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Article 25

DRL § 250: Presumption of Domicile Held Not Applicable to Bilateral Mexican Divorce

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In *Ancis*, the petitioner's real estate broker's license was revoked because of a finding of untrustworthiness, and he sought review on the grounds that the finding was unsupported by substantial evidence. The court held that the finding was supported by substantial evidence of untrustworthiness, but that the penalty suffered was too severe. Accordingly, the court reduced the penalty of revocation of petitioner's license to suspension for three months, deeming the reduced penalty to be "more appropriate."

The *Ancis* decision clearly illustrates the appellate division's authority under CPLR 7804(g) to dispose of all issues in the proceeding before it on appeal or transfer. This procedure allows the petitioner to obtain a review of *all* issues even though the application to the court is based *solely* upon the grounds set forth in CPLR 7803.

DOMESTIC RELATIONS LAW

DRL § 250: Presumption of domicile held not applicable to bilateral Mexican divorce.

Section 250 of the DRL creates the presumption that a person who resides within New York for prescribed periods before and after a divorce action is commenced in a foreign jurisdiction, or who at all times maintains a residence within the state, is a domiciliary of New York when the action is commenced. The legislative intent of this enactment is unknown,[114] but presumably its aim is to aid in the dissolution of foreign divorces on the theory that one domiciled in New York can not be domiciled in the foreign jurisdiction. However, in direct opposition to this presumption is the long established precedent that a divorce decree of a sister-state may only be challenged on jurisdictional grounds when one party had insufficient opportunity to contest the action.[115] This would therefore preclude section 250 from operating on bilateral sister-state divorces. Such decrees must be given full faith and credit by the state of marital domicile and can not be relitigated

in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held . . . is, on the entire record, supported by substantial evidence.

114 DRL section 250 was not included in the draft bill submitted by the Joint Legislative Committee on Matrimonial and Family Laws, hence there is no committee report indicating the legislative intent. Herzog, *Conflict of Laws*, 18 SYRACUSE L. REV. 157, 177 n.133 (1966).

115 Paulsen, *Divorce Jurisdiction By Consent of the Parties—Developments Since "Sherrer v. Sherrer"*, 26 IND. L.J. 380, 386 (1950-51). *See* Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. North Carolina, 325 U.S. 226 (1945).

there.[116] Unilateral divorces present a different problem. Only one party has appeared in court, and the jurisdiction could not have been contested. In such cases the question may be reopened and litigated in the state where the marriage was domiciled.[117] The question to be considered with respect to unilateral divorces is by whose standards is domicile to be judged? Will the New York presumption prevail over, for example, Nevada's six-week residency requirement?[118] If it does, is New York giving the Nevada decree less than full faith and credit? Such questions still remain unanswered.

Apparently section 250 would be most applicable to divorces obtained without the United States. In such an instance, New York is not bound by full faith and credit to honor such decrees and comity does not require recognition of them if they are contra to its public policy.[119]

In *Rosenstiel v. Rosenstiel*,[120] a husband sought to annul his marriage on the grounds that his wife's prior Mexican divorce was invalid. The Supreme Court, New York County, held that the Chihuahua, Mexico, residence requirement[121] was "a mere formality with no prerequisite that the party be in Mexico for any length of time or to state any intention of becoming a resident,"[122] and that "by the Mexican court's standards the question of domicile was irrelevant";[123] therefore, it remained to be adjudicated. The court refused to recognize the prior Mexican divorce. On appeal, the appellate division reversed,[124] and this decision in turn was affirmed by the Court of Appeals,[125] both courts expressing the opinion that to uphold the divorce would be consonant with prior decisions and would not offend the public policy of New York. It is presumed that one important consideration which the *Rosenstiel* appellate courts took into account was the fact that to affirm the supreme court's holding would have been to adversely effect

116 Sherrer v. Sherrer, 334 U.S. 343 (1948).

117 Williams v. North Carolina, 325 U.S. 226 (1945).

118 NEV. REV. STAT. § 125.020(1)(e) (1967).

119 *See, e.g.*, Rosenbaum v. Rosenbaum, 309 N.Y. 371, 375, 130 N.E.2d 902, 903 (1955); Caldwell v. Caldwell, 298 N.Y. 146, 149, 81 N.E.2d 60, 62 (1948).

120 43 Misc. 2d 462, 251 N.Y.S.2d 565 (Sup. Ct. N.Y. County 1964).

121 *Id.* at 473, 251 N.Y.S.2d at 577:

> Articles 22 and 24 of the Divorce Law of Chihuahua authorize the court to exercise jurisdiction predicated upon the "residence" of at least one of the parties. "Residence," for the purpose of these articles is defined as personal registration with the Municipal Clerk at the City Hall, the act of registration constituting a jurisdictional act which is recited in a divorce decree.

122 *Id.* at 474, 251 N.Y.S.2d at 577.

123 *Id.*

124 21 App. Div. 2d 635, 253 N.Y.S.2d 206 (1st Dep't 1964).

125 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), *cert. denied*, 383 U.S. 943 (1966).

a substantial number of New York residents who had previously obtained foreign divorces[126] and who had subsequently remarried. To have held otherwise would have rendered such remarriages bigamous, intercourse adulterous, and any offspring illegitimate.

In *Kakarapis v. Kakarapis*,[127] the Family Court of Montgomery County was recently called upon to decide whether or not section 250, enacted almost two years after *Rosenstiel*, would have any bearing on the theretofore consistent validation of Mexican bilateral divorces.[128] After signing a separation agreement in which his wife agreed to a flat, single-support settlement, Mr. Kakarapis went to Chihuahua, Mexico, signed the municipal register to meet the residence requirements, and there obtained a final decree of divorce. Mrs. Kakarapis appeared in this action through her attorney. The separation agreement was approved, ratified and incorporated into the judgment of divorce by reference.[129] Mr. Kakarapis then returned to New York and resumed his residence. Invoking section 250, his wife sought to have the divorce declared null and void. In upholding the validity of the decree the court relied upon *Rosenstiel* and did its best to push section 250 under a carpet of rhetoric without weighing its effect or its utility. Confronted with the apparent conflict between *Rosenstiel* and the statute, the court stated:

> Surely, this landmark decision affecting matrimonial jurisprudence was well-known to the legislature when that section was enacted. Had New York legislators sought to nullify the effect of the Rosenstiel decision on foreign divorces, then certainly more decisive and comprehensive language could have been chosen.[130]

The problems in this holding are manifest. Must the legislature *specifically* identify a case it wishes to nullify? Is not the public policy of New York reflected by the laws enacted by its elected representatives?[131] If *Rosenstiel* was based upon New York's public policy, hasn't the legislature declared what that public policy is by enacting section 250?

It would seem evident that the legislature intended to wage war against the "quicky" foreign divorce by adopting the view expressed in the *Rosenstiel* trial court. However, this attitude is wholly inconsistent with modern trends of thought and is contrary to the long line

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126 As of 1964 it had been estimated that over two hundred thousand New Yorkers had acquired Mexican divorces. N.Y. Times, July 8, 1964, at 34, col. 2.

127 58 Misc. 2d 515, 296 N.Y.S.2d 208 (Fam. Ct. Montgomery County 1968).

128 *See* Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 71, 209 N.E.2d 709, 716, 262 N.Y.S.2d 86, 88 (1965) and cases cited therein.

129 58 Misc. 2d at 516, 296 N.Y.S.2d at 210.

130 *Id.* at 517, 296 N.Y.S.2d at 210.

131 *See* Note, *Divorce By Personal Jurisdiction of the Parties — A Support of the Mexican Bi-Lateral Divorce*, 29 ALBANY L. REV. 328, 331 & n.39 (1965).

of precedent which has recognized the validity of Mexican divorces on the basis of comity. Moreover, Mexican divorces serve an important socio-economic function and ought not to be dealt their death blow. The same considerations which probably moved the *Rosenstiel* appellate courts, *i.e.*, adultery, bigamy and illegitimacy, must still be considered when deciding whether or not section 250 will prevail, although it may cogently be argued that since the enactment of the section, New York domiciliaries have received fair warning of the possible consequences arising from failure to comply with its mandate, and therefore it would not offend due process or "equity" to declare such a divorce void.[132] But when a marriage is finished in fact, it is, or should be, finished at law as well.[133] Since divorce proceedings in New York are cumbersome and the grounds for divorce are limited, the "quicky" Mexican divorce often serves as the liberator of the unhappy and troubled. It is quick, efficient and unhampered by the vestiges of Puritanism which so heavily pervade our present law. Unfortunately, the *Kakarapis* opinion chose to ignore section 250 rather than confront the issues which it presents by attempting to explain its applicability, if any, to out-of-state divorces.

To deny validity to Mexican divorces through the use of section 250 will only serve to increase traffic to sister-state divorce havens since they are presumably unscathed by the section under the aegis of the full faith and credit clause of the Constitution. Thus, out-of-state divorces will not be prevented even if section 250 is held valid upon review. It is hoped that future decisions will attempt to distinguish *Kakarapis* and define the scope of section 250, or that the New York legislature will take a serious look at the "presumption" which the judiciary has declared presumes nothing.

Criminal Contempt Proceedings

Contempt: Right to trial by jury refused in criminal contempt proceedings against public employees union.

The New York Court of Appeals has decided that neither the Taylor Law nor the equal protection clause of the United States Constitution mandated a jury trial in *Rankin v. Shanker*.[134]

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132 Seigel, *Conflict of Laws*, 19 Syracuse L. Rev. 235, 262-63 (1967).

It should be noted, however, that the question of the illegitimacy of the children born from such a marriage (*i.e.*, a marriage entered into after at least one of the parties thereto has obtained a foreign divorce which the New York courts may subsequently declare void) is no longer a valid consideration. New section 24 of the DRL declares that a child born out of such a marriage "is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or shall hereafter be annulled or judicially declared void." DRL § 24, *Laws of New York*, 192 Sess. ch. 325 (1969).

133 *See* 1957 N.Y. Leg. Doc. No. 32 at 21-22.

134 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 695 (1968).