



2-1-1969

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Recommended Citation

Robert L. Epting, *Domestic Relations -- Complementary Adjudication of Marital Incidents in Divorce Proceedings*, 47 N.C. L. REV. 437 (1969).

Available at: <http://scholarship.law.unc.edu/nclr/vol47/iss2/13>

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criminal justice that a reduction in guilty pleas would surely entail. It is therefore arguable that *Jackson* should not be read as a per se invalidation of state statutes such as the ones in question. With the abundance of litigation that the *Jackson* decision is engendering, the Supreme Court will undoubtedly have ample opportunity to address itself to these issues.

JAMES G. BILLINGS

Domestic Relations—Complementary Adjudication of Marital Incidents in Divorce Proceedings

The recent decision of the North Carolina Supreme Court in *Fleek v. Fleek*¹ illustrates once more that insisting that a divorce action and its incidents be made to fit precisely the traditional in rem-in personam categories may obscure the truly relevant jurisdictional factors inherent in divorce litigation.

Her husband having toured Switzerland and Italy some twelve years, Mrs. Fleek, a North Carolina domiciliary, sued in Durham County for divorce and child support. In accordance with the statute providing for service of process in proceedings "for . . . divorce . . . or other relief involving . . . domestic status . . .,"² she published notice in the local newspapers and sent copies of the complaint and summons to his last known addresses. While granting her *ex parte* divorce, the trial court declined to order child support on the basis that the statute did not authorize a judgment in personam on such service. In affirming, the supreme court stated that "the court is without power to enter a judgment *in personam* unless and until the defendant is before the Court in person, that is, by personal service of process, or by a general appearance before the Court."³ The underlying jurisdictional problem here is whether something more than domicile of the plaintiff-spouse—a sufficient basis, assuming due process notice out of the state, for jurisdiction to grant the divorce—is required to render valid a child support order against the absent spouse. The court's decision is technically correct; the statute invoked did not *specifically* authorize an exercise of jurisdiction on substituted service in the child support aspect of the case.⁴ But to the extent the opinion

¹ 270 N.C. 736, 155 S.E.2d 290 (1967).

² N.C. GEN. STAT. § 1-98.2(3) (Supp. 1967).

³ 270 N.C. at 738, 155 S.E.2d at 292.

⁴ As a matter of simple statutory interpretation, no fundamental quarrel can be made with a holding that the language, "service of process by publication or

suggests that statutory authority for such an exercise of jurisdiction could not constitutionally be given, serious questions may be raised. The opinion reveals a continuing commitment to rigid traditional in rem-in personam categories of jurisdiction that events have long since discarded.

So long as these categories have of necessity been used, divorce actions have been considered in rem, concerning a relationship (the *res*) created or maintained within the state.⁵ But the natural incidents of that relationship—property and support rights, for example—have continued to be considered in personam.⁶ When the plaintiff in an *ex parte* divorce proceeding on constructive service of process has also demanded a money judgment, the court, after rendering its decision determining the continuing validity of the marital status, has considered itself without power to enter a personal judgment against the absent defendant; the service of process that was sufficient to raise jurisdiction over the marriage status was deemed insufficient to raise jurisdiction to adjudicate a personal obligation arising out of that status. Thus while a spouse might be able to have her marriage ties severed by the state of her domicile, it has remained quite possible that she would have to pursue her partner into a foreign state to secure a property settlement. Courts insisting upon the categorization of marital incidents within the in personam-in rem framework have thus committed themselves to the problems of divisible divorce—the incomplete adjudication of marital estates, the deprivation of support for the children of that estate, and the inconvenient judicial administration resulting from a multiplicity of suits.

The intransigence of this approach has long been recognized. "While jurisdiction over individuals and over corporations has, because of a willingness to reexamine the relevant factors, been able to break away from the inadequate concept of 'power' as the sole basis of jurisdiction, a similar reexamination has not occurred with regard to the concept of the marital *res* in the field of divorce jurisdiction."⁷ Although the rule in

service outside the state may be had in . . . proceedings . . . (3) . . . for . . . divorce . . . or for any other relief involving the domestic status of the person to be served . . .," does not include child support. N.C. GEN. STAT. § 1-98.2(3) (Supp. 1967).

⁵ A. EHRENZWEIG & D. LOUISELL, JURISDICTION IN A NUTSHELL § 7, at 57-59 (2d ed. 1968); F. JAMES, CIVIL PROCEDURE § 12.1, at 612-13 (1965) [hereinafter cited as JAMES]; cf. Ballard v. Hunter, 204 U.S. 241, 262 (1907) (constructive service sufficient because owners usually keep themselves informed of what concerns their property).

⁶ Shonk v. Shonk, 16 Ohio Misc. 123, 241 N.E.2d 178 (1968).

⁷ *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 971 (1960).

Williams v. North Carolina,⁸ that a court may adjudicate the continuing validity of the marital relationship whenever the bona fide domicile⁹ of one of the spouses is established to be within the state, has facilitated divorce of absent spouses, it has also given rise to the anomaly of divisible divorce. Under the *Williams* rule, the possibility arises that that same court considered to have sufficient interest to adjudicate divorce is nevertheless without power to adjudicate the incidents of the marriage. Such an attitude seems less a solution to the problem than a refusal to recognize it. A better approach would say:

The only legal question for our concern in this case is whether the other aspect of, and indeed an incident to, a proceeding for divorce, the property arrangement, is similar enough to the dissolution of the marital relation, with respect to both the interests of the parties and the nature of what is adjudicated, that constitutionally it may be treated alike.¹⁰

Even within the traditional categorization of divorce litigation within the in rem-in personam framework, divorce actions can constitutionally be adjudicated more completely than was *Fleek*. Generally speaking, both the North Carolina legislature and court¹¹ have been advertent to expanding notions of jurisdiction¹² that have departed from an earlier philosophy requiring physical power over the defendant in order to subject him to personal jurisdiction.¹³ Satisfaction of the "minimum contacts" test and compliance with the requirements of due process, adequate

⁸ 317 U.S. 287 (1942).

⁹ A man has only one domicile, but he may have many residences. See *Texas v. Florida*, 306 U.S. 398, 432 (1939); cf. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 275 (1935).

¹⁰ *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 423 (1957) (dissenting opinion of Frankfurter, J.).

¹¹ See, e.g., *Shepherd v. Rheem Mfg. Co.*, 249 N.C. 454, 460, 106 S.E.2d 704, 709 (1959).

¹² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See also, *Miliken v. Meyer*, 311 U.S. 457 (1940); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawlowski*, 274 U.S. 352 (1927); *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960).

¹³ E.g., *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E.2d 397 (1966) (substituted service not ipso facto invalid on mere showing defendant not personally served within the state); *Harrison v. Hanvey*, 265 N.C. 243, 248-49, 143 S.E.2d 593, 597 (1965) (constructive service valid if shown defendant left state to defraud creditors or avoid service of process); *Surratt v. Surratt*, 263 N.C. 466, 139 S.E.2d 720 (1965) (had defendant, in alimony case, been shown a resident, constructive service would have been valid); *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951) (affirming constitutionality of nonresident motorist statute); *Cape Fear Rys. v. Cobb*, 190 N.C. 375, 129 S.E. 828 (1925) (substituted service on local sales agent of foreign corporation sufficient to establish jurisdiction over that corporation).

notice and opportunity to be heard,¹⁴ have become the modern requisites for the assertion of personal jurisdiction over nonresident corporations,¹⁶ nonresidents found to be doing business within the state,¹⁰ nonresident motorists,¹⁷ and residents who had departed the state with intent to defraud creditors or to avoid service of process.¹⁸ More recently, the drafters of the new North Carolina jurisdiction statute,¹⁹ enacted in conjunction with the adoption of the new North Carolina Rules of Civil Procedure, cited these developments²⁰ in basing that statute on the fundamental state interest in the litigation and general principles of fairness and reasonableness.²¹

That a court may with justification insist on more than simply the domicile of the plaintiff-spouse as a jurisdictional basis for marital incident orders is not disputed. Indeed, the court might reasonably conclude that major problems of forum shopping by far from innocent spouses, encouraged by the notorious laxity in the divorce laws of some states, would tax such a framework beyond the benefits to be derived in terms of judicial efficiency. But where that something extra does exist—a spouse who has fled the state following culpable conduct,²² or simply an absent domiciliary,²³ for instance—the court need not hesitate to exercise personal jurisdiction on the basis of these additional contacts with the marital relationship. This would take into account the modern factors of fairness and reasonableness in the determination of personal jurisdiction, and it would leave the court free to determine in each case whether the asserted domicile gives the state sufficient contact with the marriage, as a matter of due process, to assert personal jurisdiction over its partners with respect to the various incidents of the marriage.

Substantial difficulties may arise in any subsequent attempt to enforce Mr. Fleek's child support obligation, and in any event it will require an additional venture into court. Satisfactory resolution of the issue might

¹⁴ See JAMES § 12.8, at 642-43; Allen, *What's New in the Law: Choice of Law . . . Greatest Interest Rule*, 54 A.B.A.J. 918 (1968); Kurland, *The Supreme Court, The Due Process Clause and In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958).

¹⁵ N.C. GEN. STAT. § 55-145 (1965).

¹⁶ N.C. GEN. STAT. § 1-97(5) (1953).

¹⁷ N.C. GEN. STAT. § 1-105 (Supp. 1967).

¹⁸ N.C. GEN. STAT. § 1-98.2(6) (Supp. 1967).

¹⁹ N.C. GEN. STAT. § 1-75 (1967) (effective July 1, 1969).

²⁰ GEN. STATUTES COMMISSION, PROPOSED N.C. RULES OF CIVIL PROCEDURE 111 (1966).

²¹ *Id.* at 112.

²² N.C. GEN. STAT. § 1-98.2(6) (Supp. 1967).

²³ *Smith v. Smith*, 45 Cal. 2d 235, 288 P.2d 497 (1955).

legitimately have been possible in the previous divorce action, had a different statute²⁴ been invoked or had the court felt obliged to consider the problem in the light of fairness and due process and opportunity to be heard. The state's interests lie largely on the side of prompt and effective safeguarding of the children's welfare,²⁵ which seems sufficiently related to the marriage relationship to justify treatment along with its adjudication, once the court has affirmatively determined the contacts and reasonableness issues. Such an approach would certainly then satisfy the state's interest in assuring the integrity of its domestic institutions, while providing for the cleanup of those litigious problems often arising out of marital estrangement.

The policy and trend in the law of jurisdiction has favored the expansion of the concept of personal jurisdiction to the limits of fairness and reason.²⁶ It is to be hoped that the dictum in *Fleek* does not indicate an intransigent attitude, which, by "labelling the action with the question-begging phrase 'in personam,'"²⁷ will always deny a forum to plaintiffs whose husbands are, for whatever reason, absent from the state.

ROBERT L. EPTING

Eminent Domain—An Expansion of the Definition of Taking

While it has been axiomatic since 1897 that state and municipal governments are bound by the due process clause of the fourteenth amendment to justly compensate for property taken for public use,¹ the conceptual problems involved in defining "taking" and "public use" have created uncertainty² and, in some cases, caused injustice.³ It is clear that the

²⁴ N.C. GEN. STAT. § 1-98.2(6) (Supp. 1967) (departed debtor).

²⁵ *Estin v. Estin*, 334 U.S. 541, 546-47 (1948). See also *State v. Bell*, 184 N.C. 701, 115 S.E. 190 (1922) (divorce can neither terminate a father's relationship to his children nor his continuing obligation to support them). North Carolina statutory law also reflects the state's interest in the issue of child support. See, e.g., N.C. GEN. STAT. § 14-325 (1953) (making nonsupport criminal); N.C. GEN. STAT. § 52A-6 (1953) (making nonsupport an extradictable offense).

²⁶ JAMES § 12.8, at 642-43.

²⁷ *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 423 (1957) (dissenting opinion of Frankfurter, J.).

¹ *Chicago, B. & O.R.R. v. City of Chicago*, 166 U.S. 226, 241 (1897).

² See Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37-42 (1964), tracing the conflicting views of Justices Harlan and Holmes on the question of what constitutes a "taking" and introducing the original conflict between the doctrinal and functional or utilitarian approaches to "taking." See also I J. LEWIS, *EMINENT DOMAIN* (2d ed. 1900). The author states: "[W]hen we come to seek