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SINCE 1921, the divorce law of the state of Washington has provided for the entry of an interlocutory order, subject to confirmation at any time after a six-month period has elapsed. Ch. 109, L. '21, p. 332, § 2. Under this procedure, the parties are not finally divorced until the entry of a final decree of divorce after the lapse of such six-month period.

Twenty-five years of practice under this procedure culminated, in 1946, in formal recognition by the Washington State Bar Association of a widespread feeling among attorneys that our divorce statutes needed careful study The interlocutory period was felt to be failing in its purpose—that of promoting lasting reconciliations between the parties to divorce actions. Instead, due to misunderstanding and lack of information on the part of many litigants, it was found that many invalid marriages were being contracted. In many cases, the necessity of entering a final decree of divorce was completely overlooked by the parties. In others, marriages were contracted in other jurisdictions before the entry of the final decree. Property rights were much confused, and many illegitimate children were born.

A subcommittee of the state bar's Legislative Committee was appointed to study all sections of our divorce law, with a view to recommending changes to the state legislature if such study should show that amendments were desirable. The results of that study have been twice reported in this journal.[1] The committee's work resulted in a number of specific recommendations, and later a bill was drafted and submitted to the 1949 legislature, where it was passed without substantial amendment. Approved by the Governor March 19, it will become effective June 9, 1949.

Chapter 215, Laws of 1949, is a complete recodification, with amendments, of the statutes relating to divorce or annulment of marriage. Section 1 provides that the act may be cited as the Divorce Bill of 1949.

The provisions of the existing law relating to grounds for divorce have been substantially re-enacted in Section 2, three subsections only being changed. REM. REV STAT. § 982, (1), providing for divorce

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[1] 22 WASH. L. REV. 17, 23 WASH. L. REV. 320.

where the consent of the party applying was secured by force or fraud, has been amended [§ 2 (1)] by adding thereto the words "or when either party shall be incapable of consenting thereto, for want of legal age or a sufficient understanding." Read in connection with Section 5 of the new act, providing for annulment of void marriages only, these changes were intended to clarify the situations in which annulments might be sought, the contrasting time limits in divorce and annulment actions having been found to place a premium upon the seeking of annulments.

The previous statute providing for divorce in cases where the parties had lived separate and apart for five years or more has been amended [§ 2 (9)] to provide that a divorce may be granted in such cases regardless of fault in the separation. As originally proposed, this section provided for divorce in cases of two years' separation, but the time limit was amended before the bill's passage. The committee's recommendation that, in cases of prolonged separation, a divorce should be available for the settlement of the legal rights of the parties, at some definite time, without regard to fault in the separation, was apparently accepted without alteration.

Under the holding in *Cobb v. Cobb,*[2] many divorces have been secured against defendants insane at the time the action is begun, even though the insanity had existed for a very brief period of time, the divorces being sought and granted on the basis of grounds accruing prior to the commitment. Section 2 (10) of the new act, providing that, where the defendant is suffering from chronic mania or dementia at the commencement of the action, the existence of such condition for a period of at least two years prior to the filing of the complaint shall be the sole ground upon which the court, in its discretion, may grant a divorce, is intended to alter this situation. It was felt that in many cases the acts used as grounds in the divorce case were actually related to the oncoming mental illness, and also that the defendant should be allowed a reasonable period for possible recovery in order to defend against the action.

The existing section, REM. REV STAT. 984, allowing the filing of complaints for divorce "or decree of nullity of marriage" by any person who has been a resident of the state for one year has been reenacted with the omission of the words "or decree of nullity of marriage." It was felt that the one-year residence requirement should not

[2] 19 Wn.(2d) 697, 143 P.(2d) 856 (1943).

apply to actions in which the relief sought is simply judicial recognition of the invalidity of a marriage. As set forth in the case of *Hahn v. Hahn*,[3] it is desirable that the invalidity of such marriages be recognized immediately and at the first opportunity, "to the end that the public be protected so far as possible from the evils which follow such unlawful unions, and to prevent the innocent from suffering therefrom." Throughout the committee's study and drafting of the Act of 1949, the approach to annulments has been based on the belief that marriages should be held valid except where the law declares that they are absolutely void, such as where bigamy is proved.

The fundamental procedural change as to divorce actions is expressed in Section 4 of the Act of 1949, providing that no divorce case shall be heard until ninety days after filing and service of the complaint. This section is designed, in conjunction with Section 11, providing for the entry of a full and complete decree of divorce at the conclusion of a divorce hearing, to eliminate the old interlocutory period, and to substitute therefor a reasonable waiting period prior to the entry of any decree. The time limitation set out in this section naturally represents a compromise between many varying theories as to the proper length of such delay between the commencement of an action and the granting of the divorce. Suggestions were made as to this feature ranging all the way from the view that the residence requirement should be shortened to six months, and a divorce then granted at the expiration of thirty days from the beginning of the action, to the view that a six-month period should elapse between the filing of the complaint and the entry of decree. The committee was unanimous, however, that the interlocutory period as existing under the Law of 1921 should be eliminated, and that the waiting period, of whatever length, should elapse before the parties go to court and the court's decision is rendered.

The annulment of void marriages is provided for, at the suit of either party, by Section 5, in which it is provided that such actions shall be filed in the county in which plaintiff is a resident at the time of commencement of the action.

An entirely new section has been added to the statute, declaring that children born during a marriage of record, later annulled, are the legitimate children of both spouses, notwithstanding the later annulment. By this section (§ 6), the court is specifically given the same

[3] 104 Wash. 227, 176 Pac. 3 (1918).

power to provide for the custody and maintenance of such children as it has in actions for divorce.

Prior to the decision in *Barker v. Barker*[4] the power of the court to provide for the custody and maintenance of children born of void marriages was much questioned, and in many cases the court either was not asked to make such provision, or refused to do so, on the ground of lack of the requisite jurisdiction. By the *Barker* case, this question was resolved in favor of the court's right and duty to make all necessary orders, quoting in support of its decision from *Peterson v. Peterson*[5] and arriving at a general rule expressed as follows:[6]

> We consider the above case controlling, and hold that, in an annulment proceeding where an invalid marriage has been entered into in good faith by the parties, and, as a result of such invalid marriage, a child or children are born, the court has inherent jurisdiction or authority to make proper provision for the custody and maintenance of such child or children.
>
> Having decided that the court has authority to make the order complained of, it is unquestioned that such authority continues during the minority of the child.

The new statute, however, in addition to stating in specific terms the court's right to make all necessary orders relating to the custody and support of children in such cases, (regardless of any question of good faith in the marriage) declares that children born of a marriage of record, later annulled, are the legitimate children of both parents. While it is hoped that the amendments otherwise contained in the act will very substantially reduce the number of void marriages contracted in this state, our courts will nevertheless continue to meet with this problem to some extent, and it is believed that it will be of considerable relief to all parties concerned with such cases to have the benefit of a statute which enables the innocent child to be protected from the consequences of the parent's folly or carelessness.

Section 7 of the Act, providing for a stay of proceedings in the court's discretion if either party appears to be in violation of any criminal law relating to nonsupport, is a re-enactment of the existing statute.[7] This section is not ordinarily of much concern to the practicing attorney, but it has proved to be of great assistance to the representatives of the state in some cases which arise under present

[4] 131 Wash. Dec. 469, 197 P.(2d) 439 (1948).
[5] 164 Wash. 573, 3 P.(2d) 1007 (1931).
[6] 131 Wash. Dec. at 473.
[7] REM. REV. STAT. § 982-1.

day conditions. Many divorce cases are now being brought by mothers who are recipients of Aid to Dependent Children grants from the State Welfare Department. In a number of these cases, the defendant husband is employed, but failing to make any contribution to the family, such failure sometimes having continued for many months without any attempt at prosecution being made. Under this section of the statute, divorce decrees may be delayed until the cooperation of the wife is secured in a prosecution aimed at forcing the husband to make regular contributions to the family Usually a very brief delay in the granting of the decree is sufficient to persuade a reluctant plaintiff of her duty toward the relief of the taxpayer's burden.

REM. REV STAT. § 995, providing for the participation of prosecuting attorneys in divorce actions, has been amended in two respects by Section 8. The previous requirement that "copies of all pleadings, notice of trial, motions or orders" in any divorce action should be served upon the prosecuting attorney has been reduced to a requirement that summons and complaint and such other papers as may be required by court rule should be so served. This is a much more practical requirement and should prove very much less cumbersome than the prior system. It appears to the writer that copies of answer and cross-complaint should be so served because of the considerable number of noncontested decrees which are taken on the basis of a cross-complaint. Serious consideration might well be given to a requirement that copies of proposed findings and decrees should be provided, sufficiently in advance of the hearing to allow possible objections to be discussed with counsel. Such a procedure should prove of value both to counsel and court.

Under Section 8, the position of the prosecuting attorney has been somewhat changed, to make him now a party to the action in those cases in which he must appear, and to give him the right to appeal. On this point there was much discussion in committee, resulting in the conclusion that if the state has such an interest in default and noncontested actions as to require the attention and occasional intervention of the prosecutor, by the same token the state should have the right to carry questions of public policy to the highest court. It is not anticipated that this provision will result in a great number of appeals, but it is probable that there will be some. There is a very great predominance in the number of default divorces over contested cases, and it is in this type of case that certain situations arise in which public

policy is particularly involved. Under this section it may be possible to secure decisions which will be helpful as a guide to the bar in dealing with certain troublesome situations in which no authority now exists.

Section 9 of the Act of 1949 is in part a re-enactment of the existing statute with reference to orders *pendente lite* and allowances for fees and costs at the conclusion of the hearing, together with a new clause providing for allowance of attorneys' fees for services performed on appeal, at the discretion of the Supreme Court.

REM. REV STAT. § 985 is re-enacted verbatim by Section 10, declaring that where the defendant does not answer, or admits the allegations of the complaint, the court shall require proof before granting a decree of divorce or annulment.

A full and final decree of divorce, to be entered at the conclusion of the hearing, subject only to appeal as in civil cases, is provided for by Section 11. Such decree is to be final as to the dissolution of the marital relation, and as to the disposition of property, but subject to modification as to alimony and the care, custody, support, and education of children, upon a change of circumstance.

Throughout this section, the court is given the same powers and duties in granting an annulment as in granting a divorce. As to children, this section is largely a restatement of the principle declared in Section 6, requiring that in all circumstances the children of annulled marriages shall be treated exactly as are those of valid marriages dissolved by divorce. By this section, the court is given the further power to take under its jurisdiction the property of the parties to an annulment action and to make equitable distribution of the same on the principles which govern such disposition in actions for divorce.

There is no specific restriction upon remarriage during a possible appeal period contained in the Act, since it was felt that to impose such restriction would be to preserve, to some extent at least, the undesirable features of the interlocutory period. In contested cases, where an appeal is probable, it was felt that the attorneys involved would be in a position to advise their clients of the dangers of a marriage contracted before the expiration of the thirty-day period for taking an appeal, or before the conclusion of an appeal, if taken. It was felt to be undesirable to create a situation where, in the many default or noncontested cases in which decrees are granted, a marriage contracted during the possible appeal period could later be attacked and held invalid on that ground alone, even though no appeal was

actually taken. It is anticipated, moreover, that all attorneys will advise their clients as to the advisability of a thirty day delay before entering into a new marriage.

The court's power to grant a decree of separate maintenance at the conclusion of trial, if it determines that no divorce or annulment is warranted, is specifically declared by Section 12. This section states that, in such cases, the court may "set aside property for the benefit of the wife and children, if any, and impose a lien on community property to compel obedience to the decree." There seems to be considerable doubt as to whether this section would allow the actual transfer of title to property by a decree of separate maintenance, particularly in view of our decisions as to separate maintenance, and the fundamental concept of such actions being that the marriage relationship continues unchanged.

Separate maintenance decrees are made subject to modification "on a showing that the conditions rendering it necessary have changed or no longer exist." In view of the fact that separate maintenance decrees are entered on the theory that the separation is temporary, and a reconciliation desired, it seems just that if such reconciliation does in fact take place the parties should be relieved of the specific requirements of a decree.

The change of name of the woman, by decree of divorce or annulment, as provided by existing statute,[8] has been provided for by re-enactment of that section as Section 13 of the Act of 1949. REM. REV STAT. § 997, declaring that the practice in civil actions shall govern actions for divorce, except that trial by jury is dispensed with, is re-enacted by Section 14, with the addition of the words "or annulment." Section 15 allows the filing of cross-complaint for divorce or annulment, and declares that the court may grant a divorce or annulment to either party, or to both. This is a re-enactment of REM. REV STAT. § 986, with the addition of the words "or annulment."

REM. REV STAT. § 995-2, providing for the bringing of actions to modify decrees in relation to the care and custody of children in the county in which the children are then residing, or in the county in which the person having custody is residing, has been re-enacted by Section 16, with two important changes. The bill as originally presented and introduced retained the existing wording declaring that such actions to modify "shall" be brought where the children or their cus-

[8] REM. REV. STAT. § 994.

todian is residing. This section was amended in the Senate to provide that such actions "may" be brought where the children or their custodian then reside. Under this section, as now enacted, the action may be brought in the county of original jurisdiction, even though the children and their custodian are then in another.

The words "or enforce" have also been added to this section, so that it is now clearly proper to institute proceedings for enforcement in a county other than that of original jurisdiction, where the children or their custodian are residing in such other county

Sections 17 and 18 re-enact REM. REV STAT. §§ 995-3 and 995-4, providing for procedure in such actions to be instituted by the filing (in counties other than the original county) of certified copies of the order sought to be modified, and of such other portions of the original file as the court shall deem necessary

The provision for attorneys' fees in actions for enforcement or modification made by REM. REV STAT. § 997-1 was found upon experience to be inadequate, since, while allowing fees to be awarded to the moving party where the petition proved to be well founded, it made no allowance for the relief of parties brought into court to answer to a petition. This created injustice especially in cases where numerous petitions were filed, only to be denied upon hearing. This problem has been dealt with by Section 19, which is intended to grant the court the most complete possible discretion to award attorneys' fees in proceedings for the enforcement or modification of any order entered in actions for divorce, separate maintenance, or annulment. It is hoped that by this section justice will be promoted, and it is anticipated that frivolous or badly grounded petitions will be discouraged.

Sections 20 and 21 are new in our divorce statute, and are an enactment, verbatim, of the recommendations of the Uniform Law Commissioners to the American Bar Association, entitled by the Commissioners a UNIFORM DIVORCE RECOGNITION ACT. Section 20 provides that, where both parties are domiciled in this state at the time an action for divorce is commenced in another jurisdiction, such divorce shall be of no force or effect in this state. Section 21 provides a rule of evidence by which a *prima facie* case for the invalidity of such divorce may be made, thereby shifting the burden of sustaining it to the party by whom it is secured.

The constitutional aspects of these sections were carefully studied

by the Uniform Law Commissioners, and a brief supporting the conclusion that they are constitutional was submitted together with the recommendations. Since the decisions of this state have always shown a strong tendency to require that our residents should restrict themselves to this jurisdiction in seeking relief from marital problems, it was felt that the sections as proposed had a proper place in our statute law

Section 22 makes the new procedure applicable to all actions in which an interlocutory order of divorce has not been entered prior to June 9, 1949, the effective date of the Divorce Act of 1949. Since the changes made are procedural rather than substantive, it was felt that this was a proper provision, and that it would tend to eliminate the prolonged period of confusion between two systems which would otherwise result. Cases in which an interlocutory order is entered will, of course, continue to be made final according to the former system.

The above completes discussion of the Bar Association bill, as finally enacted. An additional statute relating to divorce was also passed by the 1949 session, providing for the entry of a final decree of divorce, *nunc pro tunc,* as of the earliest date when such entry would have been possible, where such decree has not been entered due to mistake, negligence, or inadvertence. Upon the entry of such decree *nunc pro tunc,* marriages contracted subsequent to the expiration of six months from the date of entry of the interlocutory order are declared to be validated for all purposes.

This section is identical with CAL. CIV CODE § 133, with the omission of one sentence permitting the entry of such decrees even though a final had previously been entered.

The California courts have construed this section several times, and the decisions are interesting. In the case of *Macedo v. Macedo,*[9] a second husband applied for an annulment, the wife not having secured a final decree at the time of the marriage. She having secured a final decree *nunc pro tunc,* the court denied the annulment. The contention was made that the act was unconstitutional, in that its effect was retroactive. The court held, however, that the plaintiff had no vested right to have the marriage annulled, and that the act violated no constitutional restriction, stating that "the Act is both curative and remedial, and the retroactive operation of such statute should be given effect

[9] 29 Cal. App.(2d) 387, 84 P.(2d) 552 (1938).

unless it disturbs some vested right or impairs the obligation of some contract."

Especially in view of the fact that, under this new section, the court may enter a decree *nunc pro tunc* of its own motion, it would seem that in the future wise counsel would plead in the alternative for a divorce or annulment, wherever the ground for the annulment is the absence of a final decree in a prior divorce secured by one of the parties.

The effect of this provision in situations where property is involved is open to some question. On this point, the cases of *Ringle v. Superior Court of Alameda County*[10] and *In re Hughes Estate*[11] raise some interesting points. In the *Ringle* case, the question arose on an application for writ of mandate requiring the court to enter a final decree *nunc pro tunc* under CAL. CIV CODE § 133. The court emphasized that no property rights were involved, but there was a second marriage, contracted after a final decree could have been entered in the wife's prior divorce action. The second husband sought an annulment, and the wife applied for a final decree *nunc pro tunc* in order to validate the marriage. The writ was granted, and the court said:

> Upon the authority of the cases cited the prevailing party is "entitled to a final judgment" under section 133 of the code when the time has expired after entry of the interlocutory decree and no ground has arisen in the intervening period—such as fraud, mistake, or equitable considerations—which would justify a denial of the application. The authorities uniformly hold that when such conditions arise the court should not enter a final decree but they are all in accord that the prevailing party is entitled to the decree when none of these conditions does exist.

In the *Hughes* case, the second Mrs. Hughes applied for letters of administration of her husband's estate. Issuance of letters to her was objected to by the first wife of the deceased, no final decree in the divorce case between Mr. Hughes and his first wife having ever been entered. The second wife thereupon applied for a final decree in her dead husband's divorce, *nunc pro tunc,* and it was granted. The court held that the second marriage was thereby validated, and the second wife the lawful widow, heir to the $70,000 estate. The court's attitude is succinctly stated:[12]

> Mere entry of the nunc pro tunc judgment acts retroactively to restore them to the status of single persons and at the same time gives them and

[10] 128 P.(2d) 558 (Cal. 1942).
[11] 182 P.(2d) 253 (Cal. 1947)
[12] *Id.* at 256.

their later acquired spouses legal married status. It is all strictly artificial, but so is the semi-divorced status occupied by the holders of an interlocutory decree.

In drafting and presenting to the legislature the bill now enacted as the Divorce Law of 1949, the Bar Association, through its committee, has made a very sincere effort to promote the public good. The response of members of the bar to the proposals has in general been very enthusiastic, and it is hoped that time will prove this confidence justified. Most lawyers seem to agree with the committee's feeling that the three-month waiting period provided under the new procedure will do as much to promote valid reconciliations as did the interlocutory period. The committee believes that experience will prove this true. Best efforts have been made throughout to benefit the public and the bar alike by correcting existing defects and the committee hopes that time will show its efforts to have been well directed.