SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 13 | Issue 2

1962

Annulment--Divorce--Prior Living Spouse

Paul Y. Shapiro

Follow this and additional works at: http://scholarlycommons.law.case.edu/caselrev

 Part of the Law Commons

Recommended Citation

Paul Y. Shapiro, *Annulment--Divorce--Prior Living Spouse*, 13 Cas. W. Res. L. Rev. 404 (1962)
Available at: http://scholarlycommons.law.case.edu/caselrev/vol13/iss2/28

This Recent Decisions is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

basis of the funds being directed for the support of the children alone upon remarriage of the wife.[22]

The Court of Appeals for the Second Circuit has resolved the question under both types of provisions in favor of allowing the husband's deduction.[23] The Tax Court has unequivocally chosen to follow the *Lester* case where the agreement and decree reduced the amounts to both the children and the wife as the contingencies would arise.[24]

On the basis of the Supreme Court's decision in accepting the history of the statute and the intent of Congress as well as the unqualified language used in a decision which was obviously intended to resolve the conflict between the courts of appeal, it is submitted that the courts will give the decision broad application in the factual situations mentioned above.

FREDERICK MCKEAN LOMBARDI

ANNULMENT — DIVORCE — PRIOR LIVING SPOUSE

Abelt v. Abelt, 173 N.E.2d 907 (Ohio C.P. 1961)
Schwartz v. Schwartz, 173 N.E.2d 393 (Ohio Ct. App. 1960)

In a marriage that is void because of a prior living spouse,[1] the decree of nullity is merely a judicial declaration of the existing status, and may be sought by either party.[2] Even though such a decree is not a legal necessity, it is in the interest of the parties as well as the public to obtain it.[3] In the vast majority of states the equitable remedy of annulment is the sole means for recognizing the standing of the bigamous marriage,[4] but in Ohio there is also the remedy of divorce — Ohio Revised Code section 3105.01(A).[5] A problematic issue in two recent decisions arises from this dual approach to judicial recognition of the bigamous couple's status.

In *Abelt v. Abelt*[6] a minor husband petitioned for annulment of his second ceremonial marriage, the first and still valid union having been consummated in 1957. He alleged a pretended marriage of neither consummation nor co-habitation. He also alleged minority, duress, and the

22. There is a substantial difference between a mere reduction of payments upon the happening of certain contingencies and the affirmative direction that the funds be used for the support of the children upon the remarriage of the wife. When the money is directed to be used only for the children, it is certainly "fixed" for their support within the meaning of the Internal Revenue Code. Should the courts wait until the remarriage of the wife before allowing the husband to be taxed on income used for support of his own children?

23. In Hirshon's Estate v. Commissioner, 250 F.2d 497 (2d Cir. 1957), payments were directed to the support of the child upon the remarriage of the wife. See also Weil v. Commissioner, 240 F.2d 584 (2d Cir. 1957), *cert. denied,* 353 U.S. 958 (1957).

24. Lindley S. Bettison, P-H 1961 TAX CT. REP. & MEM. DEC. (30 P-H Tax Ct. Mem.) ¶ 61168 (June 9, 1961); Robert E. Dolan, P-H 1961 TAX CT. REP. & MEM. DEC. (30 P-H Tax Ct. Mem.) ¶ 61165 (June 7, 1961).

existence of a still-valid prior marriage.[7] His second wife filed for divorce, apparently unaware of her husband's petition.[8] Judge Jackson, utilizing the memorandum opinion, set the trial date for both the wife's divorce case and the husband's annulment case, the latter on the ground of duress, and not on that of a prior living spouse. Following *Eggleston v. Eggleston*,[9] Judge Jackson concluded that divorce is the exclusive remedy for the plural marriage situation.[10]

In *Schwartz v. Schwartz*,[11] a husband and his first wife staged an act of adultery in order to procure a divorce in New York. Because of this fraud in procurement, the Ohio Court of Appeals held that there was no need to extend full faith and credit to that New York decree, and therefore the husband and his *second* wife, being unable to contract marriage, were parties to a void bigamous marriage.[12] After recognizing the possibility of divorce, the appellate court affirmed the decision of the common pleas court granting the parties' prayer for an annulment.

The basis for confusion in Ohio, regarding the existence of annul-

1. Nyhuis v. Pierce, 114 N.E.2d 75 (Ohio Ct. App. 1952); Short v. Short, 102 N.E.2d 719 (Ohio Ct. App. 1951); Williams v. Williams, 90 Ohio App. 369, 106 N.E.2d 655 (1951); Blaustein v. Blaustein, 77 Ohio App. 281, 66 N.E.2d 156 (1946); Smith v. Smith, 72 Ohio App. 203, 50 N.E.2d 889 (1943). The second marriage, after the dissolution of the first union, can be forged into a valid common-law marriage. See, *e.g.*, Ryan v. Ryan, 84 Ohio App. 139, 86 N.E.2d 44 (1948).

2. Smith v. Smith, 72 Ohio App. 203, 50 N.E.2d 889 (1943). See also Waymire v. Jetmore, 22 Ohio St. 271 (1872); Note, 4 WEST. RES. L. REV. 73 (1952).

3. "Social order and public decency demand that the parties to a meretricious relation, in which the forms of marriage, apparently legal, seem to bind them, should be judicially relieved therefrom." Because considerations of inheritance and succession of property often depend upon the parties' marital status, and because witnesses and evidence tending to establish the status many times disappear or lose persuasiveness through the passage of time, it follows that the judicial declaration of nullity is in the interests of the parties. Waymire v. Jetmore, 22 Ohio St. 271, 274 (1872).

4. Only twelve states provide for bigamy as a ground for divorce. KEEZER, MARRIAGE AND DIVORCE §§ 330-31 (2d. ed. 1946); see 3 NELSON, DIVORCE AND ANNULMENT, §§ 31.14-.17 (2d ed. 1945).

Many of the states that provide divorce for the bigamous marriage situation also by statute provide annulment as an additional remedy. See, *e.g.*, ARK. STAT. §§ 55-106-108 (1959); DEL. CODE ANN. tit. 13, § 1551(3) (1953); PENN. STAT. ANN. tit. 23, § 12 (1955). Colorado has recently eliminated bigamy as a ground for divorce and has added it to the grounds for annulment, COLO. REV. STAT. ANN. §§ 46-1-1, 46-3-2, 3 (Supp. 1960). Other states, handling the prior living spouse situation by means of divorce statutes, may also provide common law annulment as an additional form of relief.

5. "The Court of Comon Pleas may grant divorces for the following causes: (A) Either party had a husband or wife living at the time of the marriage from which the divorce is sought."

6. 173 N.E.2d 907 (Ohio C.P. 1961).

7. *Id.* at 908.

8. *Ibid.*

9. 156 Ohio St. 422, 103 N.E.2d 395 (1952).

10. Abelt v. Abelt, 173 N.E.2d 907, 913 (Ohio C.P. 1961).

11. 173 N.E.2d 393 (Ohio Ct. App. 1960).

12. *Id.* at 395.

ment in the area of the plural marriage, is the case of *Eggleston v. Eggleston.*[13] There the bigamous second marriage, occurring as a result of improper service in the divorce proceedings of the husband's first marriage, lasted for about twenty years, resulting in two children and property rights.[14] The trial court's decision, affirmed in the court of appeals, granted annulment, and as a result held that alimony was not available to the second wife.[15] The Supreme Court of Ohio, considering the children, the property rights, and the length of the second marriage, reversed the lower court's decision, which had left the later spouse without alimony, and held that divorce was the exclusive remedy in "that situation."[16] Instead of limiting this phraseology to that unique factual situation, some courts, including the one in *Abelt,* suggested an interpretation that divorce is the exclusive remedy in all plural marriage situations.[17] The factual peculiarities temper the effect of *Eggleston,* and the holding that divorce is the exclusive remedy in "that situation" should be construed in the light in which it was rendered.

Several cases decided after *Eggleston* limit a broad interpretation of its holding.[18] The court of appeals in *Nyhuis v. Pierce,*[19] faced with a valid common-law marriage followed by a ceremonial union of almost immediate separation, non-consummation, and non-cohabitation, held that ". . . where the facts do not require the use of the divorce statutes to protect rights of property or support, they should not be construed as

13. 156 Ohio St. 422, 103 N.E.2d 395 (1952).

14. *Id.* at 423, 103 N.E.2d at 396-97.

15. Neither party has the right to receive alimony in an annulment proceeding. Eggleston v. Eggleston, 156 Ohio St. 422, 428, 103 N.E.2d 395, 398 (1952); Short v. Short, 102 N.E.2d 719 (Ohio Ct. App. 1951). However, the supreme court in the Eggleston case also held that alimony was proper in a divorce based on the ground of the still valid marriage. *Id.* at 428, 103 N.E.2d at 398. The supreme court relied on the cases of Smith v. Smith, 5 Ohio St. 32 (1855), and Vanvalley v. Vanvalley, 19 Ohio St. 588 (1869), as authority for this proposition. But it should be noted that the opinion in *Vanvalley* was made on a motion for leave to file a petition in error. This motion was overruled. The case therefore never reached the court on its merits, and is not authority for an allowance of alimony under a void contract of marriage. See also Basile v. Basile, 86 Ohio App. 535, 93 N.E.2d 564 (1948). In addition, statements relating to alimony in the *Smith* case were pure dicta. For a further discussion of the problem of alimony in annulment and divorce actions, see *In re* Duncan, 172 N.E.2d 483 (Ohio Ct. App. 1961); Kontner v. Kontner, 103 Ohio App. 360, 139 N.E.2d 366 (1956); Treadway v. Treadway, 97 Ohio App. 248, 125 N.E.2d 552 (1954). *Contra,* Williams v. Williams, 90 Ohio App. 369, 106 N.E.2d 655 (1951); Basile v. Basile, 86 Ohio App. 535, 93 N.E.2d 564 (1948). On the subject of alimony, see generally Gage v. Gage, 165 Ohio St. 462, 136 N.E.2d 56 (1956); Annot., 54 A.L.R.2d 1410 (1957).

16. 156 Ohio St. 422, 103 N.E.2d 395, 396 (1952).

17. Abelt v. Abelt, 173 N.E.2d 907, 913 (Ohio C.P. 1961); *In re* Duncan, 172 N.E.2d 478, 483 (Ohio Ct. App. 1961).

18. It is true that there are no supreme court cases actually modifying or limiting *Eggleston,* but since a decision of the court of appeals is binding on the lower courts in the county in which it sits, Nyhuis v. Pierce, 114 N.E.2d 75 (Ohio Ct. App. 1952), being decided in Cuyahoga County, limits, in effect, the holding in *Eggleston,* at least for the court in *Abelt.*

19. 114 N.E.2d 75 (Ohio Ct. App. 1952).

being therein involved."[20] Even though neither party sought a divorce, it appears that on the basis of *Nyhuis,* divorce is not the exclusive remedy for the plural marriage situation. The recent decision of *Schwartz v. Schwartz*[21] illustrates that the *Nyhuis* case still limits the broad statements in *Eggleston.* The facts in *Schwartz* are similar to those in *Eggleston,* for both involved a second union of some twenty years, with property rights and children. But, after recognizing the possibility of divorce in the case before it, the appellate court upheld the annulment decree, because neither party asked for divorce.[22] It held that such relief was both logical and in accordance with the law. It appears then that where the parties agree as to the relief sought, divorce or annulment, their wishes usually will be granted.

The case in which the parties differ concerning the desired relief is troublesome to the Ohio courts. Where, as in *Eggleston,* there is a second marriage of long duration, with children and property rights, divorce is necessary and proper, for it provides alimony and protects property rights. But which mode of relief should be applied in the *Abelt* situation, where the second marriage was of short duration, non-consummation, and non-cohabitation? The court has set the trial date for both the annulment case and the divorce case. However, the annulment case is scheduled to be decided on duress and not on the ground of the prior living spouse.[23] In this regard the court has overlooked the following issues: (1) whether divorce is the exclusive remedy under the doctrine in Eggleston, and (2) if not exclusive, whether divorce or annulment is warranted under the facts of this case.

It has already been shown that divorce is not the exclusive remedy in the plural marriage situation, the opinion in *Abelt* notwithstanding. Although divorce may be the exclusive remedy in a situation such as in *Eggleston,*[24] a marriage of long duration, children, and property rights, it is suggested that it is not controlling in *Abelt,* where the parties to the extremely short childless marriage acquired no property rights to be divided. Even though divorce has been granted upon cross-petition to annulment actions, it is submitted that in order to arrive at the proper remedy for the *Abelt* situation, the court should consider the results stemming from each form of relief and balance the equities presented by the facts.

PAUL Y. SHAPIRO

20. *Id.* at 80.
21. 173 N.E.2d 393 (Ohio Ct. App. 1960).
22. *Id.* at 394-96.
23. Abelt v. Abelt, 173 N.E.2d 907, 913 (Ohio C.P. 1961).
24. Another view is that *Eggleston* provided divorce as the exclusive remedy where one of the parties petitioned for statutory relief under the divorce statute, OHIO REV. CODE § 3105.01(A). It is submitted that the better view is to limit the *Eggleston* case to its facts, and prescribe annulment where rights of property and support are not involved.