divorce; the federal government has no supervisory power over it.[5]

To ascertain the policy of a state the nature and objective of its statutes must be examined. A particular statute relating to the status of marriage is valid in the state of its enactment, and may or may not be given extra-territorial effect. Generally, however, a marriage contracted validly in one state will be so recognized in another, even though it would have been invalid had it been consummated in the other state. There is a decided conflict of authority regarding which law governs the capacity to marry.[6] Under one interpretation, such capacity depends on the law of the state where the marriage is celebrated — the *lex loci celebrationis* — and not on domicile;[7] while under the other personal capacity is governed by the law of the state of domicile.[8]

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[1] For a complete enumeration of these states see 35 Am. Jur., Marriage 56-83, and the annotations in 32 A.L.R. 1088.

[2] *Ibid.*

[3] This time varies from 6 months to life; however, one year is the most common period of restriction after divorce.

[4] In some states only the guilty party to the divorce action is prohibited from remarrying; in others, both parties are restricted from marrying for a certain period. The apparent purpose of such limitation is to discourage the breaking up of an existing family to enable one of the parties to marry a third person. It may be questioned, however, whether the provision actually accomplishes the desired result, or whether it may result in adultery between the divorcee and the third person during the prohibited period. This clandestine relationship between the ex-spouse and the third party, which its certainly incompatible with the idea of matrimony, may lead to their not being married at the end of the prohibitory period. The end result would be break-up of the original family, adultery of the divorcee, and the frustration of the potential new family.

[5] Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525 (1905).

[6] 35 Am. Jur., Marriage 56-83.

[7] Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81 (1882).

[8] Greehow v. James, 80 Va. 636, 56 Am. Rep. 603 (1885).

Postponement or Penalty

In determining whether a state statute can be evaded by merely crossing the boundary to another state, the provisions of such statute must be examined to ascertain whether it makes a remarriage within the prohibited time merely subject to a criminal penalty, or whether it postpones the dissolution of the matrimonial knot for a prescribed period. Generally, if the statute postpones the dissolution of the marital relation, both parties are bound by a decree in the sense that a marriage by either of them in another state within the prohibited period will not be recognized.[9] In *Heflinger v. Heflinger,*[10] Charles Heflinger was granted a divorce from his wife, Verna, by a decree of the circuit court of Norfolk, Virginia. The statutes of Virginia provided that no marriage could be validly consumated within six months after the granting of the interlocutory decree. Charles, within the six-month period, went to Baltimore, Maryland, with Clelia, a resident of Virginia, and was married there. After the marriage ceremony the parties returned to Virginia and shortly thereafter Clelia filed a bill for annulment on the sole ground that the marriage was void under the laws of Virginia. The court granted the annulment, even though Clelia knew of the prohibitory period, stating:[11]

> "If the effect of the provision of the statute or the decree of divorce is to postpone the dissolution of the former marriage until the lapse of the prescribed period, it is clear that a remarriage within that period will not be recognized or given effect in the state where the decree was granted, or, for that matter, in any other state, since, *ex hypothesi,* one of the parties at the time of the remarriage had not the status of an unmarried person."

The court further held that this provision relating to postponing the dissolution of the marital tie was within the protection of the full faith and credit clause of the Federal Constitution.[12] Contrasted to those states where an interlocutory degree is entered and the divorce postponed for a period of time are others where an absolute divorce[13] is entered but a penalty is provided if remarriage takes place within a certain time after the decree. In Hoagland v. Hoagland,[14] an action to determine the validity of a remarriage which occurred within the penalty period in another state and the parties then returned to the state of their domicile, the court stated: "a state will not refuse to

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[9] Anno. 32 A.L.R. 1088.
[10] 136 Va. 289, 118 S.E. 316 (1923).
[11] *Ibid,* at page 321.
[12] U. S. Const., Art. 4, Sec. 1. The same result was reached in Atkeson v. Sovereign Camp, Woodmen of the World, et al, 90 Okla. 154, 216 Pac. 467 (1923).
[13] Anno. 32 A.L.R. 1116.
[14] 27 Wyo. 178, 193 Pac. 843 (1920).

recognize the validity of a marriage of a divorced person solemnized in another state for the purpose of evading its laws, where the statute merely forbids such marriage within a prescribed time, under penalty."

VALIDITY OF MARRIAGE WERE CELEBRATED

The consensus of authority is if the divorce of another state is effectual to finally dissolve the matrimonial relationship and if the remarriage is not contrary to the policy and laws of the state in which it is celebrated, such remarriage will be upheld in the latter state, notwithstanding that one or both of the parties were under a restriction of another state at the time of its celebration.[15] In *Powel v. Powell,*[16] one of the parties had procured a divorce in Indiana. The Indiana statutes provided that where a resident of the state goes, with the intent of evading the effect of the statute relative to immediate remarriage, to another state and marries immediately, such marriage shall be null and void. A marriage was celebrated in Illinois, but the parties did not return to Indiana. The Illinois court held that, since the marriage was consummated in Illinois, the laws of Illinois and not Indiana must govern the marriageable status of the parties. The effect of this decision is important, especially since the Indiana statute provided for an interlocutory decree. The same question of state comity was presented in *Frame v. Thormann.*[17] There the court upheld the validity of a remarriage in Wisconsin although one of the parties had previously been divorced in Louisiana for adultery, and the statutes of Louisiana prohibited remarriage of the guilty party if a divorce were granted on that ground. The court stated:[18]

> "The statutes of another state, prohibiting a person who has been divorced for adultery from remarrying, have no extra-territorial force, and cannot prevent him from lawfully remarrying in this state."

The court did not distinguish between a decree that postpones the divorce and one that provides for a penalty after a divorce, although clearly the second type was involved in this case. There is, however, no indication that the decision would have been different had an interlocutory degree been involved. The court further pointed out that the decision turned upon considerations of comity and did not involve the full faith and credit clause of the United State Constitution.[19]

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[15] Fordham v. Marrero, 273 Fed. 61 (1921); Powell v. Powell, 207 Ill. App. 292 (1917), affirmed in 282 Ill. 357, 118 N.E. 786 (1918); Van Storch v. Griffin, 71 Pa. 240 (1872); Frame v. Thorman, 102 Wis. 653, 79 N.W. 39 (1899).
[16] *Ibid.*
[17] *Supra,* note 15.
[18] *Ibid,* at page 672.
[19] *Ibid,* at page 669.

UNIFORM MARRIAGE EVASION ACT

To clarify the problem of whether one state should recognize the prohibitions after divorce imposed by another state, the Uniform Marriage Evasion Act[20] was proposed. Up to the present time only five states — Illinois (1915),[21] Louisiana (1914),[22] Massachusetts (1914),[23] Vermont (1912),[24] and Wisconsin (1915)[25] — have adopted the act. The act provides:

> Sec. 1. 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 shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.
>
> Sec. 2. No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void.
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> Sec. 3. Before issuing a license to marry to a person who resides and intends to continue to reside in another state the officer having authority to issue the license shall satisfy himself by requiring affidavits or otherwise that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.
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> Sec. 4. Any official issuing a license with knowledge that the parties are thus prohibited from intermarrying and any person authorized to celebrate marriage who shall knowingly celebrate such a marriage shall be guilty of a misdemeanor, and shall be punished by . . .[26]

The act has not proven effective, as evidenced by the fact that it was withdrawn from the active list of Uniform Acts recommended for adoption by the states in August, 1943.[27]

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[20] 9 Uniform Laws Annoted, Miscellaneous Acts 479.
[21] Smith-Hurd Ill. St., (Ef. 1915) c. 89, para. 19-24.
[22] Dart's Gen. St. (Ef. 1914) para. 2186-2189.
[23] Gen. Laws, Ter. Ed., c. 207 (Ef. 1914) para. 10-13, 50.
[24] Pub. Laws, (Ef. 1912) para. 3006, 3067, 4087.
[25] Wis. Stat. sec. 245.04, see *infra,* note 29.
[26] Wisconsin has not adopted sections 3 and 4 of the Act.
[27] See *supra,* note 20, cumulative annual pocket part, at page 105.

THE WISCONSIN PROBLEM

In Wisconsin, the statutes relating to divorced persons and their ability to remarry within a prescribed period are Sections 245.03[28] and 245.04.[29]

Generally, the Wisconsin Supreme Court has held that a marriage within one year after the interlocutory decree of divorce is void *ab initio* if such remarriage is celebrated within the state[30] or if consummated outside of the state with the parties returning to Wisconsin.[31] There is a conflict of interpretation, however, when the parties leave the state with intent to establish domicile elsewhere and remarry within the year following the Wisconsin decree.[32]

In *Lanham v. Lanham*,[33] the leading case on this subject, the plaintiff on and prior to the 15th day of September, 1905, was a resident of Wisconsin and was the wife of one J. R. Sherman. On the day she obtained a divorce from Sherman in order to marry James W. Lanham, a resident of Wisconsin and a man eighty-four years of age. For the purpose of avoiding the one-year restriction, they went to Michigan, were married, and immediately returned to Wisconsin, where they lived until J. W. Lanham's death, two years later. The court held the Michigan marriage void, stating:[34]

> "To say that the legislature intended such a law to apply only while the parties are within the boundaries of the state, and that it contemplated that by crossing the state line its citizens could successfully nullify its terms, is to make the act essentially useless and impotent and ascribe practical imbecility to the law making power. A construction which produces such an effect should not be given it unless the terms of the act make it necessary. The prohibitory terms are broad and sweeping. They declare not only that it shall be unlawful for divorced persons to marry again within the year, but that any such marriage shall be *null and void*. There is no limitation as to the place of the pretended marriage in express terms, nor is language

[28] Wis. Stats. 245.03: "(1) No marriage shall be contracted while either of the parties has a husband or wife living * * *.

"(2) It shall not be lawful for any person, who is a party to an action for divorce from the bonds of matrimony, in any court in this state, 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 null and void."

[29] Section 245.04 of the Wisconsin Statutes is identical with Secs. 1 and 2 of the Uniform Marriage Evasion Act quoted in the body of this comment.

[30] Dallmann v. Dallman, 159 Wis. 480, 149 N.W. 137 (1915).

[31] Lanham v. Lanham, 136 Wis. 360, 117 N.W. 787 (1908).

[32] Hall v. Industrial Commission of Wisconsin, 165 Wis. 364, 162 N.W. 313 (1917); Owen v. Owen, 178 Wis. 609, 190 N.W. 364 (1922).

[33] See *supra*, note 31. See also Lyannes v. Lyannes, 171 Wis. 381, 171 N.W. 685 1920), where the court held that a marriage not completely severed by the insult of divorce was completely void; that leaving the state to avoid statutory requirements and then to return would not inject life into a marriage void at its inception.

[34] See *supra*, note 31, at page 367.

> used from which such a limitation can naturally be implied. It seems unquestionably intended to control the conduct of the residents of the state whether they be within or outside of its boundaries."

In *Rogers v. Hollister*,[35] Martha Rogers provided in her will that "if Fred Rogers is my husband at my decease * * * I give all my personal property"[36] to him. The parties were divorced and during the one-year period subsequent to the interlocutory degree Martha died. The court held that Fred Rogers was not her husband during the one-year period immediately following the entry of the interlocutory decree. This decision that the parties are not husband and wife during the interlocutory period deprives a conclusion that a subsequent marriage by one of the parties during the prohibited period is void of any support other than the statute expressly declaring it void. In other words, no support is found from those statutory provisions[37] declaring invalid bigamous marriage.

In *Dallman v. Dallman*[38] both the divorce and subsequent remarriage within the year took place in Wisconsin. There the plaintiff brought an action for annulment of his marriage to the defendant. The court granted annulment and stated.[39]

> "* * * when a party to an action in which the interlocutory judgment of divorce was entered, * * * married again before entry of the final judgment, such marriage was unlawful and might be annulled."

In *Jensen v. Jensen*[40] the seriousness of violating the one-year restriction was presented. The action involved the custody of a child. The appellant remarried in the state of Michigan three months after her divorce in Wisconsin from the appellee and returned immediately after such marriage to Wisconsin. The court held, after recognizing that the marriage was a direct violation of the law, that the offense was not serious enough to warrant the appellant being deprived of the custody of the child.

The question of comity between the states in recognizing divorce statutes and subsequent remarriages within the prohibitory period presents a conflict of authority on the subject in Wisconsin. This conflict is illustrated by two Wisconsin cases, *Hall v. Industrial Commission of Wisconsin*[41] and *Owen v. Owen*.[42] The Owen case was ap-

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[35] Rogers v. Hollister, 156 Wis. 517, 146 N. W. 489 (1914).
[36] *Ibid.*, at page 518.
[37] Wis. Stats. 351.02.
[38] See *supra*, note 30.
[39] See *supra*, note 30, at page 487.
[40] 168 Wis. 502, 170 N.W. 735 (1919).
[41] See *supra*, note 32.
[42] See *supra*, note 32.

proved by *Fitzgerald v. Fitzgerald*[43] and is the law in Wisconsin today. All three cases were decided after the enactment of the Uniform Marriage Evasion Act,[44] and involve statutes of Illinois and Wisconsin, two of the five states which have adopted such act. In the *Hall* case the laws of Wisconsin, Illinois, and Indiana were involved. In the *Owen* case the laws of Wisconsin, Michigan, and Illinois were involved. An Illinois divorce was involved in both cases prior to remarriage. In the *Hall* case the parties went to Indiana from Illinois and were married within the restricted period of the Illinois statute. In the *Owen* case, the parties went to Michigan from Illinois and were married within the year provided by the Illinois statute. Both the Indiana and Michigan marriages were questioned in Wisconsin. In the *Hall* case the remarriage was questioned in a defense to the widow's claim for workmen's compensation, while in the *Owen* case the remarriage came into question because the husband filed a bill for annulment. The decision of the *Hall* case declared the Indiana marriage void; in the *Owen* case the Michigan marriage was held valid. The validity of the Michigan marriage was upheld in the *Owen* case because the court declared the Illinois statute was penal in nature and, therefore, had no extra-territorial force. However, the very same statute was involved in the *Hall* case.

In *Fitzgerald v. Fitzgerald,*[45] the statutes of Wisconsin, Illinois, and Indiana were involved. After an Illinois divorce, the parties went to Indiana, were married within the restricted period, and then came to Wisconsin. The court upheld the decision of the *Owen* case, notwithstanding Sec. 245.04 Wisconsin Statutes.[46] The court stated:[47]

> "A marriage between persons domiciled in Wisconsin, contracted in Indiana, is valid although one of the parties to it had been divorced by a decree of the Illinois courts, and a statute of that state in effect at the time made marriages contracted within one year of divorce invalid, and the marriage in question was entered into within less than one year after the divorce, as the Illinois statute had no extra-territorial force."

The effect of the Wisconsin statute on one who remarries within the year after the interlocutory decree but who celebrates such marriage in another state and intends to establish domicile in that state was partially answered by the decision of *Elies v. Elies.*[48] There, Ruth Elies was granted a divorce from Arthur Elies and within the year

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[43] 210 Wis. 543, 246 N. W. 680 (1933).
[44] See *supra,* note 20.
[45] See *supra,* note 43.
[46] See *supra,* note 29.
[47] See *supra,* note 43, at page 546.
[48] 239 Wis. 60, 300 N.W. 493 (1941); see also Kilmer v. Kilmer, 23 N.W. (2d) 510, Wis. (1946).

married one Harris in Iowa after the parties had become residents of Iowa. The marriage was consummated after advice of counsel in Iowa that the Wisconsin decree postponing the divorce for one year had no extra-territorial effect. The action was brought to partially vacate the judgment of divorce granting custody of a child to Ruth. The court refused to modify the judgment and in effect sustained the appellee's contention that the Wisconsin interlocutory decree of divorce will not be changed in any respect when one of the parties remarries within the prohibitory period but does so in another state with intent to remain in that state. This decision was supported by the following language of the court:[49]

> "The fact that the divorced mother remarried in Iowa within one year from the entry of the judgment of divorce in Wisconsin would not support an inference that she was unfit to have the custody of her child, where the marriage in Iowa within the year was entered into only after the contracting parties had become *bona fide* residents of Iowa, expecting to remain such residents indefinitely, and after advice of counsel that such marriage would be valid, and where another marriage ceremony was performed after a year from the entry of the judgment of divorce."

As hereinbefore stated, a remarriage within the year after the granting of a divorce, where such remarriage and divorce are celebrated in Wisconsin or where the remarriage takes place in another state and the parties return to Wisconsin, is void by Section 245.04, Wisconsin Statutes;[50] however, by Section 245.35, Wisconsin Statutes,[51] such remarriage may flower into legality after the termination of the one-year period if one of the parties entered into it in good faith and in full belief that the other could celebrate a legal ceremony.[52]

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[49] *Ibid.*, at pages 66, 70.

[50] See *supra*, note 29.

[51] Wis. Stats. 245.35. "If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract * * * , and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled, or dissolved by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents."

[52] 28 Marq. Law Review 50 (1944) and cases there cited.

CONCLUSION

Under the statutes of Wisconsin, a remarriage within one year after the interlocutory decree is declared null and void. A remarriage in Wisconsin within that period can be annulled, as can a remarriage out of the state where the parties return to Wisconsin during the one-year period and it can be annulled at any time, even after the termination of the year, if a second marriage ceremony is not performed. A marriage, however, which is celebrated in another state with intent to remain in the latter state is valid for all intents and purposes, and the Wisconsin decree of divorce will not be set aside or modified because of such violation, although the parties are not completely divorced by the interlocutory decree in Wisconsin. The prohibitory statute does not purport to invalidate such marriages, covering only those where the parties intend to remain Wisconsin residents. It has been observed that invalidity of such subsequent marriages can rest alone upon the prohibitory statute. Query as to the power of a state by statute to invalidate the subsequent marriages of those no longer resident in the state.

Because of the conflict of authority[53] on this subject, a uniform marriage and divorce act would be desirable, but it seems practically unattainable because of the wide difference of opinion in the various states on the subjects of marriage and divorce.[54] Possibly a federal enactment on marriage and divorce would solve the problem, assuming constitutional barriers could be somehow surmounted.

NORRIS NORDAHL

[53] 15 Marq. Law Review 37, at page 41 (1930).
[54] 8 Wis. Law Review 27 (1932).