Domestic Relations - Further Analysis of the Legal Consequences in Wisconsin of Remarriage After Divorce

Howard H. Boyle Jr.
COMMENTS

DOMESTIC RELATIONS—FURTHER ANALYSIS OF THE LEGAL CONSEQUENCES IN WISCONSIN OF REMARRIAGE AFTER DIVORCE

Development in interpretation since the comment, "Marriage Within the Statutory Prohibited Period After Divorce", appeared in the Marquette Law Review has been sufficient to justify a recapitulation of the subject and restatement of some of the conclusions arrived at therein.

The problem, as the title of the comment implies, concerns the validity of a remarriage after an absolute divorce decree but within the time period in which a statute has forbidden a remarriage. In any discussion of the subject, of basic importance is the legal effect of the individual decree of divorce. Does it dissolve the marriage bonds immediately, or not until the statutory prescribed time period has expired? In the first instance the parties upon issuance of the decree are restored to a single status; in the second they are not. Even with all the hexogenious statutes pertaining to the subject and great diversity in interpretation thereof that abounds in the United States because of the lack of uniformity between states in the treatment of divorce, it is a safe generalization to say that if the parties are not rendered single by the decree, a remarriage would be bigamous and not recognized in any state. Such general statement has the peculiar value of most general statements; so now to examine some of the qualifications and ramifications that appear when different factual instances arise. All discussion will proceed on the assumption that the validity of the marriage subsequent to the divorce has been contested in the Wisconsin Court.

I. DIVORCE IN WISCONSIN — REMARRIAGE IN WISCONSIN.

With the directness in which the statutory language is couched and the Court's interpretation being as univocal as it is, this first topic can be summarily dismissed. Section 245.03(2), Wisconsin Statutes, provides:

"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."

3 Dallman v. Dallman, 159 Wis. 480, 149 N.W. 137 (1915); White v. White, 167 Wis. 615, 168 N.W. 704 (1918).
In *Dallman v. Dallman* the plaintiff sought an annulment to his marriage with defendant which had been celebrated in Wisconsin before defendant's one year waiting period after her Wisconsin divorce decree had elapsed. In holding for the plaintiff it was said that such subsequent marriage was void ab initio. The statutory language is explicit enough to make it unnecessary at this point to consider whether the Wisconsin decree provided for a divorce immediately on the date of its being granted or merely provided for one after the one year waiting period. The result would seem to be the same in either event.

The above stated result is inescapable unless the facts in any particular case come within section 245.35, Wisconsin Statutes. In that event the Wisconsin Court has held that the subsequent marriage becomes valid. This statute will only control if the action is brought after the expiration of the one year statutory waiting period; the subsequent marriage was a ceremonial one; one party was in good faith on entering such marriage; and there has been a living together in good faith on the part of one of them until the one year has passed.

II. Divorce in Wisconsin — Remarriage Outside Wisconsin.

This topic can be divided into two parts for present consideration; first, where a return to a Wisconsin domicile after the subsequent marriage appears, and second, where a new domicile is established outside Wisconsin after the subsequent marriage. As to the first, the result reached has in all respects been the same as that indicated under topic I. A typical statement in such a situation is the following language from the leading case of *Lanham v. Lanham*.

"To say that the legislature intended such a law (245.03) 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 lawmaking power . . . . It (245.03) seems unquestionably . . . ."

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4 159 Wis. 480, 149 N.W. 137 (1915).
5 Wis. Stat. 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 contracts 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. . . ."
7 *Ibid*.
8 *Ibid* at page 367.
9 *Ibid*. 
intended to control the conduct of the residents of the state
whether they be within or outside of its boundaries."

If that language could be said to leave any room for doubt, a later
enacted Wisconsin statute, section 245.04(1), certainly concludes any
speculation on the point.10

As to the second subdivision under this topic; when the parties take
up domicile outside of Wisconsin after the subsequent marriage, fur-
ther matter must be taken into account. Here the result of invalidity
is reached with only slightly less facility. A distinction must be drawn
between the type of divorce decree granted, i.e. whether in praesenti
or not. Although discussion of the former type of decree would ap-
pear unnecessary in view of the clear language of 247.3711 and a recent
decision of the Wisconsin Supreme Court,12 it is still important be-
cause uncertainty on the point persists.

If the Wisconsin divorce could be in praesenti, the marital status
would be considered dissolved at the time of the decree. The problem
presented is whether the statutory prohibition against marriage within
one year would be accorded extraterritorial effect. A negative answer
is indicated. Subsequent marriage under such circumstances, if valid
under the laws of the lex loci celebrationis, most assuredly would be
valid in Wisconsin.13

Where the Wisconsin decree does not dissolve the marriage bonds
immediately at the date of the decree, which now seems clear,14 the
remarriage outside the state, regardless of bona fide domicile being also
taken up outside the state, will not be held valid by the Wisconsin
Court for the simple reason that the parties to the divorce are still

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10 Wis. Stat., identical with section one of the Uniform Marriage Evasion Act
adopted in 1915. "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 con-
tract a marriage prohibited and declared void by 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."

11 Wis. Stat., "(1) When a judgment or decree of divorce from the bonds of
matrimony is granted so far as it affects the status of the parties it shall not
be effective until the expiration of one year from the date of the granting of
such judgment or decree."

12 State v. Grengs, 253 Wis. 248 at 253, 33 N.W.(2d) 248 (1948) where it is
said, "This court has consistently held that until the expiration of the year
from the granting the judgment of divorce, there is no absolute severance of
the marital relationship. Heller v. Johnson, 162 Wis. 19, 154 N.W. 845;
White v. White, 167 Wis. 615, 168 N.W. 704; Ex parte Soucek (7th Cir.)
101 Fed(2d) 405, 406."

"Under such provisions in sec. 247.37, subs. (1), (3) and (4) . . . if an
attempted remarriage takes place before the specified time has elapsed, neither
of the parties to the action of divorce ceases to be married to the other until
the lapse of that time."

13 Frame v. Thorman, 102 Wis. 653, 70 N.W. 39 (1899); Van Storch v. Griffin,
71 Pa. 240 (1872); Powell v. Powell, 207 Ill. App. 292 (1917), affirmed in
282 Ill. 357, 118 N.E. 766 (1918); Fordham v. Marrero, 273 Fed. 61 (1921).

14 See supra, notes 11 and 12.
considered married. A recent decision, that of *State v. Grengs*, see supra, note 12; generally other states hold as Wisconsin does regarding the ability of parties to a Wisconsin divorce to remarry within the one year period subsequent to the divorce. See Means v. Means, 40 Cal. App. (2d) 469, 104 P(2d) 1066 (1940), where plaintiff obtained a Wisconsin divorce, then moved to California and was remarried in Arizona before the expiration of the required one year waiting period. The remarriage was held void. Also Cummings v. United States, 34 F(2d) 284 (1929) where a Wisconsin divorced woman married a soldier in Minnesota and remained a Wisconsin resident. The marriage was held void because the ceremony was within the prohibited one year. In Mosholder v. Industrial Commission, 329 Ill. 497, 160 N.E. (1928) an attempted remarriage in Illinois within the year after a Wisconsin divorce was held void. Contra, but where the matter of full faith and credit was not mentioned. In re Ommang's Estate, 183 Minn. 92, 235 N.W. 529 (1931), where remarriage in Minnesota within the one year after a Wisconsin divorce was held valid. The court looked at the parties as Minnesota residents over which no other state could exercise control.

The case of *State v. Grengs* resolves all doubts as to the validity of a foreign marriage within the one year waiting period even though the parties intend to and do take up bona fide domicile outside the state. No marriage within the year after a Wisconsin divorce will be held valid by the Wisconsin Court, unless section 245.3517 can be shown to be effective. In that event the void marriage is validated and is so

"If, however, 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, *ex hypothesi*, one of the parties at the time of the remarriage had not the status of an unmarried person. A provision of the statute or decree, thus postponing the dissolution of the former marriage, is part of the decree and within full faith and credit provision of the Federal Constitution. The real question in this connection is whether the provision of the statute or decree in question does postpone the dissolution of the former marital relation. If it does so postpone the dissolution of the former marital relation, it generally binds both parties to the divorce in such respect, so that a marriage by either of them in another state within the prohibited period will not be recognized."

The Court quoted with approval from American Jurisprudence, as follows:

16 Am. Jur., Marriage pp. 297, 298; sec. 184; citation quoted from the case.

17 See supra, note 5.
whether the challenged marriage was celebrated in Wisconsin or outside of Wisconsin.\footnote{19}

III. Divorce Outside Wisconsin — Remarriage in Wisconsin.

This topic again can be subdivided; first, where the parties to the subsequent marriage intend to reside in Wisconsin or in a state other than that granting the divorce, and second, where the parties to the subsequent marriage intend to return to the state where the divorce was granted. This breakdown refers only to divorces \textit{in praesentia}. After what has been said, it is obvious that if the divorce by a state outside Wisconsin were such as not to take effect until the end of the prohibited period, no remarriage in Wisconsin or elsewhere could be validly undertaken within such period.\footnote{19}

In cases under the first subheading remarriage seems valid, no other difficulty appearing. The prohibition imposed by the state of divorce is regarded as having no extraterritorial effect. The only matter that would seem to prevent validity would be an inclination on the part of the court to recognize through comity the other state's prohibition; and such inclination appears difficult, if not impossible, to make out.\footnote{20}

No question of full faith and credit enters here unless the prohibition is made part of the divorce decree. The reason is that full faith and credit applies to the judgments or decrees of a court and not to statutes which have no extraterritorial effect.

As to the second subheading; by returning to the state where the divorce was granted, the parties may invoke the second section of the Marriage Evasion Act.\footnote{21}

IV. Divorce Outside Wisconsin — Remarriage in Second State.

Again under this topic divorces are classified into those operative upon the granting of the decree, and those not effective until the lapse of the statutory time period. If marriage was contracted in a second state after the latter kind of divorce, full faith and credit would necessitate a holding of void by a Wisconsin court unless again section 245.35, Wisconsin Statutes, could be shown to control. If 245.35 in such case was held controlling and the remarriage held valid in Wisconsin, several questions as to the extraterritorial effect of such Wis-

\footnote{19}Hoffman v. Hoffman, 242 Wis. 83, 7 N.W. (2d) 428 (1943).
\footnote{20}See supra, note 16.
\footnote{21}Frame v. Thorman, 102 Wis. 653 at 672, 79 N.W. 39 (1899). "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 marrying in this state; although it may subject him to punishment in the former state."
\footnote{21}Wis. Stat. sec. 245.04. "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."
consin decision might be raised. From the wording of the statute and the interpretation given it in *Hoffman v. Hoffman*, it appears certain that the statute applies to the type of situation now discussed.

Where the divorce is *in praesenti*, any holding will depend on whether the parties after their subsequent marriage returned to the state of the divorce or not. With this distinction in mind it becomes clear that *Hall v. Industrial Commission of Wisconsin* and *Owen v. Owen*, both involving *in praesenti* divorces under the same Illinois statute, are not in conflict as is often stated to be the case, but both are the law of this state under their respective fact situations.

Under the first situation, where the parties to the subsequent marriage again take up domicile in the forum that granted the *in praesenti* divorce, and still assuming a prescribed waiting period before remarriage, the laws of that forum must be examined. If it can be shown that remarriage would be declared void if celebrated there and that the Marriage Evasion Act or a statute similar to the first section of that act exists, the Wisconsin Court will hold that the subsequent marriage is invalid.

"... This court has also held that where parties are prohibited from marrying in the state of their domicile and they leave such state for the purposes of evading the laws of the state of their domicile, are married in a sister state, return to the state of their domicile, and live there, in illicit cohabitation, it will give effect to the laws of such state where the parties thereafter remove to this state."*

If the divorcing forum had neither Marriage Evasion Act nor similar statute, however, it would seem that the urgency for such comity would be lacking because in holding with the divorcing forum that the subsequent marriage was invalid, the Wisconsin Court has stressed the existence of such statute and appeared to base its holding thereon.

In doing this the Wisconsin Court viewed the matter through the eyes of the divorcing forum. Invalidity could also be ascertained from the viewpoint of the remarriage forum if it could be spelled out that such remarriage was not valid there. This could be accomplished, assuming: (1) that the parties returned to domicile in the state which

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22 See *supra*, note 18.
23 165 Wis. 364, 162 N.W. 313 (1917).
24 178 Wis. 609, 190 N.W. 364 (1922).
25 *Ibid* at page 613. Also supporting this view is the language of the Court in the Hall case, where it is said, "Since (the Illinois statute) declares a public policy similar to our own, no good reason is perceived why this court should not take cognizance of plaintiff's evasion of the laws of our sister state and apply the same rule to their infraction that we would apply to a violation of our own laws."
26 *Hall v. Industrial Commission of Wisconsin*, 165 Wis. 364, 162 N.W. 313 (1917).
granted the divorce and, (2) that the parties were prohibited from remarrying in that state; if the *lex loci celebrationis* had adopted section two of the Marriage Evasion Act or similar statute. The statute clearly voids a marriage under these facts. Would not the same grounds for comity be present?

Under the second situation, where the parties go elsewhere than the state of divorce, the Wisconsin Court has followed the general rule of cases where a marriage's validity is in question and held that such marriage if valid where contracted, is valid everywhere. The divorcing forum's proscription against remarriage is regarded as not extraterritorial and not effective to reach over its border to disturb the subsequent marriage ceremony. An even clearer case is presented, if before the divorce is decreed, the party to the subsequent marriage has taken up domicile in some other state. That comity is not available in such circumstances appears from the language used in *Fitzgerald v. Fitzgerald*.

"If it had been the intention of the legislature in the modification of the existing rules of law relating to the validity of marriages in other jurisdictions, to extend the public policy of the state to the point of declaring void marriages contracted in violation of the law of other states, it would have undoubtedly said so."

Looking at the controversial cases of *Hall v. Industrial Commission of Wisconsin*, and *Owen v. Owen* plus the cases that follow it, keeping in mind the foregoing discussion, one can easily distinguish. In the *Hall* case there was a divorce in Illinois, remarriage within the forbidden period in Indiana, two months in Wisconsin, then return to Illinois for one and a half years. The remarriage was held void. In

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27 See *supra*, note 21.
29 210 Wis. 543, 246 N.W. 680 (1933).
30 *Ibid.* "It is considered that Owen v. Owen (1922) is not out of harmony with the prior decisions of this court." The *Hall* decision was handed down in 1917.
31 The return to Illinois seemed to be the deciding factor in this case; but also necessary for the Wisconsin holding was; first, an Illinois statute that declared remarriages within the prohibited period void, and second, the Uniform Marriage Evasion Act, section one (in effect in Illinois). Illinois adopted the Marriage Evasion Act in 1915. (Smith-Hurd Ill. St., c89, para. 19-20) which took care of the second point; the first requirement was fulfilled by Illinois Statute, chapter 40, sec. 1a Smith-Hurd Ill. Ann. Stats. which provided: "That in every case in which a divorce has been granted . . . neither party shall marry again within one year from the time the decree was granted . . . provided however, that nothing in this section shall prevent the persons divorced from remarrying each other, and every person marrying contrary to the provisions of this section shall be punished by imprisonment in the penitentiary . . . *and said marriage shall be held absolutely void.*"

An additional point that might deserve some attention is the Court's mention that the statute was "deemed imported into plaintiff's divorce decree."
the *Owens* case there was a divorce in Illinois, remarriage in Michigan, and subsequent domicile in Wisconsin. The remarriage was held valid. Also in *Fitzgerald v. Fitzgerald*\(^{32}\) there was a divorce in Illinois after the party to the subsequent marriage in Indiana had taken up domicile in Wisconsin, and the parties to the remarriage later domiciled in Wisconsin. The remarriage was held valid.

If the facts of the *Hall* case should be presented again, it is doubtful that the same decision would be reached in view of the fact that the Illinois statutes under which the Illinois judgment rendering such a marriage invalid has been changed.\(^{33}\)

**CONCLUSION**

Where parties marry after the divorce of one of them from a third person, the time of required celibacy not having been observed, the Wisconsin Court will say such marriage is valid only under the following circumstance: An *in praesenti* divorce of another state when the parties remarry in yet another state with intent (carried out) not to return to domicile in the state granting the divorce. In all cases the assumption is that the marriage is in accord with the requirements of the state where the ceremony was performed.

**Howard H. Boyle, Jr.**

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\(^{32}\) See *supra*, note 29.

\(^{33}\) Act approved June 30, 1923; (Laws 1923 p. 327). The repealing act validates all marriages contracted in violation of section 1a if otherwise legal and vested property rights are not affected. "It is apparent that if the parties to this action had taken up their residence in the State of Illinois at or after the passage of the repealing and validating act of 1923, the marriage would have been valid in Illinois." *Fitzgerald v. Fitzgerald*, 210 Wis. 543, 246 N.W. 680 (1933).