

Spring 3-1-1965

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Recommended Citation

Rights Of Surviving Party Before Final Divorce, 22 Wash. & Lee L. Rev. 140 (1965),
<https://scholarlycommons.law.wlu.edu/wlulr/vol22/iss1/13>

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RIGHTS OF SURVIVING PARTY BEFORE FINAL DIVORCE

Divorce statutes in a majority of states¹ provide that specific waiting periods, commencing with the entry of a divorce decree, must expire before the rights and privileges of an absolute divorce become effective. The death of either party during the statutory waiting period results in a situation uncertain as to the marital status and inheritance rights of the surviving party.

In the recent case of *Saunders v. Hanson*,² the Court of Appeals for the District of Columbia reviewed an estate proceeding wherein the widow asserted a right to share, as widow, in the estate of her husband. The widow had previously sought a divorce which was denied her, but granted to the husband on the ground of desertion. The decree for absolute divorce did not grant alimony or property rights and was not appealed. The District of Columbia has a six month waiting period before the divorce decree becomes effective.³ Twelve days before the expiration of this period the husband died.

Prior to the issuance of the divorce decree, the husband executed a last will and testament in which he bequeathed to his *putative* wife the sum of five dollars. The wife renounced the will and elected to take payment of her intestate share as the decedent's widow. The executor and daughter of the decedent, who opposed the renunciation and election of the putative widow, filed a complaint for a declaratory judgment.

The District Court entered summary judgment in favor of the

¹Ala. Code tit. 34, § 38 (Recomp. 1958); Ariz. Rev. Stat. Ann. § 25-320 (1956); Cal. Civ. Code Ann. §§ 131, 132 (Deering 1960); Colo. Rev. Stat. Ann. §§ 46-1-9, 10 (1953); Del. Code Ann. tit. 13, § 1534 (1953); D.C. Code Ann. § 16-421 (1961); Hawaii Rev. Laws § 324-31 (Supp. 1963); Ind. Ann. Stat. § 3-1224 (Repl. Vol. 1946); Kan. Gen. Stat. Ann. §§ 60-1512, 1514 (1949); Mass. Ann. Laws ch. 208, §§ 21, 24 (Recomp. 1955);

Minn. Stat. Ann. § 518.27 (1945); § 517.03 (Supp. 1963); Mont. Rev. Codes Ann. § 21-102 (1947); § 48-151 (Supp. 1963); Neb. Rev. Stat. § 42-340 (1960); N.J. Rev. Stat. § 2A:34-18, 19 (1952); Okla. Stat. Ann. tit. 12, §§ 1280, 1282 (1961); Ore. Rev. Stat. § 107-110 (1963); R.I. Gen. Laws Ann. § 15-5-23 (1956); S.D. Code §§ 14.0701, 14.0707 (1939); Tex. Rev. Civ. Stat. art. 4640 (1948); Utah Code Ann. §§ 30-3-6, 7, 8 (Supp. 1963);

Vt. Stat. Ann. tit. 15, §§ 553, 559 (1958); W. Va. Code Ann. § 4722 (1961); Wis. Stat. § 247.37 (1963). In three states, the waiting periods are discretionary. *Infra* note 16.

²327 F.2d 889 (D.C. Cir. 1963).

³D.C. Code Ann. § 16-421 (1961) states: "Every decree for absolute divorce shall contain the date thereof and no such final decree shall be absolute and take effect until the expiration of six months after its date."

widow.⁴ Since the divorce decree is merely provisional, the death of the husband during the six month waiting period abated the action for all purposes. The divorce decree, therefore, could not bar the widow from sharing, as widow, in the estate of her dead husband.⁵

In a per curiam opinion, the Court of Appeals affirmed the decision below on the ground that the divorce decree is provisional and thus ineffective for all purposes until the expiration of six months.⁶ While concurring, Judge Burger stated that the application of the District of Columbia statute was not intended to be as broad as the majority stated.⁷

A minority of jurisdictions⁸ do not have statutory waiting periods. A decree of divorce *a vinculo matrimonii* is an absolute divorce from

⁴In re Hanson, 210 F. Supp. 377 (D.D.C. 1962).

⁵The court relied on the decisions of *Oliver v. Oliver*, 185 F.2d 429 (D.C. Cir. 1950); and *Wesley v. Brown*, 196 F.2d 859 (D.C. Cir. 1952). In the *Oliver* case, the court interpreted § 16-421 of the D.C. Code as granting a provisional decree until the expiration of six months. 185 F.2d at 431. The court, however, was interested only in using the statute to declare void a subsequent marriage celebrated within the six months period. In *Wesley v. Brown*, wherein the wife who obtained the divorce was also the decedent, the court relied on its holding in the *Oliver* case.

⁶Supra note 2. The court relied on its decisions in *Oliver v. Oliver*, *Wesley v. Brown*, supra note 5; and *Dillard v. Dillard*, 275 F.2d 878 (D.C. Cir. 1960). In the *Dillard* case, the court discussed the underlying policy of § 16-421 of the D.C. Code. The statute "adopts and clearly expresses the broad policy of postponing for six months, and for all purposes, the effective date of any decree of absolute divorce granted in the District of Columbia." 275 F.2d at 882.

⁷Judge Burger pointed to the court's consideration of the legislative history of § 16-421 of the D.C. Code in *Oliver v. Oliver*, supra note 5. "Other statements by members of the [House] Committee clearly indicate that the provision was intended as a barrier to hasty and fraudulent divorces." 185 F.2d at 432. See 79 Cong. Rec. 11587 (1935). The District Court had previously held that marriage during the six month waiting period was sufficiently dissolved for the wife to sue her husband for assault. *Steele v. Steele*, 65 F. Supp. 329 (D.D.C. 1946). Under District of Columbia law, the common law rule prevails that neither the husband nor the wife is liable for tortious acts committed against the other during coverture. E.g., *Yellow Cab Co. v. Dreslin*, 181 F.2d 626 (D.C. Cir. 1950).

Judge Burger concluded that the purpose of § 16-421 of the D.C. Code was to prevent easy divorces and hasty remarriages of divorced persons. That purpose was not served by allowing a divorced spouse to inherit as a surviving spouse. 327 F.2d at 891. It appears that Judge Burger ignored the remarks of Representative Carpenter: "[A]nd in no event can the parties remarry until the lapse of six months, because the decree *does not become binding* until 6 months after its date." (Emphasis added.) (79 Cong. Rec. 11587 (1935)).

⁸Ga. Code Ann. § 30-101 (Supp. 1963); Ky. Rev. Stat. Ann. § 403.010 (1963); Nev. Rev. Stat. § 125.130 (1957); N.C. Gen. Stat. § 50-11 (Supp. 1963); Tenn. Code Ann. § 36-817 (1955); Va. Code Ann. § 20-118 (Supp. 1964). Prior to 1960, § 20-118 of the Virginia Code provided for a four month prohibition against remarriage. For a discussion of the former provisions of § 20-118, see 15 Wash. & Lee L. Rev. 327 (1958).

the time the decree is entered.⁹ Unless otherwise provided by local law, the decree terminates all obligations of either party to the other, including the wife's dower right and the husband's right of curtesy.¹⁰

The divorce statutes of twenty-six states¹¹ provide for a diversity of waiting periods.¹² These statutes can be divided into two categories. Firstly, there are the statutes which grant a single final decree of absolute divorce, but with the possible limitation that one,¹³ or both parties¹⁴ may not marry a third person for a specified time. Eleven statutes in the first category provide for a mandatory waiting period.¹⁵ The

⁹Barrett v. Failing, 111 U.S. 523-25 (1884); Biddle v. Biddle, 206 Ark. 623, 177 S.W.2d 32 (1944). The decree *a vinculo matrimonii* is a divorce from the bond of matrimony. A decree *a mensa et thoro* is a divorce from bed and board.

¹⁰Barrett v. Failing, Biddle v. Biddle, supra note 9. The decree dissolves the marriage and bars dower rights. E.g., O'Malley v. O'Malley, 46 Mont. 549, 129 Pac. 501 (1913).

¹¹Supra note 1.

¹²This diversity of statutory enactments among the states is possible because every state has the constitutional power to control the domestic relations of its domiciliaries. But an ex parte decree of divorce rendered in one state may be collaterally impeached in another state by proving that the court which granted the decree did not have jurisdiction. Williams v. North Carolina, 325 U.S. 226, 229 (1945).

¹³Ind. Ann. Stat. § 3-1224 (Repl. Vol. 1946); Mich. Stat. Ann. §§ 25.122 (1957); Miss. Code Ann. §§ 2744, 2745 (Recomp. 1942); S.D. Code §§ 14.0701, 14.0707 (1939). The prohibition against remarriage is only applied to the party guilty of adultery in Mississippi and South Dakota. In Michigan, only the party against whom the divorce is granted is affected. In Indiana, the party who is granted the divorce is prohibited from remarrying a third party for two years, when the divorce judgment has been rendered without other notice than publication in a newspaper. E.g., State ex rel. Seifret v. Branner, 174 Ind. 684, 92 N.E. 70 (1910).

¹⁴Ala. Code tit. 34, § 38 (Recomp. 1958); Ariz. Rev. Stat. § 25-320 (1956); Iowa Code Ann. § 598.17 (1946); Kan. Gen. Stat. Ann. §§ 60-1512, 1514 (1919); Minn. State Ann. § 518.27 (1945); § 517.03 (Supp. 1963); Mont. Rev. Codes Ann. § 21-102 (1947); § 47-151 (Supp. 1963); Okla. Stat. Ann. tit. 12, §§ 1280, 1282 (1961); Ore. Rev. Stat. § 107.110 (1963); W. Va. Code Ann. § 4722 (1961). In Texas, the prohibition period is only imposed when a divorce has been granted for cruel treatment. Tex. Rev. Civ. Stat. art. 4640 (1948).

¹⁵Ala. Code tit. 34, § 38 (Recomp. 1958); Ariz. Rev. Stat. Ann. § 25-320 (1956); Ind. Ann. Stat. § 3-1224 (Repl. Vol. 1946); Kan. Gen. Stat. Ann. §§ 60-1512, 1514 (1949); Minn. Stat. Ann. § 518.27 (1945) § 517.03 (Supp. 1963); Okla. Stat. Ann. tit. 12, §§ 1280, 1282 (1961); Ore. Rev. Stat. § 107.110 (1963); S.D. §§ 14.0701, 14.0707 (1939); Tex. Rev. Civ. Stat. art. 4640 (1949); W. Va. Code Ann. § 4722 (1961).

The waiting period varies from sixty days in Alabama and West Virginia to two years in Indiana. The Oklahoma statute was derived from the Kansas statute. The language in both these statutes indicates that the divorce decree is not final or absolute until the expiration of the statutory waiting period. In application, however, both decrees operate as a final divorce decree that grants all the rights and privileges of an absolute divorce, except the right to marry a third party during the statutory waiting period. Durland v. Durland, 67 Kan. 734, 74 Pac. 274 (1903); Woods County v. Tucker, 312 P.2d 452 (Okla. 1957).

statutes of Iowa, Michigan and Mississippi provide for waiting periods that are subject to the discretion of the trial court.¹⁶

Secondly, there are the statutes which grant a decree of divorce, but with the provision that the decree is ineffective to dissolve the bonds of matrimony until the expiration of a specific waiting period.¹⁷ The statutes in the second category can be sub-divided into two groups: One group requires the entry of a final decree at the expiration of the waiting period in order to terminate the marriage;¹⁸ and the other group provides that the marital bonds are automatically severed, without the necessity of another decree, upon the expiration of the statutory waiting period.¹⁹

Under the first category of statutes, the divorce decree grants all the rights and privileges of an absolute divorce with the exception that the parties to the divorce suit may not marry a third person until the expiration of the statutory waiting period.²⁰ If either party dies during the waiting period, the survivor is not entitled to share in the estate of the deceased.²¹ Inheritance rights of the surviving party are

¹⁶Iowa Code Ann. § 598.17 (1946); Mich. Stat. Ann. § 25.122 (1957); Miss. Code Ann. §§ 2744, 2745 (recomp. 1956).

The prohibition can be imposed for one year in Iowa and two years in Michigan. In Mississippi no maximum time limit is set for the prohibition period which can be imposed upon the party guilty of adultery. For good cause shown, however, the court which granted the divorce decree may remove the prohibition after one year.

¹⁷Cal. Civ. Code Ann. §§ 131, 132 (Deering 1960); Colo. Rev. Stat. Ann. §§ 46-1-9, 10, (1953); Del. Code Ann. tit. 13, § 1534 (1953); D.C. Code Ann. § 16-421 (1961); Hawaii Rev. Laws § 324-31 (Supp. 1963); Mass. Ann. Laws, ch. 208, §§ 21, 24 (Recomp. 1955); Neb. Rev. Stat. § 42-340 (1960); N.J. Rev. Stat. § 2A:34-18, 19 (1952); R.I. Gen. Laws Ann. § 15-5-23 (1956); Utah Code Ann. §§ 30-3-6, 7, 8 (Supp. 1963); Vt. Stat. Ann. tit. 15, §§ 553, 559 (1958); Wis. Stat. § 247-37 (1963).

¹⁸Cal. Civ. Code Ann. §§ 131, 132 (Deering 1960); Del. Code Ann. tit. 13, § 1534 (1953); N.J. Rev. Stat. § 2A:34-18, 19 (1952); R.I. Gen. Laws Ann. § 15-5-23 (1956); Vt. Stat. Ann. tit. 15, § 553, 559 (1958); Wis. Stat. § 247-37 (1963); Riddell v. Guggenheim, 281 F.2d 836 (9th Cir. 1960).

¹⁹Colo. Rev. Stat. Ann. §§ 46-1-9, 10 (1953); D.C. Code Ann. § 16-421 (1961); Hawaii Rev. Laws § 324-31 (Supp. 1963); Mass. Ann. Laws, ch. 208, §§ 21, 24 (Recomp. 1955); Neb. Rev. Stat. § 42-340 (1960); Utah Code Ann. §§ 30-3-6, 7, 8 (Supp. 1963). Hoffer v. Hoffer, 120 Colo. 152, 207 P.2d 1203 (1949).

²⁰Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105, 1107 (1921); Durland v. Durland, 67 Kan. 734, 74 Pac. 274 (1903); Deich v. Deich, 136 Mont. 566, 323 P.2d 35 (1958); Woods County v. Tucker, 312 P.2d 452 (Okla. 1957); Plummer v. Davis, 169 Okla. 374, 36 P.2d 938 (1934). The West Virginia statute is typical: "When a divorce is decreed neither party to the marriage so *dissolved* shall in any case again marry within sixty days from the date of the decree..." (Emphasis added.) W. Va. Code Ann. § 4722 (1961).

²¹Dillard v. Dillard, 275 F.2d 878 (D.C. Cir. 1960); Schurink v. United States, 177 F.2d 809 (5th Cir. 1949); Fletcher v. Monroe, 145 Ind. 56, 43 N.E. 1053 (1896); Durland v. Durland, 67 Kan. 734, 74 Pac. 274 (1903); Woods County v. Tucker, 312

limited to any settlement granted in the decree itself, with a possibility of property bequeathed by will.²²

Under the second category of statutes, the divorce decree is provisional, and the rights and privileges of an absolute divorce are not effective until the expiration of the statutory waiting period. Six of these statutes utilize the true interlocutory system.²³ The initial interlocutory divorce decree is merely a judicial declaration that a party is entitled to a divorce at a later date. The divorce is thus conditional until the expiration of the statutory waiting period, and the bonds of matrimony are not severed until the final decree is entered.²⁴

The remaining statutes in the second category provide for a single decree of divorce which is provisional, but becomes final and effective at the expiration of the statutory waiting period without requiring any action by the court.²⁵ The bonds of matrimony are not severed until the decree becomes effective.²⁶

Under all the second category statutes, the death of either spouse during the statutory waiting period abates any divorce action that is concerned solely with the personal status of the parties.²⁷ As a result,

P.2d 452 (Okla. 1957). A foreign marriage, however, raises a conflict of laws problem. Several jurisdictions hold that the prohibitional period has no extraterritorial effect. *Sanders v. Sanders*, 147 Cal. App. 2d 450, 305 P.2d 655 (Dist. Ct. 1957); *Bauer v. Abrahams*, 73 Colo. 509, 216 Pac. 259 (1923); *Pickard v. Pickard*, 241 Iowa 1307, 45 N.W.2d 269 (1950); But see, *Wilson v. Cook*, 256 Ill. 460, 100 N.E. 222 (1912). The Montana statute provides that any Montana resident party to a local or foreign divorce cannot remarry for six months after the decree. Mont. Rev. Codes Ann. § 48-151 (Supp. 1963).

²²Some jurisdictions, however, provide for statutory revocation of the divorced spouse's interest under the testator's will when the testator fails to revoke the will before his death. Ind. Ann. Stat. § 6-508 (Repl. Vol. 1946); Kan. Gen. Stat. Ann. § 59-610 (1949); Minn. Stat. Ann. § 525-191 (1945); Model Probate Code § 53 (Simes 1946).

²³See statutes, *supra* note 18. The initial decree is called *interlocutory* in California; and a decree *nisi* in Delaware, New Jersey and Vermont.

²⁴In *re Seiler's Estate*, 164 Cal. 181, 128 Pac. 334 (1912); *Vinyard v. Vinyard*, 43 Del. 422, 48 A.2d 497 (Super. Ct. 1946); *Dacunzo v. Edgye*, 19 N.J. 443, 117 A.2d 508 (1955); *Hoffland v. Liesenfeld*, 196 Wis. 7, 219 N.W. 273 (1928).

²⁵*Supra* note 19. *Copple v. Bowlin*, 172 Neb. 467, 110 N.W.2d 117 (1961).

²⁶*Saunders v. Hanson*, *supra* note 2. *Oliver v. Oliver*, *supra* note 5. In the matter of *Parker*, 177 Neb. 197, 128 N.W.2d 696 (1964); In *re Harper's Estate*, 1 Utah 2d 296, 265 P.2d 1005 (1954). Hawaii apparently does not have any reported cases on this subject.

²⁷*Saunders v. Hanson*, *supra* note 2. In *re Seiler's Estate*, *supra* note 24. In the matter of *Parker* and In *re Harper's Estate*, *supra* note 26. Death, however, does not expunge the divorce action from the records. *Morris v. Propst*, 98 Colo. 213, 55 P.2d 944 (1936). Nor does death abate the divorce action when a final decree has been signed, but not entered by the clerk. *Matthews v. Matthews*, 185 Misc. 1013, 58 N.Y.S.2d 517 (Sup. Ct. 1945).

the surviving wife is considered the widow of the deceased husband, and the surviving husband is considered the widower of the deceased wife.²⁸ The reasoning assigned to this rule is that the death of either spouse terminates the divorce action because of its personal nature, and because the marriage is automatically dissolved by death.²⁹ The Wisconsin divorce statute is an exception to this rule. The statute provides that the bonds of matrimony exist for the one year waiting period. If, however, either party dies within the one year period, the marriage relation is completely severed "immediately before such death."³⁰

When the divorce decree under the second category of statutes is concerned with the personal status and the property rights of the parties, there is some conflict among the states as to whether the death of either party before the expiration of the statutory waiting period completely abates the action. In some jurisdictions, the provisional decree may become a final decree as to the property rights involved, notwithstanding the death of either party to the action.³¹ In other jurisdictions, the death of either party abates the action and nullifies the provisional decree in its entirety.³²

In the principal case, the court was concerned with a provisional divorce decree that did not grant alimony or property rights. The court's decision, that the death of the husband during the six months waiting period abated the divorce action, is in accord with the cases which have construed a statute similar to that of the District of Columbia. Judge Burger's interpretation of the statute in his concurring opinion, indicates that Congress intended to pass a first category type statute which only imposes a limitation on hasty remarriage.³³

²⁸E.g., *Diggs v. Diggs*, 291 Mass. 399, 196 N.E. 858 (1935); and *In re Waller's Estate*, 116 Neb. 352, 217 N.W. 588 (1928).

²⁹*McPherson v. McPherson*, 200 Wash. 365, 93 P.2d 428 (1939).

³⁰Wis. Stat. 247.37 (1963). (Emphasis added.) E.g., *Hirchert v. Hirchert*, 243 Wis. 519, 11 N.W.2d 157 (1943).

³¹*Darter v. Magnussen*, 172 Cal. App. 2d 714, 342 P.2d 528 (Dist. Ct. 1959); *Holmberg v. Holmberg*, 106 Neb. 717, 184 N.W. 134 (1921); *In re Harper's Estate*, supra note 26.

³²*Chase v. Webster*, 168 Mass 228, 46 N.E. 705 (1897). In the *Matter of Parker*, supra note 26. Under this rule, the living party is entitled to the property rights springing by operation of the law from the marital relation, when death dissolves the marriage before the expiration of the statutory waiting period. The surviving party, however, may be precluded from these rights, when he is bound by contract, waiver or estoppel, that fixes those rights within the provisional decree of divorce. E.g., *Gould v. Superior Court*, 47 Cal. App. 197, 191 Pac. 56 (Dist. Ct. 1920).

³³Supra note 7. "[T]he purpose of the statute is fully effectuated when it prevents remarriage within six months after the decree; it should have no other consequence." 327 F.2d at 891. Judge Burger went on to say: "As I see it, the cor-