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Family Law and Community Property

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FAMILY LAW AND COMMUNITY PROPERTY

REVISION OF DIVORCE DECREE IN EX PARTE PROCEEDING

Oklahoma. The rule in the majority of American jurisdictions seems to be that, once a decree of divorce has been made, the court is without power to alter it unless authority is granted by statute or reservation of such power is provided in the decree.[1] In the absence of a reservation, it would appear that the statutory requirements must be strictly fulfilled.

In *Allen v. Allen*[2] plaintiff (wife of defendant) brought action on a written contract that was entered into by the litigants during coverture in contemplation of the termination of the marital status. The contract provided that defendant husband would pay to plaintiff $140 per month until remarriage or until her death. Defendant complied with this provision of the contract from 1939 (at which time a decree of divorce was granted the defendant against the plaintiff in Nevada) until 1946. The present suit was predicated on defendant's default touching the monthly installments.

Defendant countered that the wife had no rights under the contract and that no action could be validly sustained. His defense was based upon an *ex parte* proceeding without notice to the plaintiff wife in which the Nevada court, in an order *nunc pro tunc,* modified the divorce judgment by the incorporation of the 1939 contract, copying it verbatim into the decree, thereby purporting to extinguish the contract between the parties. Defendant in addition contended that full faith and credit must be given to the divorce judgment as amended by the *nunc pro tunc* order of the Nevada court.

The trial court denied plaintiff any relief, giving as its reason the decree of the Nevada court as modified by the order *nunc pro tunc* of 1946. The Supreme Court of Oklahoma, with four jus-

[1] 2 VERNIER, AMERICAN FAMILY LAWS (1932) 275.
[2] _____Okla._____, 256 P. 2d 449 (1953).

tices dissenting, vacated the judgment of the trial court, directing that upon remand, judgment be entered for the plaintiff.

Only questions of law were presented on the appeal; no issues of fact were raised by the pleadings. Many authorities from diverse jurisdictions were cited upholding the plaintiff's position. In essence, the noted cases held that where a property settlement is copied into a divorce decree and made a part of it, the contract is merged in the decree and no action is maintainable upon the agreement. On the other hand, where the contract is simply referred to with approval by the court rendering the decree (as in the instant case), there is absence of merger and an action may be maintained upon the contract.[3]

The pivotal question upon which the case turns is whether an order *nunc pro tunc*, without notice to the adverse party, is valid. The parties had stipulated that the law on this question was the same in both states. The court found that the laws were in fact parallel. A *nunc pro tunc* order made without notice to the adverse party is void.[4]

Defendant's contention that full faith and credit must be accorded the judgment of a sister state could not stand. A state is required to give full faith and credit to the judicial proceedings of a sister state only in the event that the court of the sister state had jurisdiction over the subject matter and the persons.[5] Plaintiff was not a party to the order *nunc pro tunc*.

CONTRACT FOR ALIMONY — ENFORCEABILITY

Texas. All but four American jurisdictions have enacted statutes permitting alimony to the wife in absolute divorce cases. Usually the alimony is an incident to the divorce, which is the main relief sought. South Carolina does not grant divorces. In

[3] Finley v. Finley, 65 Nev. 113, 189 P. 2d 334 (1948).
[4] Lindsay v. Lindsay, 52 Nev. 26, 280 Pac. 95 (1929).
[5] U. S. CONST. Art IV, § 1.

Delaware the court may decree that part of the husband's property be set aside to the wife. Texas permits the court to make an equitable division of the spouses' property for the care of the wife.[6]

In *McBride v. McBride*[7] appellant sought modification of a judgment against him. Specifically, he sought elimination of an obligation to pay his divorced spouse a third of his monthly income, but not to exceed $200 per month, until the appellee remarried or until their son reached the age of twenty-one years. The son at the time of the suit was four years of age, and the settlement contract provided that appellee would receive the monthly payment for her maintenance and support for approximately seventeen years. The contract was "ratified and approved and . . . made a part of . . . [the divorce] decree."

The court of appeals held:

> This latter provision, which we hold to be in the nature of permanent alimony, has no connection with, is not payable from and is not referable to any property which either spouse may have owned or claimed. Nor does it purport to be for the support, maintenance and education of the son. It is by its own unmistakable language an agreement to support and maintain a divorced wife from future earnings of a divorced husband.
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> The point here . . . is that if future wages of an ex-husband may be subjected to the support of an ex-wife then the circuit has been completed and permanent alimony becomes an established reality despite our statutes and many court decisions to the contrary.[8]

Appellee argued that the statutory bar of permanent alimony was negatived by the voluntary nature of the agreement. The argument availed appellee nothing, since the court had no jurisdiction and was without authority to grant permanent alimony.[9] Consent

[6] 2 VERNIER, AMERICAN FAMILY LAWS (1932) 260.
[7] 256 S. W. 2d 250 (Tex. Civ. App. 1953).
[8] *Id.* at 253. The statutes referred to are TEX. REV. CIV. STAT. (Vernon, 1948) arts. 4636-4639.
[9] Cunningham v. Cunningham, 120 Tex. 491, 40 S. W. 2d 46 (1931).

of the parties could not confer this character of jurisdiction upon the court.[10] Contracts contrary to public policy are void and will not be carried into effect by the courts.[11] The public policy of the State of Texas is disclosed by and embodied in the statutes referred to in the opinion.

The court refused to hold that future wages are property or "estate of the parties" within the meaning of the statute authorizing division of property in divorce cases.[12]

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[10] Federal Underwriters Exchange v. Pugh, 141 Tex. 539, 174 S. W. 2d 598 (1943).

[11] 10 TEX. JUR., *Contracts*, § 109.

[12] TEX. REV. CIV. STAT. (Vernon, 1948) art. 4638: "The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."