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Misconduct During an Interlocutory Divorce Period

ever, the United States Supreme Court's decision in *Carignan* and the use of the more enlightened procedure followed in a majority of jurisdictions reflects growing concern whether practice here follows theory.[28]

In an analogous situation, dissatisfaction with this procedural device of instructing the jury to disregard evidence was expressed in *United States ex rel, Scoleri v. Banmiller.*[29] During the trial and before conviction of Banmiller, the state introduced evidence of the defendant's prior criminal record as relevant to the question of the penalty to be imposed if the jury found him guilty of first degree murder, but not on the question of guilt itself. The United States Court of Appeals for the Third Circuit held that the evidence, even with an instruction to the jury to disregard on the question of guilt itself, was so prejudicial that it constituted a denial of due process of law. Similarly, an instruction to the jury to disregard a confession ruled inadmissible by the trial judge would seem to be so prejudicial to the defendant that this procedure, too, should be considered as constituting a denial of due process.

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MISCONDUCT DURING AN INTERLOCUTORY DIVORCE PERIOD

In several states the statutes provide that parties to a divorce suit must wait a specified period of time after entry of an initial divorce decree before the divorce becomes final.[1] The preliminary decree is known as an interlocutory decree in some states,[2] and as a decree nisi in

[28]E.g., Tooisgah v. United States, 137 F.2d 713, 716 (10th Cir. 1943); State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960); House v. State, 230 Ark. 622, 324 S.W.2d 112 (1959); State v. Taborsky, 147 Conn. 194, 158 A.2d 239 (1960); State v. Seward, 163 Kan. 136, 181 P.2d 478 (1947); State v. Thomas, 208 La. 548, 23 So. 2d 212 (1945); Hawkins v. State, 193 Miss. 586, 10 So. 2d 678 (1942); Harrold v. Territory, 18 Okla. 395, 89 Pac. 202 (1907); State v. Harrison, 236 S.C. 246, 113 S.E.2d 783 (1960); State v. Hinz, 78 S.D. 442, 103 N.W.2d 656 (1960).

[29]310 F.2d 720 (3d Cir. 1962).

[1]Cal. Civil Code § 131 (Deering 1960); Del. Code Ann. tit. 13, § 1534 (1953); D.C. Code Ann. § 16-421 (1961); Mass. Ann. Laws ch. 208 § 21 (1955); Neb. Rev. Stat. § 42-340 (1952); N.J. Rev. Stat. § 2A:34-19 (1952); N.Y. Practice Manual § 1176 (Clevenger 1962); R.I. Gen. Laws Ann. § 15-5-23 (1956); Vt. Stat. tit. 14 ch. 3215 (1947).

[2]Cal. Civil Code § 131 (Deering 1960); D.C. Code Ann. § 16-421 (1961) (six months before the decree becomes final plus an additional 90 days called an interlocutory period); Neb. Rev. Stat. § 42-340 (1952); N.Y. Practice Manual § 1176

others.[3] The waiting period between the interlocutory decree and the final decree varies from three months[4] to six months,[5] and a year.[6] The parties' martial status is not terminated until the final decree and so, during this interim period, remarriage is forbidden.[7]

Several reasons are given for these statutory interim periods. The principal one is that the parties are given a chance for reconciliation.[8] Another reason sometimes given is that it prevents speedy divorce and hasty remarriage, and so generally serves as a deterrent to divorce.[9] It is also said that the period permits the determination of a child's paternity,[10] and gives the party not present at an ex parte divorce hearing an opportunity to present defenses.[11]

Two interesting questions concerning interlocutory divorce decrees confronted the Rhode Island Supreme Court in the recent case of *Pakuris v. Pakuris*.[12] In this case the wife petitioned for and was awarded an absolute divorce, custody of the parties' minor child, and an allowance for the support of the child. Rhode Island's divorce laws provide for a six months waiting period before the initial decree is made final.[13] During this six months period the husband moved to change the custody of the child, and the wife filed a motion to hold the husband in contempt of court for failing to make his support payments. At a hearing upon these motions, the husband was held in contempt. However, the wife admitted at this hearing that she was living with another man as his wife and stated her intentions of marrying this other man as soon as the divorce decree becomes final.

After the hearing, but before the expiration of the six months

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(Clevenger 1962); R.I. Gen. Laws Ann. § 15-5-23 (1956) (not specifically called an interlocutory decree by statute, but the equivalent of one).

[3]Del. Code Ann. tit. 13, § 1534 (1953); Mass. Ann. Laws ch. 208, § 21 (1955); N.J. Rev. Stat. § 2A:34-19 (1952); Vt. Stat. tit. 14 ch. 3215 (1947).

[4]Del. Code Ann. tit. 13 § 1534 (1953); N.J. Rev. Stat. § 2A:34-19 (1952); N.Y. Practice Manual § 1176 (Clevenger 1962).

[5]Mass. Ann. Laws ch. 208, § 21 (1955); Neb. Rev. Stat. § 42-340 (1952); R.I. Gen. Laws Ann. § 15-5-23 (1956); Vt. Stat. tit. 14 ch. 3215 (1947).

[6]Cal. Civil Code § 131 (Deering 1960).

[7]See statutes cited note 1 supra, and Olson v. Superior Court, 175 Cal. 250, 165 Pac. 706 (1917).

[8]Olson v. Superior Court, 175 Cal. 250, 165 Pac. 706 (1917); Lane v. Superior Court, 104 Cal. App. 340, 285 Pac. 860 (Dist. Ct. App. 1930); Bajakian v. Bajakian, 57 R.I. 470, 190 Atl. 461 (1937); Berger v. Berger 44 R.I. 295, 117 Atl. 361 (1922).

[9]Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891 (1905).

[10]Lane v. Superior Court, 104 Cal. App. 340, 285 Pac. 860 (Dist. Ct. App. 1930).

[11]See Scolardi v. Scolardi, 42 R.I. 456, 108 Atl. 651 (1920).

[12]186 A.2d 719 (R.I. 1962).

[13]R.I. Gen. Laws Ann. § 15-5-23 (1956).

waiting period, the husband filed a motion objecting to the entry of the final decree. His objection was on the grounds that his wife's conduct with another man constituted misconduct barring her rights to a final decree. The trial justice sustained his motion, and denied the wife her final decree. The wife took exception to the trial justice's ruling, arguing that her misconduct did not bar her rights to a final decree, and further pointing out that the Rhode Island statute[14] does not expressly provide for the denial of a final decree for misconduct on the part of the prevailing party during the waiting period. However, the Rhode Island Supreme Court upheld the trial justice's ruling and held that the wife's action constituted misconduct barring her rights to a final decree. In defining misconduct the court said:

> "[T]he prevailing party must continue to comply with the allegations of the petition for divorce, pertaining to his or her conduct, up to the time of the entry of the final decree and any conduct which would bar a decision for divorce on the original petition presents grounds for contesting entry of the final decree."[15]

The Rhode Island Supreme Court reasoned that, even in the absence of an express statutory provision prohibiting misconduct, the six months waiting period was intended by the legislature to offer the parties an opportunity to become reconciled and that misconduct on the part of the prevailing party is contrary to any notion of reconciliation.

Several states have concluded that misconduct on the part of the prevailing party before the final decree is grounds for contesting the entry of the final decree.[16]

Two cases concerning misconduct have been decided by the Su-Supreme Court of Michigan.[17] The applicable statute provides a six months waiting period in every divorce case where there are depen-

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[14]Ibid.

[15]Pakuris v. Pakuris, 186 A.2d 719, 721 (R.I. 1962).

[16]Weeks v. Superior Court, 187 Cal. 620, 203 Pac. 93 (1921); Vinyard v. Vinyard, 43 Del. 222, 48 A.2d 497 (Super. Ct. 1946); Waurinevich v. Waurinevich, 170 A.2d 709 (Del. Super. Ct. 1961); Moors v. Moors, 121 Mass. (7 Lathrop) 232 (1876); Linn v. Linn, 341 Mich. 668, 69 N.W.2d 147 (1955); Pfender v. Pfender, 104 N.J. Eq. 107, 144 Atl. 333 (Ch. 1929); Helbig v. Helbig, 103 N.J. Eq. 348, 143 Atl. 338 (Ct. Err. & App. 1928); Burgher v. Burgher, 184 Misc. 682, 54 N.Y.S.2d 683 (Sup. Ct. 1945); Pakuris v. Pakuris, 186 A.2d 719 (R.I. 1962); White v. White, 167 Wis. 615, 168 N.W. 704 (1918).

[17]Linn v. Linn, 341 Mich. 668, 69 N.W.2d 147 (1955); Curtis v. Curtis, 330 Mich. 63, 46 N.W.2d 460 (1951).

dent children under the age of seventeen.[18] In *Curtis v. Curtis*,[19] the wife admitted she had become engaged to another man within the six months before the entry of the final decree, and that she had occasionally shown her affections towards him. The husband moved to vacate the final decree, contending this constituted misconduct barring her right to a final decree. But the Michigan Supreme Court held there was no showing of any misconduct on her part that would indicate moral depravity, or that she was an unfit custodian of the child.[20] Within a few years the Michigan court was faced with a similar case, *Linn v. Linn*,[21] where the husband after a final decree petitioned the court to set it aside because of the wife's alleged misconduct during the interlocutory period. The wife, after prevailing in a divorce proceeding, had committed adultery and had become pregnant prior to the entry of the final decree. The court set aside the final decree because it thought the concealment by the wife of her immoral conduct during the interlocutory period constituted a fraud upon the court.

One state has concluded that misconduct on the part of the prevailing party before the final decree is not grounds for contesting the entry of the final decree. The Supreme Court of Washington in *State ex rel. Hansen v. Superior Court*[22] held that the final decree should be entered even though the prevailing party had committed adultery or had attempted to remarry during the interlocutory period. The court said:

> "To apply such a rule under any conceivable facts except those tending to perpetuation of the marriage would mean that in every case the defeated party would only be required to charge that the other had given cause for divorce after the entry of the interlocutory decree and thereupon the whole case would be opened up for relitigation."[23]

The import of the Washington decision is that the parties will be denied the final decree only when the circumstances show they have voluntarily reconciled during the interlocutory period, and intend to perpetuate the marriage.

The language of the Michigan and other decisions, indicates that

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[18]Mich. Comp. Laws § 552.9 (1948), as amended by Mich. Comp. Laws § 552.9 (1956) now provides for a six months "cooling off" period before litigation begins. See infra note 31.

[19]330 Mich. 63, 46 N.W.2d 460 (1951).

[20]Ibid.

[21]341 Mich. 668, 69 N.W.2d 147 (1955).

[22]131 Wash. 13, 228 Pac. 702 (1924). But see State ex rel. Chaudain v. Superior Court, 180 Wash. 115, 39 P.2d 389 (1934), and especially the dissenting opinion.

[23]State ex rel. Hensen v. Superior Court, 131 Wash. 13, 228 Pac. 702 (1924).

misconduct is a ground for denying a final divorce decree because it is inconsistent with the promotion of a reconciliation, the theory of the interlocutory period.[24] Yet the only conduct that has this effect is that which indicates moral depravity, or which would originally have been grounds for divorce. For a party to become engaged to another during the interlocutory period is as incompatible with a reconciliation, as the commission of adultery, but only adultery is a ground for denying the final decree.[25] The Michigan cases discussed earlier are hard to reconcile. As a practical matter there would have been more reason to uphold the final decree in the Michigan case involving adultery. There, the wife not only remarried, but she was bearing another man's child.[26] Certainly she and her first husband were beyond reconciliation; and it would appear that public policy would favor upholding the unborn child's legitimacy.

Better reasoning would suggest that misconduct should be abolished altogether as a grounds for contesting a final decree. Misconduct has little to do with the opportunity for a reconciliation or the opportunity to present defenses in a divorce suit. Remarriage is still forbidden until the final decree, and the paternity of the children can still be determined. But to include misconduct as a grounds for contesting, or setting aside the final decree, prolongs litigation, forces unwilling parties to continue a marriage, and produces no beneficial results.

Even with the abolition of misconduct, reconciliation still remains a basis for denying the final decree. But reconciliation as the theory underlying the interlocutory period and also as a basis for contesting the final decree is mutually inconsistent, because there has been a failure to distinguish between an attempt to reconcile and a bona fide reconciliation. This is evident in the Washington case of *Walker v. Walker*[27] where the husband was awarded an interlocutory decree, and then, he and his spouse sporadically cohabited in en-

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[24]Cases cited note 16 supra; see notes 19, 20 supra and accompanying text.

[25]Compare Linn v. Linn, note 17 supra, with Curtis v. Curtis, note 17 supra. Note 16 Colum. L. Rev. 228, 230 n.13 (1956). See Helbig v. Helbig, 103 N.J. Eq. 348, 143 Atl. 338, 339 (Ct. Err. & App. 1928), where the court said, "A mere pretense will not do, even though the offending spouse intended to actually go through with a real adultery and thought he was doing so when interrupted at almost the last moment." 143 Atl. 338, 339. It is submitted that "almost adultery" is as inconsistent with notions of reconciliation as a "completed adultery." Certainly, the other spouse will not be more eager to become reconciled because his spouse was interrupted at the last moment.

[26]In the Linn case, supra note 25, the wife married the man responsible for her pregnancy as soon as the final decree was entered.

[27]151 Wash. 480, 276 Pac. 300 (1929).

deavor to effect a permanent reconciliation. A final decree was entered, and he remarried a third person. Later, the wife had the final decree set aside on the ground that the sporadic cohabitation constituted reconciliation. It is difficult to see any permanent reconciliation under these circumstances; the husband certainly did not feel reconciled with his wife, or he would not have had the final decree entered, nor would he have remarried. It would appear that the interlocutory period inconsistently provides the opportunity for reconciliation but denies the parties a final decree if they seek to utilize this opportunity. Under these circumstances, reconciliation is discouraged instead of being encouraged. Parties to an interlocutory decree would do well to stay apart rather than run the risk of having a court-established reconciliation forced upon them.[28]

As might be expected, the impact of the interlocutory decree on the divorce rate and reconciliation is negligible.[29] The damage to the marital relationship has already been done by the time the interlocutory decree is entered, and the parties are usually beyond reconciliation by this time.[30] Consequently, some states have provided for a "cooling off" period before litigation begins, the theory being that the climate is more favorable to reconciliation before litigation.[31]

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[28]Another example of a "court-established reconciliation" is Slusher v. Slusher, 85 Cal. App. 2d 626, 193 P.2d 778 (1948). Here, the wife acquired an interlocutory decree and then she and her husband attempted to reconcile by living together over a period of approximately seven months. The reconciliation failed, the wife alleged, because the husband beat her, forced her to stay out in the yard, cursed her in front of the parties' minor children, and was constantly intoxicated. Then, the husband alleged the wife's sole motive in attempting to reconcile was to obtain a larger share of the property. The court held there was a reconciliation. It is clear under such circumstances that the only reconciliation here was one established by the court, and that there was no semblance of an actual reconciliation between the parties. As to the approaches taken regarding reconciliation, see Helbush v. Helbush, 209 Cal. 758, 290 Pac. 19 (1930); Nacht v. Nacht, 167 Cal. App. 2d 254, 334 P.2d 275 (1959); Nemer v. Nemer, 117 Cal. App. 2d 35, 254 P.2d 661 (1953); Peters v. Peters 16 Cal. App. 2d 383, 60 P.2d 313 (1936); Ruggles v. Bailey, 15 Cal. App. 2d 555, 59 P.2d 837 (1936); Kronman v. Kronman, 129 Cal. App. 10, 18 P.2d 712 (1933); Hawkins v. Hawkins, 104 Cal. App. 608, 286 Pac. 747 (1930); Lane v. Superior Court, 104 Cal. App. 340, 285 Pac. 860 (1930); Krussman v. Krussman, 25 Del. (2 Boyce) 25, 78 Atl. 642 (Super. Ct. 1910); Cary v. Cary, 144 App. Div. 846, 129 N.Y. Supp. 444 (1911); Lund v. Lund, 6 Wash. 2d 425, 315 P.2d 856 (1957); Tarr v. Tarr, 184 Va. 443, 35 S.E.2d 401 (1945).

[29]See 3 Nelson, Divorce and Annulment, 133, 134, 135 (2d ed. 1945); note, 25 Brooklyn L. Rev. 313, 323 & n.58 (1958). "Of the 1,408 interlocutory decrees of divorce or annulment entered in New York County in actions begun in 1952, only three were vacated during the interlocutory period, and only one of these on grounds of reconciliation." Note, 16 Colum. L. Rev. 228, 249, 250 & n.156 (1956).

[30]Nelson, supra note 30, at 135, 136; 15 Wash. & Lee L. Rev., 327, 332 (1958).

[31]These statutes provide that there will be no hearing on the complaint until a specified time after the return day, date of issuance of summons, or first public