DIVISIBLE DIVORCE: PRESERVATION OF THE WIFE'S SUPPORT RIGHTS AFTER A VALID EX PARTE DIVORCE DECREE

Whenever a husband or wife seeks a divorce and both are residents of the same state the issues to be decided are purely dependent on local law. The community interest in avoiding future problems of bigamy and adultery by properly severing the marital relationship and the interest of the wife in securing an adequate property settlement can be protected in one action. Each party can be personally served with process, and there is seldom a subsequent conflict with other states over the validity of the adjudication of either interest. However, divorce is often sought after the husband or the wife has left the matrimonial domicile and established a residence in another state. If both states attempt to adjudicate all or part of the rights of the parties in a divorce or support proceeding two conflicting decisions may result, raising problems of conflict of laws. A recent Washington decision[1] illustrates some of the problems and confusion that exist in determining which state proceeding governs under the full faith and credit clause of the Constitution[2] and its supporting statute.[3]

H and W were married and established a home in Massachusetts. The marriage collapsed when H was transferred to Washington and W refused to join him. After H sent W a verified copy of a divorce complaint the latter immediately filed suit for separate maintenance in Massachusetts, and after H made a general appearance the court awarded W $203 a month as temporary support. H later obtained an ex parte divorce in a Washington court, the Washington decree providing that he was to pay only $50 a month for child support. Shortly thereafter, W secured three execution judgments in Massachusetts for due and unpaid support installments and brought suit in Washington

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1. Perry v. Perry, 318 P.2d 968 (Wash. 1957).

2. U.S. Const. art. IV, § 1 provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may . . . prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

3. 28 U.S.C. § 1738 (1952) provides: "Such Acts, records and proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."

Although this wording seems clear the literal meaning of the statute has never been completely accepted by the Supreme Court, and exceptions have developed to the literal mandate. See generally Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153 (1949).

to enforce these judgments. The Washington Supreme Court reversed an award made by the trial court, declined to give the Massachusetts judgments full faith and credit and held that the Washington divorce decree cut off W's rights to receive any support payments accruing after the divorce was granted.

The holding of the Washington court was based on an interpretation of Supreme Court decisions[4] dealing with the problems of full faith and credit arising out of migratory divorces. Before examining the interpretation adopted by Washington, however, it is necessary to trace briefly the history of the relationship between the full faith and credit clause and divorces granted where one party is neither personally served with process nor present in the state where the divorce is granted.

It is a settled rule that a divorce rendered in a state where neither party has a bona fide domicile is not entitled to full faith and credit in another state.[5] If one party is domiciled in the state, however, the marital relationship may be validly terminated in an ex parte proceeding.[6] The status of this ex parte divorce under the full faith and credit clause has been subject to some uncertainty. Although the Supreme Court originally held that an ex parte decree was entitled to full faith and credit,[7] this position was soon modified by a holding that the full faith and credit mandate applied only when the ex parte decree was rendered in the last matrimonial domicile,[8] i.e., the last state where the parties had lived together as man and wife. Under this rule a person remarrying following an ex parte divorce in a state other than the matrimonial domicile[9] could be subjected to a prosecution for bigamy or adultery in a state not recognizing the ex parte decree. The undesirability of this consequence was finally recognized

4. See notes 14-16 infra.

5. See Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901); Streitwolf v. Streitwolf, 181 U.S. 179 (1901).

6. An ex parte proceeding is one in which one party is neither personally served with process nor present in the state when the divorce is granted. The Supreme Court recognized that an ex parte decree was valid at least within the jurisdiction in Maynard v. Hill, 125 U.S. 190 (1888). The first American decision recognizing the validity of an ex parte divorce was Harding v. Alden, 29 Greenl. 140 (Me. 1832). See Harwood, Alimony After a Decree of Divorce Rendered on Constructive Service, 24 Ky. L.J. 241, 243 (1936).

7. Atherton v. Atherton, 181 U.S. 155 (1901).

8. Haddock v. Haddock, 201 U.S. 562 (1906).

9. For the purpose of this note the term "domicile" is used interchangeably with "residence" since most American statutes fail to make a distinction in determining legal residence requirements for the granting of divorces. See Reese & Green, That Elusive Word, "Residence," 6 Vand. L. Rev. 561, 565 (1953); Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. Chi. L. Rev. 775 n.2 (1955).

by the Supreme Court in 1942 in a case involving a conviction for bigamous cohabitation arising out of one state's refusal to recognize a divorce decree granted in another.[10] The Court held that an ex parte divorce obtained in any state must be given full faith and credit as conclusively terminating the marital relationship. This decision solved the problems created by the "matrimonial domicile" rule, but raised new difficulties for a wife seeking support after a husband has obtained an ex parte divorce granting little or no support. For example, in many states separate maintenance is granted only where there is an existing marital relationship and any right to sue for alimony terminates with a divorce decree.[11] In light of a previous Supreme Court decision, holding that support rights of the wife after a divorce were determined by the laws of the divorcing state,[12] it appeared that the husband could avoid any obligation to support his wife by obtaining an ex parte decree in a state where, by statute, the right to support terminated with the granting of the divorce.

However, if the law of the divorcing state were not controlling and if the wife's right to support could be substantively separated from the divorce decree, the granting of a divorce would not necessarily terminate support rights when the wife was neither present at the proceeding nor personally served with process. By adopting this reasoning the socially desirable result of having the decree recognized in all states and the interest of the wife in securing an adequate property settlement could be preserved much in the same manner as if the actions had been brought in a single state having personal jurisdiction over both parties. This concept of dividing the elements of

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10. Williams v. North Carolina, 317 U.S. 287, 303 (1942). For purposes of reaching a decision the majority assumed that the parties had acquired a bona fide domicile in Nevada, the divorcing state. In Williams v. North Carolina, 325 U.S. 226 (1945) (Williams II), it was held that a sister state could question whether domicile was, in fact, established in the divorcing state, and thus determine whether that state had jurisdiction to grant the divorce. The extent to which jurisdiction could be questioned was modified by Sherrer v. Sherrer, 334 U.S. 343 (1948), where it was held that jurisdiction of a state to grant the divorce could not be collaterally attacked if both parties appear in the divorce proceeding. See also Coe v. Coe, 334 U.S. 378 (1948). There is no question in the principal case that the Washington court had jurisdiction to grant the divorce, since W appeared specially to litigate the issue.

11. See, e.g., Rodda v. Rodda, 185 Ore. 140, 150, 200 P.2d 616, 625 (1949) (alimony award can only be made at the time the court dissolves the marriage); Marrobie v. Marrobie, 334 Mich. 447, 452, 54 N.W.2d 623, 625 (1952). Pennsylvania has no provision for permanent alimony, except where the wife is insane. Pa. Stat. Ann. tit. 23, § 45 (1955).

For a comprehensive collection of cases and statutes concerning the availability of alimony after a valid ex parte divorce see Annot., 28 A.L.R.2d 1378 (1953).

12. Thompson v. Thompson, 226 U.S. 551, 566-67 (1913).

a divorce was suggested by writers[13] as a partial solution to the problems emanating from the requirement that all ex parte divorces be given full faith and credit and was adopted by the Supreme Court in *Estin v. Estin*.[14] The Court here held that although an ex parte decree was conclusive insofar as it terminated the marital relationship, one state was not bound to accept an ex parte alimony adjudication of another when, prior to the divorce, support proceedings had been instituted in the state where the wife was domiciled. Two subsequent decisions by the Court indicate that the presence of the prior support action is not essential to the concept of divisible divorce. In *Armstrong v. Armstrong*[15] it was held that an ex parte divorce decree did not bar the wife from later bringing an original action for support where there was no adjudication of support rights in the divorce proceeding. Then, in *Vanderbilt v. Vanderbilt*,[16] where it was clear that the divorcing court intended to pass on the wife's support rights, the Court found that this did not preclude a later support action in another state.

Thus at the time of the Washington decision this rule can be stated from the decisions of the Court: a state is required to give full faith and credit to an ex parte decree of a sister state as conclusively severing the marital relationship; however, a state is not required to give full faith and credit to an ex parte adjudication of the wife's right to support. Two important problems involving subsequent support decrees are yet to be resolved. (1) What validity does the support decree have in the state where the ex parte divorce was granted?[17] (2) Which of the two opposing judgments in entitled to full faith and credit in a third state faced with deciding which judgment to enforce?[18] Any solution of these problems depends on the theory adopted by the Court in allowing a separation of support rights from the divorce decree and is directly considered in the principal case.

The Washington court, in refusing to enforce the Massachusetts execution judgments granted pursuant to a prior support decree, applied reasoning derived from the *Estin* case. That decision is said to rest on two distinct and independent grounds in determining why the state granting the wife support does not have to give full faith and

13. See materials cited in Estin v. Estin, 334 U.S. 541, 545 n.2 (1948). The possibility of splitting the elements of a divorce was also considered earlier by Justice Douglas, concurring in Esenwein v. Esenwein, 325 U.S. 279, 281-83 (1945).

14. 334 U. S. 541 (1948). See also Kreiger v. Kreiger, 334 U.S. 555 (1948), decided the same day and on the same facts as the Estin case.

15. 350 U.S. 568 (1956).

16. 354 U.S. 416 (1957).

17. This question was specifically avoided by the Court in the Estin decision. 334 U.S. at 549.

18. Justice Frankfurter posed this question in a footnote to his dissent in the Vanderbilt case. 354 U.S. at 428 n.3.

credit to an ex parte adjudication of alimony rights:[19] (1) the interest of the state where the wife is domiciled in protecting her from becoming a public charge creates an exception to the full faith and credit mandate; (2) the right to alimony or support is a property right that cannot be defeated without personal jurisdiction over the wife. Washington adopts the first ground as controlling in the *Perry* case,[20] but in the alternative finds that if its interpretation of the *Estin* decision is erroneous and full faith and credit must be given the Massachusetts judgments other considerations lead to the same result.[21] Since these two aspects of the decision are based on entirely different reasoning each will be considered separately.

Utilization of the first ground of the *Estin* case, i.e., that the interest of the state in protecting its resident is controlling, assumes that both the judgment of the divorce state and that of the support state are valid,[22] and is essentially a solution to the conflict created by the presence of two valid judgments. Thus the decree of the divorce state is denied full faith and credit because of the controlling interest of the support state in protecting its resident. When the decree of the support state is sought to be enforced in the divorce state the same conflict between valid judgments is presented, but the interest of the divorce state in protecting its resident from being burdened with unreasonable support payments is now controlling and the divorce state can deny full faith and credit to the support decree. The two judgments, then, create an "irreconcilable conflict,"[23] each decision valid in its own state, but neither entitled to full faith and credit in the other.

That the presence of a strong state interest may at times warrant an exception to the mandate of full faith and credit is not a new concept.[24] This principle has been applied to limit the extraterritorial effect of state statutes[25] and there are indications that similar reason-

19. See Morris, Divisible Divorce, 64 Harv. L. Rev. 1287, 1292 (1951); Reese & Johnson, supra note 3, at 167; Note, 1956 Wash. U.L.Q. 224, 232.

20. 318 P.2d at 972.

21. Id. at 973.

22. Id. at 972.

23. These words used by the Washington court, id. at 972, have been used before to describe the conflicting policies of states in marital disputes. Powell, And Repent at Leisure, 58 Harv. L. Rev. 930, 952 n.59 (1945). See Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 447 (1943) (dissenting opinion).

24. See Yarborough v. Yarborough, 290 U.S. 202, 213 (1933) (dissenting opinion). Here Justice Stone argued that a state's interest in a minor child domiciled within its boundaries was so important that it was not necessary to give full faith and credit to a decree of child support rendered in another state. See also Reese & Johnson, supra note 3, at 171.

25. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 498 (1941); Pacific

ing is employed in child support[26] and custody[27] cases. However, generally where a foreign judgment is sought to be enforced, the theory is seldom utilized as a basis of decision,[28] although it is a recurring argument in dissenting opinions.[29] While the interest exception is grounded on the sound policy argument that in a particular case the interest of a single state may outweigh the national policy of full faith and credit,[30] to apply this reasoning to support proceedings creates many problems that seem to outweigh the advantages. Two conflicting judgments may result, prolonging the settlement of disputes since neither has force in the forum of the other.[31] A third state could logically accept or reject either of the conflicting decrees or perhaps ignore both and re-litigate the issues, thus creating an additional adjudication of the same case further prolonging the settlement of the rights of the parties. In addition, even where both parties appear and the marital relationship and support rights are adjudicated in the same action, if the wife is from another jurisdiction a logical extension of this concept would allow a redetermination of her support rights by her own domiciliary state, since it has the same interest whether the wife is personally served or not. This particular extension of reasoning, however, has been rejected by the Supreme Court.[32] Finally, the "interest" exception is couched in such broad terms that it would be very difficult to apply and easy to abuse.[33]

The "interest" reasoning employed by the Washington court is not dictated by the *Estin* case. On the contrary, a close analysis of the opinion and the more recent decisions of the Court leads to an opposite conclusion, i.e., that the second ground of the decision is con-

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Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 504 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 550 (1935). See Carnahan, What is Happening in the Conflict of Laws: Three Supreme Court Cases, 6 Vand. L. Rev. 607, 614 (1953).

26. See New York ex rel. Halvey v. Halvey, 330 U.S. 610, 616 (1947) (concurring opinion).

27. See May v. Anderson, 345 U.S. 528, 535 (1953) (concurring opinion).

28. See Carnahan, supra note 25, at 613; Reese & Johnson, supra note 3, at 171. Policy considerations of the state seem to be the bases of the decisions in Esenwein v. Esenwein, 325 U.S. 279 (1945), and Williams v. North Carolina, 325 U.S. 226 (1945) (Williams II).

29. See Sherrer v. Sherrer, 334 U.S. 343, 356 (1948) (dissenting opinion); Morris v. Jones, 329 U.S. 545, 554 (1947) (dissenting opinion); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 447 (1943) (dissenting opinion); Yarborough v. Yarborough, 290 U.S. 202, 213 (1933) (dissenting opinion).

30. See Reese & Johnson, supra note 3, at 163-64.

31. See text supported by note 23 supra.

32. See Sherrer v. Sherrer, 334 U.S. 343, 354-56 (1948).

33. See Reese & Johnson, supra note 3, at 164. The writers compare the "interest" exception to the reasonableness test used under due process.

trolling. The issue in the *Estin* case is framed by the Court in terms of whether the divorcing state could properly determine the support rights of the wife when she was not personally served with process.[34] The Court, after finding that support rights are an intangible property interest which cannot be deprived the wife without personal jurisdiction over her,[35] concludes that since the divorcing state lacked this personal jurisdiction its judgment was not entitled to full faith and credit.[36] This result, in terms of the issue, suggests that although a divorce proceeding may be ex parte in severing the marital relationship it must be in personam insofar as it affects the "property rights" of the wife. In the *Armstrong* case, a concurring opinion interpreted the *Estin* decision as holding that an alimony judgment could only be rendered in an in personam proceeding.[37] Significantly, this concurring opinion was adopted by the majority in *Vanderbilt v. Vanderbilt*, the most recent Supreme Court decision on divisible divorce, where it was held that an ex parte decree is *void* as far as it affects the wife's support rights.[38] If the judgment is void there is no question that it is not entitled to full faith and credit and, in addition, could even be collaterally attacked in the state rendering the ex parte decree.[39] The language and results of these three cases clearly seem to indicate that the "property right" reasoning is the true ground for allowing a separation of the elements of divorce. The divisible divorce doctrine, then, is based on due process, i.e., the wife's right to support cannot be taken away without personal jurisdiction over her, and is not based on an exception to the full faith and credit clause.

By placing the divisible divorce doctrine on due process grounds the problem of "irreconcilable judgments" is solved, because only one support decree would be valid. For instance, an ex parte divorce, adjudicating the support rights of the wife, rendered in state A would be valid in the wife's domicile, state B, as terminating the marital relationship. However, a subsequent support judgment rendered with personal jurisdiction over both parties in state B would be entitled

34. 334 U.S. at 547.
35. Id. at 548.
36. Id. at 549.
37. 350 U.S. at 576.
38. 354 U. S. at 419.
39. If the nature of the wife's right is a "property interest" which cannot be taken away without an in personam judgment, then on long-standing principles any support judgment rendered in an ex parte proceeding would have no force. "[W]here the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service . . . is *ineffectual for any purpose*. . . ." Pennoyer v. Neff, 95 U.S. 714, 727 (1877). (Emphasis added.)

to full faith and credit in state A, since that portion of its judgment adjudicating support rights is void. A third state, faced with both judgments, could give force to each without any conflict as to the valid portion of either judgment. Use of the property right-due process rationale lends some stability and predictability to a determination of the wife's rights. Also, it should be noted that this reasoning places the wife on equal footing with the husband, i.e., the wife's right to support cannot be deprived her without personal jurisdiction over her, just as the husband's duty to pay cannot be determined without personal jurisdiction over him.[40]

The "property right" reasoning, however, does have some important limitations. Divorce was unknown to the common law and is entirely of statutory origin.[41] The right of the wife to support following the termination of the marital relationship is of like origin.[42] As previously noted, many state statutes make the right to support or alimony contingent on the existence of the marital relationship.[43] If the wife seeks support under such a statute after her husband has secured an ex parte decree elsewhere, she will be unsuccessful since the existence of the right depends on the existence of the marital relationship. In a situation, as in the *Estin* case, where the wife has protected her support rights by instituting a prior support proceeding and the interpretation of the state law provides that the prior action survives the decree, she will prevail in a subsequent action. Similarly, where the state in which the wife is resident has a statute which allows support to be granted after the divorce, she will retain the right to sue following an ex parte decree. Thus, the property right which cannot be deprived the wife without due process of law is an elusive one, depending for life upon the existence of a favorable state statute. Where the statute does not exist the right dies with the divorce.

It should also be noted that classification of the wife's right to support as a "property right" is based on policy grounds rather than on

40. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 419 (1957) (dictum); Armstrong v. Armstrong, 350 U.S. 568, 579-80 (1956) (dictum); Pollock v. Pollock, 273 Wis. 233, 248, 77 N.W.2d 485, 494 (1956) (dictum); 2 Bishop, Marriage & Divorce §§ 159, 169-70 (6th ed. 1881).

41. See Madden, Domestic Relations §§ 81-82 (1931). The term divorce may mean either a divorce "from bed and board" (separate maintenance) or a divorce "from the bond of marriage" (absolute divorce). The textual statement refers to the latter.

42. Alimony, i.e., an award of future payments granted in conjunction with an absolute divorce, has been authorized in absence of a statute, but only as an incident to a divorce proceeding based on a statute. The majority of American states have specific statutes authorizing alimony. Madden, Domestic Relations §§ 97-98 (1931).

43. See text supported by note 11 supra; Note, 1956 Wash. U.L.Q. 224, 239-44.

a traditional legal rule.[44] The basic policy of protecting the absent party's interest in an ex parte divorce situation is the same whether the "state interest" or "property right" criterion is used. Although classification of the right to support as a "property right" may be a fiction, such a classification effectively serves to provide for the automatic application of well-established rules of due process and full faith and credit to support cases and lends predictability to an area now plagued by uncertainties.

Application of the "property right" reasoning to the Washington case would alter the ultimate result, but would not necessarily require the Washington court to recognize the second and third Massachusetts execution judgments. That portion of the Washington decree purporting to pass on any alimony rights of the wife would be void[45] since the wife made no appearance in the proceeding. This does not mean, however, that the Massachusetts execution judgments were entitled to full faith and credit. The original support action in Massachusetts was brought under a statute[46] which gave a right to support only so long as the marriage was in existence and, in addition, decisions by the Massachusetts court clearly hold that support granted under the statute terminates with a divorce decree.[47] Since Massachusetts was required to give full faith and credit to the Washington divorce decree,[48] the last two execution judgments were void by Massachusetts law and, therefore, not entitled to full faith and credit. There is an additional reason why the Massachusetts execution judgments could be questioned. Although part of the original support action, an execution can be had on arrears in alimony or support payments only if proper notice is given to the absent party.[49] No notice was given to H as to the third execution judgment and there was some question whether proper notice was given in the granting of the second execution. Improper notice would be an adequate ground for refusing full faith to these actions.[50]

Because the Washington court discussed these methods of refusing to give validity to the Massachusetts judgments and because they

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44. See Carnahan, supra note 25, at 630.

45. See notes 39-40 supra, and text supported thereby.

46. Mass. Ann. Laws c. 209, § 32 (1955), provides for support of the wife and minor children if they are deserted by the husband. Massachusetts also has a statute which provides for the granting of alimony after a divorce. Mass. Ann. Laws c. 208, § 34 (1955).

47. Shain v. Shain, 324 Mass. 603, 88 N.E.2d 143 (1949); Rosa v. Rosa, 296 Mass. 271, 5 N.E.2d 417 (1936).

48. See text supported by note 10 supra.

49. Griffin v. Griffin, 327 U.S. 220 (1945).

50. See id. at 228.

could have reached the same result on this reasoning alone, it is curious why it resorted to the "interest" reasoning at all. There seem to be at least three reasons: (1) The Washington court may have been unwilling to declare a part of its own lower court's decree void insofar as it attempted to pass on the alimony rights of W. (2) Massachusetts could change its substantive law to allow the support proceeding to survive the granting of a divorce,[51] which would mean that if proper notice were provided to future execution proceedings on the support arrears the execution judgments would be valid. (3) W could amend her original petition to ask for alimony under another Massachusetts statute, permitting the granting of alimony after a divorce,[52] then provided the personal service obtained with the original petition carries over, the alimony judgment would be valid. An additional policy reason in this particular case may be the fact that the wife seemed to be the party who caused the break up of the marriage. By adopting the "interest" reasoning Washington was protecting itself against all possible future actions by the wife.

Although the motives of the Washington court in this particular case might have influenced the result, it is submitted that an analysis of divisible divorce cases leads to the conclusion that the divisible divorce doctrine is based on property right-due process grounds and that this realization will solve many of the conflict of laws problems created by compulsory extraterritorial recognition of ex parte divorces.

The difficulties created by migratory divorces are by no means solved. State legislation is needed to preserve the support rights of the wife where statutes now leave her without a remedy. Even if a favorable statute exists, if the wife is unable to serve the person of the husband with process or attach his property within the state the existence of a remedy will be of little use.[53] This raises the

51. Apparently the New York courts, in order to provide relief for Mrs. Estin, changed its substantive law to permit the survival of the prior support proceeding. See Estin v. Estin, 334 U.S. 541, 544, 552 (dissenting opinion) (1948).

52. See note 46 supra.

53. Since alimony is a personal claim against the husband the court must have personal jurisdiction over him or be able to sequester his property within the state before an adjudication awarding alimony will be valid. See authorities cited note 40 supra.

By splitting the elements of divorce the hardships created when a husband obtains an ex parte decree by a quick trip to Florida or Nevada are, in practicality, solved. Following a decree the husband usually returns to the state of matrimonial domicile. In doing so he makes himself available for service of process. Since any ex parte adjudication of support rights is void the wife will not lose her right to sue for support, provided the state gives her a remedy by statute.

further question of whether a wife can migrate from state to state seeking the proper combination of a favorable statute and property of the husband, and finding it, establish a residence and sue for alimony. Although this question has not been directly decided at least one member of the Supreme Court has verbalized his opposition to such a step.[54]

54. Justice Harlan would limit recovery of alimony after an ex parte decree to the state in which the wife was domiciled at the time of divorce on the ground that no other state would have an "interest" in the situation. Therefore, he would not hold the ex parte support decree entirely void, but rather he would give it effect in all states except the state in which the wife is domiciled at the time of the divorce. Vanderbilt v. Vanderbilt, 354 U.S. 416, 434 (1957) (dissenting opinion).