St. John's Law Review

Volume 12
Issue 1 *Volume 12, November 1937, Number 1*

Article 10

May 2014

Alimony--Effect of Remarriage--Section 1159 of Civil Practice Act--Rights of Foreign Administrators Thereunder (Kirkbride v. Van Note, 275 N.Y. 244 (1937))

St. John's Law Review

RECENT DECISIONS

ALIMONY—EFFECT OF REMARRIAGE—SECTION 1159 OF CIVIL PRACTICE ACT—RIGHTS OF FOREIGN ADMINISTRATOR THEREUNDER. —Plaintiff obtained a divorce which resulted in a decree providing for the payment of alimony to her. A few months after obtaining her decree, plaintiff remarried, whereupon her former husband ceased making payments of alimony. Several years later he died intestate in a foreign state and defendant was there appointed his administrator. Shortly thereafter, plaintiff filed a claim with the foreign administrator for the amount of alimony unpaid since her remarriage. In this action the administrator obtained an *ex parte* order substituting him as defendant in place of his deceased intestate, plaintiff's former husband. He also applied for an order modifying the decree of divorce by annulling the provision for alimony *nunc pro tunc* as of the date of remarriage. From a judgment granting an order to vacate the order of substitution and denying a motion for an order to modify the divorce judgment, *held,* both orders reversed. Public policy demands that the foreign administrator should be permitted to apply for a modification of the divorce decree insofar as it directs the payment of alimony after the remarriage of plaintiff and upon application, the court "must modify" and cannot in its discretion refuse to do so. *Kirkbride* v. *Van Note,* 275 N. Y. 244, — N. E. (2d) — (1937).

The majority of courts are in accord in holding that the remarriage of the divorced wife does not *ipso facto* terminate the former husband's obligation to pay the alimony decreed,[1] but they do maintain that it may prove a cogent factor for the modification or termination of it.[2] In these jurisdictions proof of remarriage operates to place the burden of proof on the wife to show that the support afforded by her second husband is inadequate.[3] Some states by statute,[4] and others by decision,[5] support the doctrine that remarriage *per se* gives

---

[1] Morgan v. Morgan, 211 Ala. 7, 99 So. 185 (1924); Cohen v. Cohen, 150 Cal. 99, 176 N. W. 180 (1900); McGill v. McGill, 101 Kan. 324, 166 Pac. 501 (1917); Gordon v. Baker, 182 Ill. App. 587 (1913); Southworth v. Treadwell, 168 Mass. 511, 47 N. E. 93 (1897); Heston v. Odlin, 125 Wash. 477, 216 Pac. 845 (1923); Kistler v. Kistler, 141 Wis. 491, 124 N. W. 1028 (1910); Holt v. Holt, L. R. 1 P. & D. (Eng.) 610 (1868).

[2] Emerson v. Emerson, 120 Md. 184, 87 Atl. 1033 (1913); Nelson v. Nelson, 282 Mo. 412, 221 S. W. 1066 (1920). *Contra:* Miller v. Clark, 23 Ind. 370 (1864); Sampson v. Sampson, 16 R. I. 456 (1917).

[3] Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267 (1906); Cole v. Cole, 142 Ill. 19, 31 N. E. 412 (1892); Southworth v. Treadwell, 168 Mass. 511, 47 N. E. 93 (1897); Phy v. Phy, 116 Ore. 31, 236 Pac. 751 (1925).

[4] N. Y. CIV. PRAC. ACT § 1159 (as am'd L. 1934); CAL. CIV. CODE (1913) § 139; REV. CIV. CODE LA. (1912) art. 160; 3 MICH. COMP. LAWS (1929) § 12748.

[5] Bowman v. Worthington, 24 Ark. 522 (1867); Cary v. Cary, 112 Conn. 256, 152 Atl. 302 (1930); Carlton v. Carlton, 87 Fla. 460, 100 So. 745 (1924); Baker v. Baker, 4 Ohio App. 170 (1915).

to the husband the right to apply for relief from the further payment of alimony. In the instant case the court has closely followed the modern trend [6] which treats alimony, not as a penalty, but as an allowance for support which is based upon the obligation arising out of the former marital relation; this allowance for support necessarily terminates upon the divorced wife's voluntary choice of a new marital status with its concomitant obligation to support.[7] As a result of this the court has overruled the case of *Cary* v. *Cary*,[8] and now holds that upon the remarriage of the divorced wife her right to alimony immediately ceases; that whether the divorced husband obtains a modification of the divorce decree under Section 1159 of the Civil Practice Act [9] immediately upon, or subsequent to, his wife's remarriage the modification operates *nunc pro tunc* as of the date of her remarriage and excuses him from further payment of alimony therefrom.[10]

This provision of the Civil Practice Act leaves the court no discretion,[11] and when the proper party applies for a modification thereunder, the court "must modify". Since double support would offend sound public policy and good morals,[12] this right to apply for a modification is not personal to the husband.[13] Therefore, if the husband dies his legal representative, upon whom the liability for unpaid ali-

---

[6] 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1924) § 1754; see Cary v. Cary, 112 Conn. 256, 260, 152 Atl. 302, 303 (1930).

[7] Cary v. Cary, 112 Conn. 256, 152 Atl. 302 (1930); Phy v. Phy, 116 Ore. 31, 236 Pac. 751 (1925).

[8] 217 N. Y. 670, 112 N. E. 1055 (1916) (decided by a divided court).

[9] N. Y. CIV. PRAC. ACT (1920) § 1159 as amended L. 1934, c. 220 (This section provides that a divorced husband may apply for a modification of the divorce judgment directing payments for the support of his former wife, upon her remarriage).

[10] *Contra:* Krauss v. Krauss, 127 App. Div. 740, 111 N. Y. Supp. 788 (1st Dept. 1908); Mowbray v. Mowbray, 136 App. Div. 513, 121 N. Y. Supp. 45 (1st Dept. 1916); Hartigan v. Hartigan, 142 Minn. 274, 171 N. W. 925 (1919); *cf.* Linton v. Hall, 86 Misc. 560, 149 N. Y. Supp. 385 (1914).

[11] Schley v. Andrews, 225 N. Y. 110, 121 N. E. 812 (1919); Sleicher v. Sleicher, 251 N. Y. 366, 167 N. E. 501 (1928); Severance v. Severance, 260 N. Y. 432, 183 N. E. 909 (1933); Skidmore v. Skidmore, 160 App. Div. 594, 145 N. Y. Supp. 939 (2d Dept. 1914); Linton v. Hall, 86 Misc. 560, 149 N. Y. Supp. 385 (1914); Dumproff v. Dumproff, 138 Misc. 298, 244 N. Y. Supp. 597 (1930).

[12] Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682 (1909); Krauss v. Krauss, 127 App. Div. 740, 111 N. Y. Supp. 788 (1st Dept. 1908); Morgan v. Morgan, 211 Ala. 7, 99 So. 185 (1924); Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21 (1881); Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033 (1913); Baker v. Baker, 4 Ohio App. 170 (1915).

[13] Hunter v. Hunter, 197 App. Div. 678, 189 N. Y. Supp. 831 (1st Dept. 1921); Pond v. Pond, 79 Vt. 352, 65 Atl. 97 (1906).

mony devolves,[14] is to be considered as the proper party to apply for such modification.

Since the repeal of Section 160 of the Decedent Estate Law [15] which allowed a foreign administrator to sue or be sued in our courts, the common law rule applies. The general rule at common law was,[16] and today still is,[17] that an administrator cannot, as such,[18] maintain a suit in one state by virtue of letters granted in another, unless he first obtains letters of ancillary administration [19] from the former.[20] However, in a number of cases a foreign administrator has been permitted either without question,[21] or in order to prevent a gross injustice,[22] or as a matter of comity,[23] to act in his representative capacity in our courts without first obtaining letters of ancillary administration. Furthermore, we might say that in the instant case the foreign administrator is neither suing nor being sued. He merely seeks permission to apply for a modification of the judgment of divorce in so far as it orders payment of alimony after the remarriage of the divorced wife.

H. P.

---

[14] N. Y. CIV. PRAC. ACT § 83; Faversham v. Faversham, 161 App. Div. 521, 146 N. Y. Supp. 569 (1st Dept. 1914); Van Ness v. Ransom, 164 App. Div. 483, 150 N. Y. Supp. 251 (2d Dept. 1914), *aff'd without opinion,* Parsons v. MacFarlane, 220 N. Y. 605, 115 N. E. 1046 (1917); Hunter v. Hunter, 197 App. Div. 678, 189 N. Y. Supp. 831 (1st Dept. 1921).

[15] N. Y. DECEDENT ESTATE LAW (1920) § 160 was repealed by N. Y. Laws of 1926, c. 660; Helme v. Buckelew, 229 N. Y. 363, 128 N. E. 247 (1920) (Held Decedent Estate Law § 160 unconstitutional). *Contra:* KAN. REV. STATS. (1923) §§ 22, 832-835; OHIO CODE (1934) § 10509—165 (Both these statutes permitting a foreign administrator to be sued in his representative capacity have been held valid); (1935) 21 CORN. L. REV. But see Manley v. Park, 187 U. S. 547, 23 Sup. Ct. 216 (1922).

[16] Black v. Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433 (1890); Chapman v. Fisher, 6 Hill 554 (N. Y. 1844); Robinson v. Crandall, 9 Wend. 425 (N. Y. 1844).

[17] Farmers' T. Co. v. Bradshaw, 137 Misc. 203, 242 N. Y. Supp. 598 (1930); Matter of Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301 (1933); Hare v. O'Brien, 233 Pa. 330, 82 Atl. 475 (1912).

[18] 3 BEALE, CONFLICT OF LAWS (1935) § 515.1; Johnston v. Wallis, 112 N. Y. 230, 19 N. E. 653 (1889).

[19] Hopper v. Hopper, 125 N. Y. 400, 26 N. E. 457 (1891); Flandrow v. Hammond, 13 App. Div. 325, 43 N. Y. Supp. (1st Dept. 1897); Downey v. Owen, 98 App. Div. 411, 90 N. Y. Supp. 280 (4th Dept. 1904).

[20] SUR. CT. ACT § 45, subds. 3, 4 (Would prevent letters of ancillary administration from issuing since the decedent possessed no assets in our state); 3 BEALE, CONFLICT OF LAWS (1935) § 467.2. *Contra:* WIS. STATS. (1931) § 238.19.

[21] Matter of Hughes, 95 N. Y. 55 (1884); Matter of McCabe, 177 N. Y. 584, 69 N. E. 1126 (1904); Matter of Davis, 182 N. Y. 468, 75 N. E. 530 (1905).

[22] See De Coppet v. Cone, 199 N. Y. 56, 61, 92 N. E. 411, 413 (1910); Holmes v. Camp, 219 N. Y. 359, 372, 114 N. E. 841, 845 (1916).

[23] See Petersen v. Chemical Bank, 32 N. Y. 21, 43, 29 How. Pr. 240, 247 (1865); Helme v. Buckelew, 229 N. Y. 363, 366, 128 N. E. 216, 217 (1920); Thorburn v. Gates, 184 App. Div. 443, 171 N. Y. Supp. 568 (1st Dept. 1918).