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# Domestic Relations

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some suitable person or association to act in behalf of the child." Here the parents were notified of the proceedings concerning the child, but were not notified that the court was appointing a guardian ad litem for the child. Two earlier cases suggest, but do not hold, that the above section applies only when the parents are not present. *State ex rel. Raddue v. Superior Court,* 106 Wash. 619, 180 Pac. 875 (1919); *In re Jones,* 41 Wn.2d 764, 252 P.2d 284 (1953). The court here held that where the interests of the child and of the parents conflict, the trial court may appoint a guardian. The fact that the parents were given no notice of the appointment, if error, was held to be harmless, since the parents were given full opportunity to be heard on their motion to quash the appointment. The parents, in their brief, claimed that they had no knowledge of what occurred at the hearing appointing the guardian, or of the trial court's grounds for appointing the guardian.

The court also held that while it is the express duty of the probation officer to represent the interests of the child, this duty is exercised on behalf of the state and county. Therefore, when the county prosecutor declines to appear to represent the probation officer, RCW 36.27.030 gives the trial court authority to appoint a special prosecutor.

## DOMESTIC RELATIONS

**Direct Support by a Father As a Defense to His Liability For Non-Payment of Child Support Money.** In the recent case of *Koon v. Koon,*[1] the Washington court held that a father who directly supported his two minor sons instead of paying child support money to their mother in accordance with the provisions of a divorce decree was not thereby discharged from liability for nonpayment of the money to the mother. The court considered itself bound to follow the earlier case of *Bradley v. Fowler.*[2] In that case a father who directly supported his children instead of paying child support money to their mother was held to be in contempt. The divorce decree there in question specifically provided that the father was to pay the support money even during those months when the children, who had been placed in the custody of their mother, were visting with their father.

In following the *Bradley* case, the court distinguished the line of cases including *Ditmar v. Ditmar,*[3] *State ex rel. Meins v. Superior Court,*[4] and *Gainsburg v. Garbarsky.*[5] Each of those cases had held a father who had directly supported his children instead of paying child support money to their mother to be free from liability for nonpayment. They were distinguished as cases involving the express or implied consent of the mother, as parent-trustee, to payment of support money in a manner other than directly to her.

The court's holding in the *Koon* case is bound to add to the confusion

[1] 50 Wn.2d 577, 313 P.2d 369 (1957).
[2] 30 Wn.2d 609, 192 P.2d 969 (1948).
[3] 48 Wn.2d 373, 293 P.2d 759 (1956).
[4] 159 Wash. 277, 292 Pac. 1011 (1930).
[5] 157 Wash. 537, 289 Pac. 1000 (1930).

already present with respect to the enforceability of child support orders. It is true that in the earlier *Meins* and *Gainsburg* cases there were facts from which it might be concluded that the mother, by failing to properly care for the children, had impliedly consented to their direct support by the father. However, the much more recent *Ditmar* case involved no such facts. The consent pleaded by the father in that case was an express agreement by the mother that if the father would directly support one of the children, he would be free from his duty to pay to the mother support money for that child. The court held that the mother was a trustee of the support money for the benefit of the child. As such, she could not agree on her own behalf to such a reduction of the amount due her. However, the court went on to hold that its jurisdiction to enforce child support orders was predicated on the continued dependency of the child in question. Therefore, the court reasoned, in the absence of specific provisions to the contrary, there is a necessary implication in every divorce decree for child support that its binding effect shall continue into the future only for the period during which the children's dependency upon their custodian continues. Finding no such specific provision to the contrary in the decree before it, the court held that the father, who in compliance with the unenforceable agreement with the mother had in fact directly supportd the child in question, had by such support terminated the child's dependency upon the mother. The father thus was free from liability for nonpayment of the support money to the mother.

It therefore appears that the question which the court in the *Koon* case should have asked was not whether the mother had consented to the direct support of the children by the father. Such consent, even if present, would according to the holding in the *Ditmar* case have been inoperative, unless it was the sort of implied consent apparently found in the *Meins* and *Gainsburg* cases. Rather, the court should have asked, in following the *Bradley* case, whether the decree in question was similar to the decree in that case, in that it specifically provided for continued payment of support money to the mother even during those periods when the children were not in fact dependent upon their mother because of the father's direct support.

Given such an enforceable decree, the result in the *Koon* case must follow. A father's remedy in the event of his desire to directly support his children rather than to pay support money to his former wife is to seek modification of the decree.[6] However, since the primary con-

[6] RCW 26.08.110.

sideration involved in child support orders is the welfare of the child, a decree should compel a father to pay support money to the mother of the children only so long as the children are in fact dependent upon her unless the children's welfare otherwise dictates. By the same token a father who directly supports his children only because their mother fails to provide a home or proper care for them, though technically a volunteer insofar as the mother is concerned, ought not to be compelled to pay twice where the welfare of the children has been served by the first payment.

**Enforcement of a Foreign Separate Support Judgment.** The case of *Perry v. Perry*,[1] recently decided by the Washington court, represents a rather startling interpretation of the doctrine of full faith and credit in the field of domestic relations. The court was asked by the former wife of a Washington resident to enforce a Massachusetts judgment for past due separate support money against her former husband. In spite of the fact that the Massachusetts court which had rendered the judgment had *in personam* jurisdiction over the husband and had afforded him notice of the proceedings resulting in the judgment, the Washington court refused to enforce it.

This refusal was based on the fact that the husband had acquired an *ex parte* Washington divorce prior to the time that the support money in question had become due. Because the support provisions in the divorce decree were inconsistent with the support provisions of the Massachusetts support order upon which the judgment in question was based, the court, relying on the recent U. S. Supreme Court case of *Estin v. Estin*,[2] denied full faith and credit to the judgment. Alternatively, the court held that according to the reasoning employed by Justice Rutledge in his dissent in the U.S. Supreme Court case of *Griffin v. Griffin*,[3] even if the judgment was entitled to full faith and credit, it was unenforceable in Washington.

In view of certain factors involved in the *Estin* and *Griffin* cases not present in the *Perry* case, as will be indicated in detail in this note, it is submitted that the Washington court in the Perry case was without foundation for its holding with respect to the judgment in question.

Briefly, the case involved an action in Washington by the former Mrs. Perry to enforce against Mr. Perry the latest of three judgments

[1] 151 Wash. Dec. 321, 318 P.2d 968 (1957).
[2] 344 U.S. 541 (1948).
[3] 327 U.S. 220 (1946) (dissenting opinion).

she had recovered in Massachusetts for unpaid support money which she claimed was due under a Massachusetts separate support decree. This judgment, granted almost two years after Mr. Perry had obtained his Washington divorce, consolidated the two earlier judgments and covered as well the support money unpaid since the docketing of the second judgment. Mr. Perry had filed a general appearance before Massachusetts court at the time of his wife's action for separate support. Therefore that court had continuing in personam jurisdiction over him when it entered the judgment, in that the judgment was merely supplementary to the support action. He was given notice prior to the docketing of the earlier two judgments, only the first of which was related to support money unpaid prior to his receipt of the Washington divorce, but he was not notified prior to the docketing of the third judgment.

The Washington court held that only so much of the consolidated judgment as related to the first judgment covering the period prior to the Washington divorce was enforceable in this state.

The court's refusal to enforce, for want of due process, so much of the judgment as related to support money accruing after the second judgment is consistent with the *prevailing* opinion in the *Griffin* case. The holding in that case was that the appearance of a husband in a divorce action did not dispense with the necessity for notice to him of the docketing of a judgment for alimony arrears.

However, the Washington court's refusal to enforce so much of the consolidated judgment as related to Mr. Perry's failure to pay support money under the Massachusetts decree from the time of the Washington divorce until the docketing of the second judgment, even though he had received the requisite notice prior to the docketing of that judgment, seems erroneous. It is this refusal that is the subject of the discussion to follow.

As has been noted, the Washington divorce was granted to Mr. Perry *ex parte*. However, Mrs. Perry did file a special appearance to contest the jurisdiction of the Washington court to grant her husband a divorce. The divorce was granted subsequent to the issuance by the Massachusetts court of a temporary support order on behalf of Mrs. Perry, but prior to the entry of her final separate support decree. The Washington decree ordered Mr. Perry to pay his former wife $50 per month for the support of their child, in contrast with the Massachusetts support order directing him to pay $203 per month for her

own support. The Massachusetts court had knowledge of the Washington divorce, but chose to ignore it in entering the final decree and judgments.[4]

Relying on *Estin v. Estin*,[5] the Washington court first denied that the second Massachusetts judgment was entitled to full faith and credit, so that regardless of its validity in Massachusetts, only the Washington divorce decree was enforceable in Washington. In the *Estin* case it was held that New York was not required to give full faith and credit to so much of a husband's *ex parte* Nevada divorce, which contained no provision for alimony, as was asserted to have terminated the rights of a New York wife to support money under a prior New York separate maintenance decree. The Washington court considered that case to have been decided on the following alternative grounds: (1) that the prior New York decree had vested the wife with a property right of which she could not be deprived except by a court which unlike the Nevada court had in personam jurisdiction over her, and (2) that New York had such an interest in the support and livelihood of its domiciliary as to justify it in refusing to give full faith and credit to the Nevada decree insofar as that decree was contended by the husband to have terminated his former wife's right to support. The Washington court chose to follow the second ground. It thus interpreted the *Estin* case to have held that once a state had determined its domicilary's economic needs and ability to pay, as Washington had done in ordering Mr. Perry to pay $50 a month to his former wife, that state was not required to give full faith and credit to a conflicting foreign decree such as the Massachusetts order that he pay a larger amount.

The difficulty with that line of reasoning, however, is that it assumes that even had Mrs. Estin been personally before the Nevada court, as Mr. Perry was before the Massachusetts court, the Supreme Court would have permitted New York to refuse to recognize the Nevada

[4] The temporary order also restrained Mr. Perry from proceeding with his then pending Washington divorce action until final determination of his wfie's separate support action. Almost a year passed before Mr. Perry, having been unsuccessful in his attempts to cause his wife to ask for a final hearing, notified the Massachusetts court that he considered himself no longer bound by the temporary injunction, and proceeded to obtain the divorce in Washington. Mrs. Perry's counsel argued before the Washington court, according to his brief, that Mr. Perry had acquired his divorce in violation of the Massachusetts court, and that therefore Massachusetts was entitled to ignore it when it later entered the final decree and the judgments. The Washington court in its opinion failed to discuss this argument, apparently rejecting it as having no bearing on the question of the ability of Massachusetts to collaterally attack the Washington divorce.

[5] 344 U.S. 541 (1948).

decree. Such a rule would mean the end of full faith and credit in the area of domestic relations, in that it would permit the state of domicile to completely disregard a foreign judgment, even though the foreign court had personal jurisdiction over the parties before it. Fortunately, the theory behind such a rule has gained little headway in the Supreme Court since it was first suggested.[6]

However, it is apparent that the fact of Mr. Perry's personal appearance in Massachusetts did bother the Washington court, for the court went on to hold that even if it was required to grant full faith and credit to the second Massachusetts judgment, that judgment was unenforceable in Washington, in view of the reasoning employed by Justice Rutledge in his dissent in the *Griffin* case.

The court found that under Massachusetts law, as indicated by the case of *Rosa v. Rosa,*[7] a valid divorce terminates a husband's liability for payments of separate support which have not become due at the time of the divorce. It also found that according to *Williamson v. Williamson,*[8] Massachusetts allows retroactive modification of support orders. Therefore the court held that the second judgment was unenforceable under Massachusetts law and thus could not be enforced in Washington either. The court reasoned that since the Washington divorce was valid in Massachusetts because of Mrs. Perry's *special* appearance in Washington,[9] Mr. Perry could have prevented the docketing of the second judgment covering support money unpaid after the divorce if he had "actually litigated" his defense. The court then referred to Justice Rutledge's dissenting opinion in the *Griffin* case. According to the law of New York, which had issued the judgment for alimony arrears being sued upon in that case, the docketing of such a judgment did not preclude the husband from later making his defense. For that reason, Justice Rutledge had dissented from the holding of the majority of the court that due process required notice to the husband before the docketing

[6] This theory apparently originated in Justice Stone's dissent in *Yarborough v. Yarborough,* 250 U.S. 202 (1933), and in addition to its appearance in the *Estin* case, it was recognized in Justice Douglas' concurring opinion in *Eisenwein v. Pennsylvania,* 325 U.S. 279 (1945). In no case however, has this ground this ground alone been the basis for allowing a state to deny full faith and credit to a foreign support order, much less to a foreign *judgment* such as that in the *Perry* case.

[7] 296 Mass. 271, 5 N.E.2d 417 (1936).

[8] 246 Mass. 270, 140 N.E. 799 (1923).

[9] In *Sherrer v. Sherrer,* 334 U.S. 343 (1948), it was held that the appearance of the defendant spouse in a divorce action rendered *res judicata* the question of the court's jurisdiction to grant the divorce, so that the state of domicile of that spouse could not later collaterally attack the decree on the ground that the plaintiff spouse was not domiciled within the state granting the divorce. See also footnote 4, *supra.*

of the judgment. From this, the Washington court concluded that even though Mr. Perry was notified before the docketing of the second judgment in Massachusetts, he could still raise the Washington divorce as a defense to the enforcement of that judgment in Massachusetts. Therefore, according to the doctrine of full faith and credit the defense was also available to him in Washington.

It would seem that this reasoning is open to the following objections:

(1) Justice Rutledge in the *Griffin* case was applying New York law with respect to the right of a defendant to raise a defense to a judgment for alimony arrears after docketing of the judgment. It does not appear that Massachusetts allows the same right. In fact the *Williamson* case, cited by the court as authority for the proposition that retroactive modification of a support decree was available in Massachusetts, involved modifiication *before,* not *after,* the arrears had been reduced to a judgment.

(2) Suppose, however, that Massachusetts would allow Mr. Perry to raise a defense after docketing of the judgment. By virtue of the doctrine of *res judicata,* it would appear that such an allowance ought *only* to apply to a defense which was not raised prior to the judgment because of a failure to notify the defendant of the proceedings. But Mr. Perry *was* notified in advance of the docketing of the second judgment, and simply failed to take advantage of the opportunity to litigate the defense which he subsequently presented to the Washington court. Therefore, only if Massachusetts, in addition to allowing retroactive modification of its decree after the arrears due under that decree had been reduced to a judgment, would also have allowed Mr. Perry to contest the execution of that judgment in spite of his failure to take advantage of his opportunity to raise his defense before docketing, could the Washington court validly accept the Washington divorce as a defense to the enforceability of the second Massachusetts judgment.

Therefore it is concluded that the second basis for the Washington court's holding in the *Perry* case, like the first, fails to meet the test of a critical analysis of the authorities cited. Undeniably, as Judge Finley suggests in his interesting footnote to the opinion of this case, there "should be some means available to protect the welfare of Washington domiciliaries, and this state's social interest therein," but it must be apparent that the means here attempted are not satisfactory.

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