Marriage and Divorce - Judgments - Absolute or Limited Divorce Judgments Under 247.09 of the Wisconsin Statutes

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ABSOLUTE OR LIMITED DIVORCE JUDGMENTS UNDER SECTION 247.09 OF THE WISCONSIN STATUTES

A problem confronting divorce courts in this state almost daily arises out of section 247.09 of the Wisconsin Statutes. It reads:

"A divorce from the bond of matrimony may also be adjudged for either of the causes specified in the second and third subdivisions of section 247.08 whenever, in the opinion of the court, the circumstances are such that it would be discreet and proper so to do."

The subdivisions referred to are as follows:

(2) Extreme cruelty of either party
(3) On the complaint of the wife, when the husband, being of sufficient ability, shall refuse or neglect to provide for her or when his conduct toward her is such as may render it unsafe and improper for her to live with him."

It is clear that the court with jurisdiction in matters of divorce have the power under section 247.09 to grant an absolute divorce upon grounds which are declared in section 247.08 to be cause for a limited divorce. The question here raised is two fold: first, have the divorce courts, under section 247.09, the power to grant an absolute divorce when only a limited divorce is prayed for in the complaint; secondly, if the courts do have such power should such absolute discretion be vested in them.

The first question finds its answer in the cases which appear to stand as precedent in this state. As far as research herein has revealed there are only three cases which involve this problem directly, the most recent of which is Sang v. Sang. In that case the plaintiff husband sued for a divorce from bed and board but the trial court granted an absolute divorce to the plaintiff. Upon appeal, the plaintiff sought modification of the judgment so as to grant a limited divorce in accordance with his complaint. While the Supreme Court reversed the judgment on the ground that the trial court was without jurisdiction over the parties, it stated the law to be that "the trial court may grant an absolute divorce although the prayer be for one from bed and board." This case cited In re Estate of Kehl, and Shequin v. Shequin as controlling precedent.

In the case of In re Estate of Kehl, the language of the trial court upon rendering the judgment indicated rather clearly that an absolute

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1 Wis. Stat. (1941) 247.08(2) (3).
2 215 Wis. 353, 254 N.W. 639 (1934).
3 23 N.W. (2d) 340, April, 1942.
4 161 Wis. 183, 152 N.W. 823 (1915).
5 Supra, note 3.
divorce was granted though the prayer of the complaint was for a limited divorce only. The appellants in the supreme court insisted that it was a divorce a vinculo, the respondent that it was a limited divorce. Upon deciding the issue, the supreme court said: "It is true that a court may grant a divorce a vinculo although the prayer of the complaint be for one from bed and board. But the prayer of the complaint, with nearly all judges, we believe, controls the nature of the judgment granted by the court especially when the defendant interposes no objection, and none was interposed herein. We consider the real intention of the court was to render a judgment in accordance with the prayer of the complaint." While this case is clearly in line with the position taken in Sang v. Sang as to the discretionary power of the court, it lends support to the view that the prayer of the complaint should be the basis for the judgment.

The earliest and leading case in point is Shequin v. Shequin. In this case, the complaint, as amended before trial, was for a divorce a mensa et thoro. An absolute divorce was granted, however, at the request of the defendant who was the guilty party. The plaintiff appealed. The supreme court said that "the mere fact that the prayer of the complaint asked for a limited divorce did not preclude the court from granting a divorce from the bonds when the proof warranted such a judgment." This language upholds the statements in Sang v. Sang and In re Estate of Kehl. But it should be noted that in Shequin v. Shequin it was shown by the defendant that the plaintiff's attorneys consented to the judgment for an absolute divorce; and the supreme court held the plaintiff bound thereby. In Shequin v. Shequin, the court cited Dutcher v. Dutcher as precedent for the discretionary power of the court to grant an absolute divorce though only a limited divorce is prayed for. Dutcher v. Dutcher does not seem to involve this problem directly or indirectly, nor does it discuss the statute out of which this problem arises. The only possible language therein, it seems, which might have been construed as relating to the question is as follows:

"It has been seen that this case was in the minds of the revisers in New York, and influenced them in framing the divorce statute from which section 13 in our statute is copied, and on which our whole statute is largely modeled. And accordingly we find the New York statute in terms permissive both as to judgments of nullity and judgments of divorce. In our statute, the provisions for judgments of nullity or affirmance of marriage are in terms

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6 Supra, note 2.
7 Supra, note 4.
8 Supra, note 2.
9 Supra, note 3.
10 Supra, note 4.
11 39 Wis. 651 (1874).
obligatory, and for judgments for divorce in terms permissive throughout; a distinction of language in kindred sections in the same statute pregnant with meaning.

The rule that *may* means *shall* in statutes where the public or individuals have a claim de jure to the exercise of the power conferred, is not overlooked. But we have the great authority of Chancellor Kent for holding permissive words in the grant of this peculiar jurisdiction, to imply a sound judicial discretion in its exercise; strongly fortified here by the abrupt transition of the statute from uniformly obligatory words in one branch of the jurisdiction conferred, to uniformly permissive words in the other; an antithesis precluding oversight and implying design.\[12\]

While this language does not seem to justify the broad statement in *Shequin v. Shequin*,\[13\] the fact remains that ever since that decision the trial courts have taken the position that they have the power to grant an absolute divorce under section 247.09 irrespective of the prayer of the complaint so long as the proof warrants such a judgment, and the broad language of the cases above cited justifies this view.

As to the second question, namely, whether or not the courts *should* be vested with this broad discretion, it is the opinion of the writer that the courts should not possess this power. This opinion is based, first, upon the statute itself; secondly, upon authorities holding that relief granted must be in conformity with the demands of the complaint; and lastly, upon justice and sound social policy.

Under section 247.09, an absolute divorce may be granted 1) for extreme cruelty of either party, 2) on the complaint of the wife, when the husband, being of sufficient ability, shall refuse or neglect to provide for her or when his conduct toward her is such as may render it unsafe and improper for her to live with him. It must be remembered, however, that these grounds are originally grounds only for a limited divorce under section 247.08 and they are made grounds for an absolute divorce only by virtue of section 247.09. In other words, in the absence of section 247.09 it would be impossible to obtain an absolute divorce upon these grounds. It seems, therefore, that the statute was intended to grant an adequate remedy to the complaining party where, in the absence of the statute, such remedy would not exist. It does not seem to have been the intention of the legislature that this statute should be, in effect, a subdivision of section 247.08 so as to give the courts the power to grant, in its discretion, an absolute divorce without regard for the prayer of the litigants. Further, the discretionary power seems to be given in this statute so that the court may decide from the circumstances of the case whether or not a party

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12 Dutcher v. Dutcher, 1847, 39 Wis. 651, pp. 666-667.
13 Supra, note 4.
seeking the remedy of an absolute divorce under this statute should be granted such remedy.

As far as actions in the courts are concerned, divorce actions are treated the same as other cases. And in cases generally, at law or in equity, the demands of the complaint control and limit the relief granted by the judgment. The state of Wisconsin has so provided by statute and the courts have upheld the statute in their decisions. It is true that this statute on the measure of relief provides that where an answer is interposed to the complaint the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. There is no apparent reason why this general rule should not apply to divorce actions under section 247.09, at least where the judgment is taken by default, when it does as a matter of fact apply to other aspects of a divorce action. In Hoh v. Hoh the complaint in the divorce action demanded relief only as to alimony and temporary allowances. The trial court granted a default judgment for a division of the husband's property. Upon appeal the judgment of the trial court was held erroneous as granting a remedy outside the prayer of the complaint.

The danger of vesting this power in divorce courts which are so fundamentally vital to the proper and wholesome direction of a sound social policy of which marriage is in many ways the basis, is a real one. If this power to grant an absolute divorce without at least the consent of the parties when only a limited divorce is requested continues to exist in the courts the ends of social evils and injustice can only be served: social evil, because divorce always affects society and judgments for absolute divorce without regard for the desire of the litigants seems to lead to no apparent good to society; injustice, because this power may violate the rights of individuals who have moral convictions and reasons opposed to absolute divorce whether these convictions or reasons be religious or personal in character. Socially and in justice, then, no litigant should be subjected to such complete judicial discretion.

The cases cited herein were not decided solely upon the basis of this discretionary power. In Shequin v. Shequin there was present the consent of the plaintiff's attorneys; In re Estate of Kehl, the supreme court was asked merely to interpret a trial court's judgment; in Sang v. Sang, the trial court's lack of jurisdiction was the decisive element. Nevertheless, from what has been said it is clear that the supreme court

14 Wis. Stat. (1914) 270.57.
16 Wis. Stat. (1941) 270.57; City of Wauwatosa v. Union Free High School District, 214 Wis. 35, 252 N.W. 351.
17 Supra, note 15.
has stated and reiterated its position in favor of absolute discretion
of the trial court under section 247.09, and relief, it would seem,
can come only from the legislature.

It is suggested here that section 247.09 be amended by the legisla-
ture to include the words “with the consent or at the prayer of the
complainant.” With this amendment by insertion, the statute would
read in its entirety as follows:

“A divorce from the bonds of matrimony may also be adjudged
for either of the causes specified in the second and third subdivi-
sions of section 247.08 with the consent or at the prayer of the
complainant whenever, in the opinion of the court, it would be
discreet and proper so to do.”

The inserted amendment would empower the court to grant the remedy
prayed for and no other, or deny it, depending for its decree upon the
facts and circumstances of the case. Such a legislative act would re-
move the uncertainty and fear that litigants going into court must now
face under section 247.09 in that they can never know when a judg-
ment for an absolute divorce granted under judicial discretion will
give them what they do not seek or desire.

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