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Article 11

Mexican Divorces; Birth Control Legislation

POSTSCRIPTS

Mexican Divorces

In a 1964 annulment action, *Rosenstiel v. Rosenstiel,*[1] the New York Supreme Court declared that a Mexican divorce decree, procured at a proceeding at which the husband had appeared personally and the wife had appeared by attorney, was invalid. The court held that domicile of one of the parties was a prerequisite for jurisdiction and, since no domicile had been established, the Mexican court could not have validly entertained the suit.[2]

An analysis of this decision, published in the Summer 1964 issue of *The Catholic Lawyer,* emphasized the need for "an appellate confrontation with the question of whether domicile is the *sine qua non* of recognition" of foreign divorce decrees, and concluded that "because of the many social interests involved, the requirement of domicile is deserving of some definitive interpretation."[3]

This clarification was provided by the Court of Appeals decision affirming the appellate division's reversal of *Rosenstiel.*[4] The Court, while admitting that the physical contact with the foreign jurisdiction was ephemeral,[5] and that in the past domicile has been heavily emphasized as a prerequisite to compulsory recognition,[6] concluded that "a balanced public policy now requires that recognition of the bilateral Mexican divorce be given rather than withheld and such recognition as a matter of comity offends no public policy of this State."[7]

In light of this decision, the concept of domicile has lost much of its former significance as a jurisdictional prerequisite in divorce actions. Stating that "domicile is not intrinsically an indispensable prerequisite,"[8] the Court found that compliance with the one-day Mexican residence requirement was sufficient to give the foreign court jurisdiction. In *Wood v. Wood,* the companion case to *Rosenstiel,* the Court went a step further. It upheld a divorce de-

[1] 43 Misc. 2d 462, 251 N.Y.S.2d 565 (1964).

[2] Further support for the decision rested upon an alleged violation of Section 51 of the New York Domestic Relations Law, which prohibits agreements "to alter or dissolve a marriage." For a thorough discussion of this statute, recently reenacted as Section 5-311 of the General Obligations Law, see Note, *Separation Agreements and New York Public Policy,* 11 CATHOLIC LAW. 138 (1965).

[3] 10 CATHOLIC LAW. 255, 260 (1964).

[4] Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

[5] *Id.* at 72, 209 N.E.2d at 711, 262 N.Y.S.2d at 89.

[6] *Id.* at 73, 209 N.E.2d at 712, 262 N.Y.S. 2d at 90.

[7] *Id.* at 74, 209 N.E.2d at 713, 262 N.Y.S.2d at 91.

[8] *Id.* at 73, 209 N.E.2d at 712, 262 N.Y.S.2d at 90.

cree in which jurisdiction over the parties had been based upon mere submission to the court by the physical appearance of one party and the appearance of the attorney of the other. The Court in *Rosenstiel* compared the six-week Nevada residence requirement with the one-day Mexican requirement and concluded that, since both Mexico and Nevada have no real interest in the foreign marriages which their courts purport to dissolve, no distinction should be drawn by New York with regard to recognition. Rather, the decrees of both should be recognized.

Judge Desmond, concurring only in the result, took issue with the majority's comparison:

> As to analogizing the one-day Mexican divorce to the six weeks' Nevada decree, the first and ready answer is that judgments from other States are given faith and credit here because the Federal Constitution so commands. The second answer is a substitution of the true analogy that is, between one-day foreign divorces and post-card foreign divorces, as between which there is no logical or real difference at all.[9]

Dissenting, Judge Scileppi suggested that the drastic consequences of the invalidation of bilateral Mexican divorce decrees could be avoided by making the decision only prospective in application. Prospective application should be used only in cases where the public interest compels, and such an interest was present in this case.

The enormity of this public interest, which both the majority and the dissent recognized, is largely due to the great number of New Yorkers who have been granted Mexican divorces. The fact that so many have resorted to foreign laws to obtain divorce decrees has been cited to indicate the need for reform in our own matrimonial legislation. Such reform may soon be forthcoming. The 1965 New York Legislature established the Joint Legislative Committee on Matrimonial and Family Law.[10] In the fall of 1965, the first legislative hearings on divorce in New York in at least a century were held. From these hearings could be seen the development of an attitude toward the abandonment of fault as a basis for divorce in favor of a new test, viz., a showing that there has been an irreparable breakdown in the marriage relationship. A compulsory reconciliation period was also recommended as a prerequisite to any final decree of divorce.

It is to be hoped that the ultimate result of these hearings will be the enactment of more realistic divorce laws, so that such evasions of the law as resorted to by the parties in the instant case will become less prevalent.

Birth Control Legislation

The Winter 1961 issue of *The Catholic Lawyer* included a discussion of the Connecticut birth control statute[1] in which the

[9] *Id.* at 77-78, 209 N.E.2d at 715, 262 N.Y.S.2d at 94.

[10] 154 N.Y.L.J., Sept. 30, 1965, p. 1, col. 3-4.

[1] CONN. GEN. STAT. REV. § 53-32 (1959): "Any person who *uses* any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." (Emphasis added.) CONN. GEN. STAT. REV. § 54-196 (1959): "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

author stated that "practical reason may suggest that Connecticut modify its legislation."[2] The fact that modification was in order was clearly recognized in June 1965 in the case of *Griswold v. Connecticut*,[3] wherein the United States Supreme Court held the Connecticut birth control statute unconstitutional.

Mr. Justice Douglas, delivering the opinion of the Court, found a constitutional objection to a law "forbidding the *use* of contraceptives rather than regulating their manufacture or sale. . . ."[4] The marital relationship was declared to be within a "zone of privacy created by several fundamental constitutional guarantees."[5] The objection to the Connecticut statute was that in making the *use* of contraceptives a crime, the state had violated the "zone of privacy" surrounding the marital relationship.

In a recent New York case,[6] the court was presented with an alleged violation of the former New York birth control statute.[7] The court held *Griswold* not controlling, stating that: "The *Griswold* case merely decided that the statutes concerning the subject matter, as they are written in the statute books of . . . Connecticut, are unconstitutional."[8] In distinguishing the provisions of the New York statute from those of the Connecticut statute, the court noted that New York provided an exception in the case of doctors,[9] while the Connecticut statute made no such exception.[10] Thus, under the New York statute, a doctor could prescribe the use of contraceptives for the prevention or cure of disease, and druggists could sell such devices on prescription,[11] while no statutory or case-law exception was found in Connecticut.

However, the *constitutional* objection to the Connecticut statute was not, as the New York court appears to suggest, that no exception was provided for doctors. Rather, the statute was held violative of the *constitutionally protected* right of privacy inherent in the marital relationship because the *use* of contraceptives was made a crime. Thus, the former New York statute would probably have been held constitutional as a valid exercise of the police power since it was directed against the manufacture and distribution of contraceptives rather than their use.[12]

A recent amendment to the New York statute has, however, obviated the problem for all practical purposes in New York.[13]

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[2] Regan, *The Connecticut Birth Control Ban And Public Morals*, 7 CATHOLIC LAW. 5, 10 (1961).

[3] 381 U.S. 479 (1965).

[4] *Id.* at 485 (italics of the Court). It should be noted that the Connecticut statute was unique in that it was the only such statute in the United States making *use* of contraceptives a crime. See Note, *Birth Control Legislation*, 9 CLEV.-MAR. L. REV. 245, 248 (1960).

[5] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[6] People v. Baird, 47 Misc. 2d 478, 262 N.Y.S.2d 947 (Nassau County Dist. Ct. 1965).

[7] Laws of New York 1881, ch. 676. The New York statute made it a crime to sell, lend, give away or manufacture any recipe, drug or medicine for the prevention of conception or for causing unlawful abortion. The *use* of contraceptives, however, was not proscribed.

[8] *Supra* note 6, at 480, 262 N.Y.S.2d at 984.

[9] *Supra* note 7.

[10] State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940).

[11] People v. Sanger, 222 N.Y. 192, 118 N.E. 637 (1918).

[12] See People v. Byrne, 99 Misc. 1, 163 N.Y. Supp. 682 (Sup. Ct. 1917).

[13] N.Y. PEN. LAW § 1142. This statute became effective September 1, 1965. *People v. Byrne* was decided under the old statute since the alleged act took place before the effective date of the new statute.

Under the new statute, devices and medicine for the prevention of conception may be sold by licensed pharmacies without prescription to persons sixteen years of age or older. The prohibition of sales to minors under the age of sixteen years would appear to be a valid exercise of the police power since the state has an interest in protecting the morals of children and may, in pursuit of that interest, legislate more strictly in their behalf.

The present New York attitude toward birth control legislation is both realistic and practical. It is realistic in that it recognizes the fact that many people see no moral objection to family planning by means of artificial birth control. Further, the effect on community morals of the private use of contraceptive devices has not been determined, and arguments that a proliferation of such devices will result in a general lowering of moral standards are highly speculative. In the practical realm, the New York statute obviates the difficult, if not impossible task of enforcing a statute which regulates the manufacture and sale of contraceptives.

It is not suggested that the state is without power to legislate in the area of artificial birth control. On the contrary, in the exercise of the police power a state may properly regulate the manufacture, sale and distribution of birth control devices to protect the health, welfare and morals of its citizens. While New York has apparently adopted the position that the sale of artificial birth control devices will not be inimical to health, welfare and morals of its citizens, another state may very well determine such sale to be contrary to what it deems best for its citizens. On policy grounds a state may proscribe the manufacture or distribution of artificial birth control devices, or closely regulate such manufacture or distribution if it determines this to be necessary.

It is suggested that, in the final analysis, the legislature must determine whether or not the manufacture and distribution of artificial birth control devices are to be regulated, and if so, to what extent. On the other hand, the determination as to whether or not such devices should be used is to be made by the individual, according to the dictates of his conscience and in the exercise of his chosen religion.