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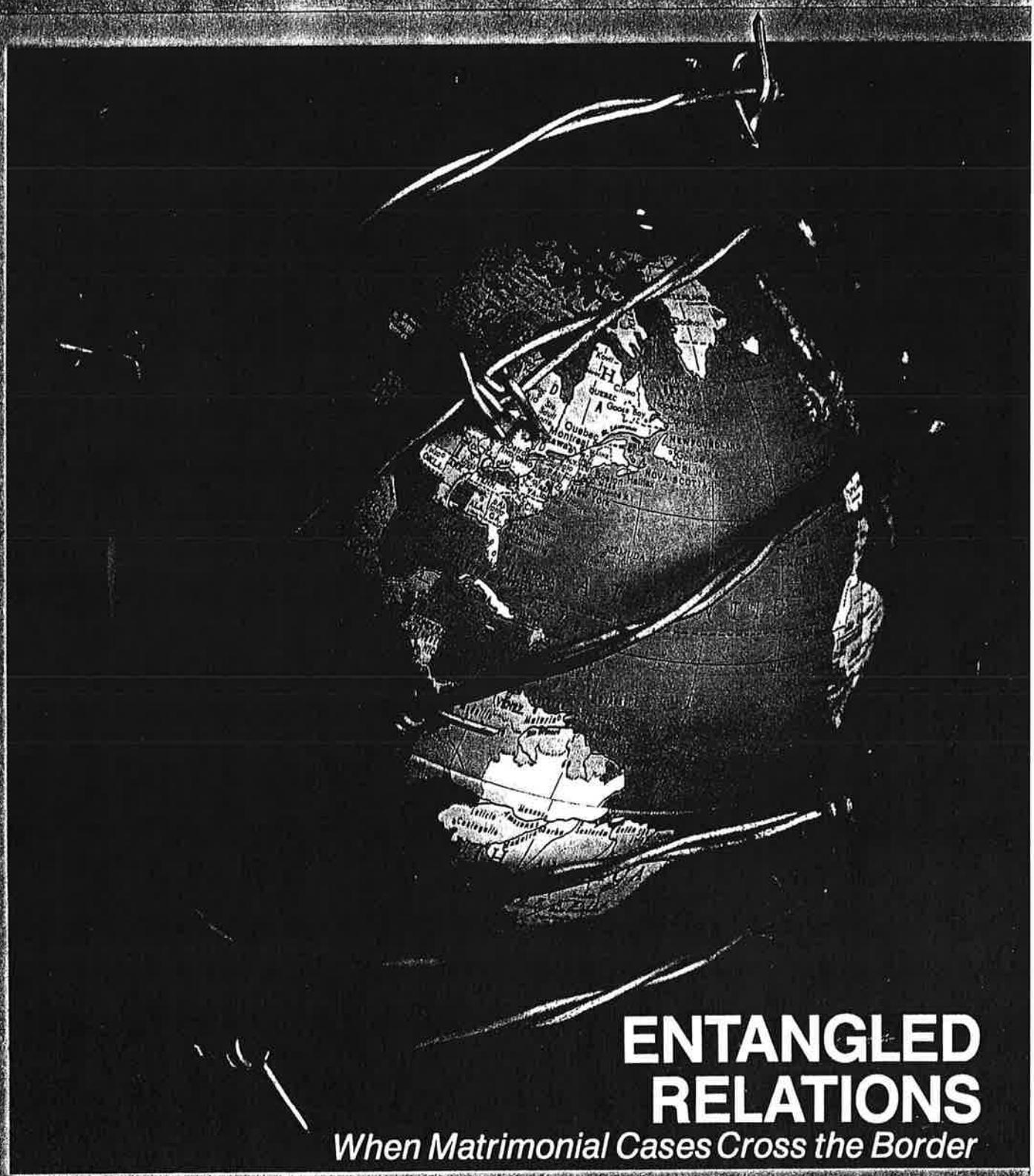

ENTANGLED RELATIONS

When Matrimonial Cases Cross the Border

Recognition and Enforcement
The Tangled International Divorce Web

At Home

BY STEPHEN C. GLASSMAN

Today, the surge in our mobility and integration of our world community have created complex international implications for the family law practitioner. All of us who engage in this rapidly changing field must know the fundamentals to see how international themes may be played in private practice.

In determining whether to recognize a foreign decree under the doctrine of comity, a court may measure public policy considerations and potential prejudice to the jurisdiction where recognition is sought. Public policy has been defined as that which "refers to the morality, conscience, and public good of a state as exemplified in its state constitution, legislative statutes and judicial opinions." Peter Nash Swisher, 21 J. Family L. 9, 14, fn. 18 (1982-83), "Foreign Migratory Divorces: A Reappraisal" (hereafter Swisher).

However, there have been instances where public policy or prejudice to state, citizenry, or the parties had no relationship to the application of the doctrine of comity. "Domestic Relations-Jurisdiction-Extension of Comity to Foreign-Nation Divorce." 46 Tenn. L. Rev. 238, 241 (1978).

Comity has been extended to quasi-judicial acts. For example, the get (the Jewish divorce) has been recognized by American courts. The get is performed by a rabbinical court, which is given authority by law over marriage and divorce in Israel. Swisher, supra at 17 and fn. 34.

THE ROLE OF DOMICILE

The import of domicile was grafted into our law at an early point in our history. In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the court stated that the domiciliary state "has [an] absolute right to prescribe the condi-

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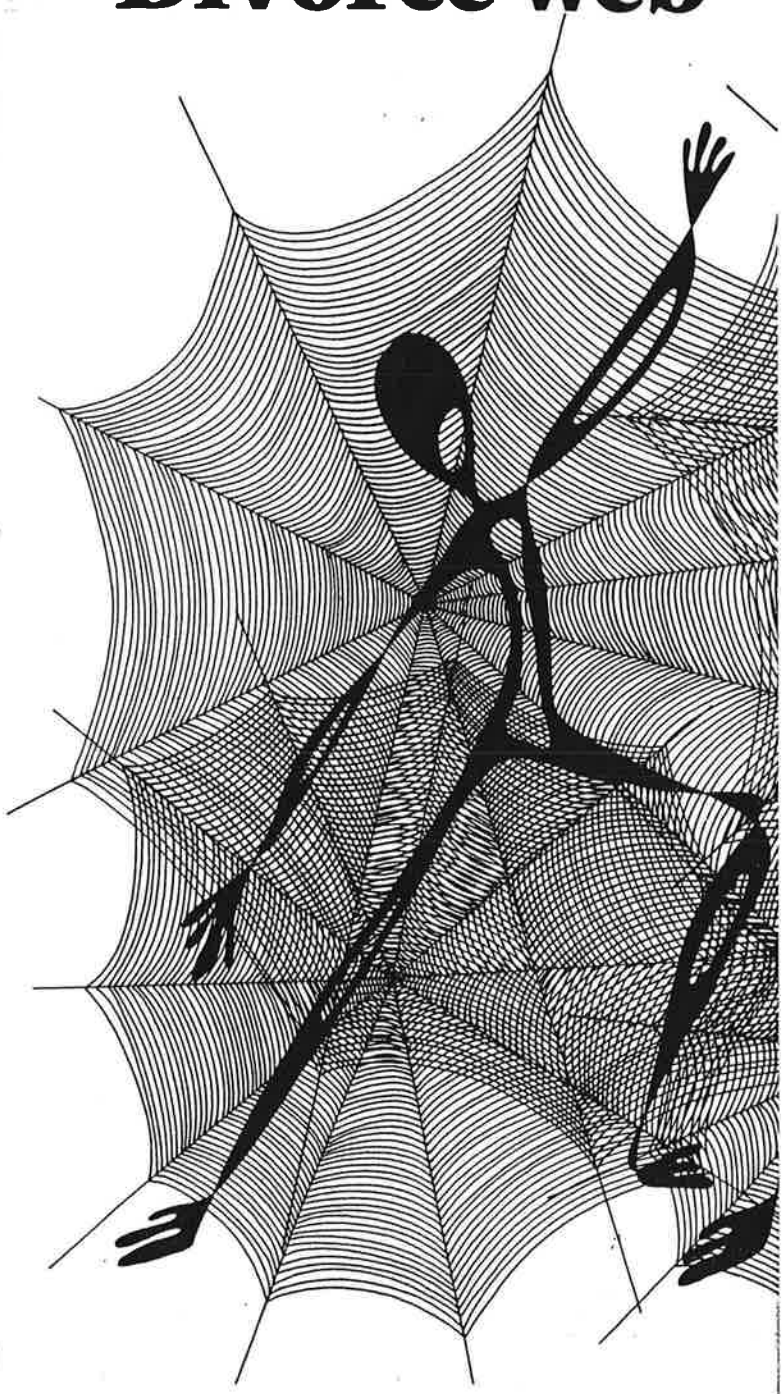

Getting foreign divorces recognized in American courts differs

(Continued from page 4)
tions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."

Professor Swisher succinctly stated the role of domicile when recognizing foreign divorces in a majority of states as follows:

> [T]he overwhelming majority of American states will refuse to recognize a foreign divorce, regardless of its purported validity in the nation awarding it, unless at least one of the spouses was a good-faith domiciliary in the foreign nation at the time the divorce was rendered.

Swisher *supra* at 25

The American requirement of domicile as a precondition to recognition of a foreign divorce has created serious and sometimes dramatically divergent results for Americans obtaining foreign divorces.

Americans in their ingenuity and other nations in their zeal have sought means to allow American citizens to obtain what colloquially has been referred to as the "quickie" divorce.

There are essentially three distinct vehicles that have been used by Americans in getting such a divorce.

The mail-order divorce is rendered even though neither party is domiciled or resident in the jurisdiction issuing the divorce decree. American courts have uniformly refused to recognize foreign divorces where neither party has so much as entered into the foreign jurisdiction to obtain a divorce. See Annot. 13 A.L.R.3d 1419 (1967).

The ex-parte divorce is based on the physical presence of one of the parties seeking a divorce with notice or constructive notice given to the absent defendant. In *Wells v. Wells*, 230 Ala. 430, 161 So. 794, 795 (1935), the Supreme Court of Alabama held that a Mexican divorce obtained by Mr. Wells was not and could not be valid. In this case, Mr. Wells only temporarily visited Mexico and never intended to remain there. Mrs. Wells made no appearance, though Mr. Wells sought to serve her by constructive service.

In Re Gibson's Estate, 7 Wisc. 506, 96 N.W.2d 859 (1959), was an action filed in Mexico, where the wife received personal service of the pleadings in the United States. The Wisconsin court held that this ex-parte divorce could not be recognized since neither party was domiciled in Mexico, and the wife had not submitted to the jurisdiction of the Mexican court.

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The third type of "quickie," the bilateral divorce, elicits mixed reactions from American courts. Here, a jurisdictional basis exists in the particular foreign country which satisfies that country's laws, though that requirement is not necessarily residency or domicile. Both of the parties are present in the foreign state, or one party is present and the other appears through counsel or otherwise consents to jurisdiction.

Except for a few jurisdictions that have receded from the doctrine of domicile, bilateral foreign divorces have not been recognized through comity. The first of those states to erase the requirement of domicile in the recognition of foreign divorces was New York. Though New York had recognized bilateral foreign divorces in its lower courts, it was not until *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 709,262 N.Y.S.2d 86 (1965), *cert. denied*, 384 U.S. 971 (1966), that any state had adopted a policy recognizing a foreign bilateral divorce granted to its own resident domiciliaries.

The doctrine of the *Rosenstiel* case first was followed in the Virgin Islands in *Perrin v. Perrin*, 408 F.2d 107 (3d Cir. 1969), and then in Connecticut, in *Yoder v. Yoder*, 31 Conn. Supp. 344, 330 A.2d 825 (1974). Later, in *Hyde v. Hyde*, 562 S.W.2d 194 (Tenn. 1978), Tennessee recognized a divorce granted to two of its domiciliaries by the Dominican Republic.

Though the doctrine of the *Rosenstiel* case has had limited acceptance among New York's sister states, even some of New York's more conservative siblings have been touched by it. In *Zwerling v. Zwerling*, 244 S.E.2d 311 (1978), the Supreme Court of South Carolina swallowed hard in reversing the lower court which granted summary judgment to Mr. Zwerling on the ground that his marriage to Mrs. Zwerling was invalid. In Mrs. Zwerling's prior marriage, she and her husband were New York domiciliaries and ended their marriage with a bilateral Mexican divorce. Mrs. Zwerling then married Mr. Zwerling in New York, where both parties were domiciliaries.

Although bilateral foreign divorces are not recognized in South Carolina, the South Carolina court recognized the Zwerling marriage as valid because New York had recognized it.

The South Carolina court did not adhere to the *Rosenstiel* doctrine, but felt it was obliged to accept the foreign divorce in this case pursuant to the Full Faith and Credit Clause of the U.S. Constitution. Reliance on the clause may be somewhat dubious in this instance, because the court in reality was recognizing New York's recognition of bilateral Mexican divorces. This may stretch the clause beyond its limits.

In *Zwerling*, the court determined the New York

by state, depending on how it was done overseas

marriage was valid where celebrated; therefore, South Carolina was bound. Certainly, North Carolina did not conclude that about the Nevada marriage in *Williams II*, 325 U.S. at 229.

The Commonwealth of Pennsylvania was confronted with an annulment action by the husband against his wife. She was a party to a bilateral Mexican divorce while she and her former husband were domiciliaries of New York. The court again held in favor of the wife, and the annulment action was dismissed. The primary ground for the decision sounds in the language of the Full Faith and Credit Clause, although the court also relied on the doctrine of estoppel.

It is interesting to note that courts often ignore the Full Faith and Credit Clause. Some go further and mistake the difference between it and comity. *Clagett v. King*, 308 A.2d 245 (D.C. 1973).

THE DOCTRINE OF ESTOPPEL

Application of the doctrine of estoppel has proved to be a judicial alternative to direct recognition of a bilateral foreign divorce between American resident domiciliaries. The doctrine as it pertains to foreign divorce decrees is defined in the Restatement, *Conflict of Laws* §112 and is quoted with appropriate ancillary citations in *Rosen v. Sitner*, 418 A.2d 490, 492 (Pa. 1980):

> The validity of a divorce decree cannot be questioned in a proceeding concerning any right or other interest arising out of the marital relation, either by a spouse who has obtained such decree of divorce from a court which had no jurisdiction, or by a spouse who takes advantage of such decree by remarrying.

See also: 24 Am. Jur.2d Divorce and Separation §§ 971, 972; 27B C.J.S. Divorce §§ 364-366.

There are essentially two views to the application of the doctrine of estoppel in the United States. A case analysis demonstrates the divergency in the American courts.

In *Scherer v. Scherer*, Ind. Ct. App. 4th Dist., 5/20/80, 6 F.L.R. 2664, the Indiana Court of Appeals held that the husband, not domiciled in the Dominican Republic, is estopped from attacking the validity of a bilateral Dominican Republic decree of divorce incorporating a property settlement agreement executed by both parties. Here the wife had married her American attorney after the Dominican divorce, at which she was represented by an attorney in the Dominican Republic and where her first husband appeared through a special power of attorney.

In *Poor v. Poor*, Mass. Sup. Jud. Ct., 8/28/80, 6 F.L.R. 2892, the Massachusetts Supreme Judicial Court estopped a husband from seeking annulment from his wife on the ground that her prior marriage was not legally terminated by a bilateral Haitian divorce granted to her and her former husband; neither of whom was a domiciliary of Haiti. This outcome was particularly appropriate because the husband had known of the divorce before his marriage, had examined the Haitian divorce papers, and had believed they constituted a valid divorce. The court emphasized that application of the estoppel doctrine in no way constituted recognition of the Haitian divorce as otherwise valid.

Similarly and ironically, the North Carolina Court of Appeals in a well-written opinion in *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E. 2d 659, Pet. Desc. rev. denied, 311 N.C. 760, 321 S.E.2d 140 (1985), estopped Mrs. Mayer's second husband from defending an action for alimony on the grounds that her ex parte Dominican divorce from her first husband, a lawyer, was invalid. See also, Whiteside "Domestic Rela-

The 'Hill Street Blues' warning and quickie divorces

tions—The Validity of Foreign Divorce Decrees in North Carolina: *Mayer v. Mayer*," 20 Wake Forest L. Rev. 765 (1984).

Although the court ascribed to Mrs. Mayer's motivation for leaving her first husband and releasing him from any alimony obligation, "a greater love or for what she erroneously interpreted was a better deal;" her second husband, Mr. Mayer, was not so fortunate.

Another tack courts use rather than recognition under *Rosenstiel* or estoppel is the issue of jurisdiction. In *Garfunkel v. Garfunkel*, 612 S.W.2d 862 (1981), the Missouri Court of Appeals held that it was without *in personam* jurisdiction over one party to a Haitian divorce where he was a nonresident of Missouri and was served out-of-state. Therefore, the wife was unable to contest the validity of the previously obtained Haitian divorce between her and her husband; both of whom were nondomiciliaries of Haiti.

The alternate and more conservative position regarding foreign bilateral divorces is manifested in *Everett v. Everett*, 345 So.2d 586 (La. App. 4th Cir. 1971). See also "Foreign Divorces: A Question of Jurisdiction," 5 Southern University Law Review 139 (1978). Here, the court held a Dominican Republic divorce to be invalid, and permitted the wife to pursue a divorce in Louisiana on the ground of adultery. Both parties had submitted to the jurisdiction of the Dominican Republic court. The husband made an actual appearance, and the wife was represented by counsel. There was a settlement between the parties prior to the Dominican divorce. Therefore, the only criteria for determining the validity of a foreign divorce in Louisiana was domicile as a basis of jurisdiction. Estoppel appears to have been rejected.

In dealing with the American "quickie" divorce, the practitioner must take the advice of the able precinct sergeant on "Hill Street Blues," who, as an afterthought before sending his men into the streets, implores them to "Be careful out there!" Perhaps, changes in state laws making divorce more routine will eliminate the "quickie" problem.

THE HAGUE CONVENTION

Any discussion of recognition of foreign divorces would be incomplete without mention of the Convention on the Recognition of Divorce and Legal Separations, 978 United Nations Treaty Series 399 (1975). Because the United States is not a signatory to the convention, it is not the binding law of this country. However, the practitioner must appreciate its contents, since the convention will have increasing influence in American courts, even without formal U.S. recognition. More important, the convention is or will be the governing instrument for divorce recognition in countries that formally ratify it. For a discussion of jurisdictional basis and recognition under the convention, see Dyer, page 5.

The application of the convention is best illustrated by the frequently cited case of *Torok v. Torok*, [1973] 1 W.L.R. 1066, in which the English High Court was presented with two Hungarian nationals who immigrated to the United Kingdom in 1956. They were married in Scotland in 1957, and thereafter became British subjects. The wife remained in England while the husband moved to Canada in 1967.

In 1972, the husband instituted divorce proceedings in Hungary, which along with a number of other countries continues to recognize nationality as a basis of citizenship. In 1973, upon notice to the wife, a Hungarian court granted a partial divorce decree.

The English court pointed out that under the convention, if the Hungarian court had granted a final decree, the English court would not be able to make an order regarding support for the wife, or enter an order involving the former marital home in England. This would be true even though Hungarian courts usually do not award spousal support and there was no procedure in Canadian courts for enforcement of any order the Hungarian court might enter.

However, the fact that the English court entered a final decree before a final decree was entered in Hungary, avoided the implications of the convention to Mrs. Torok. See also *Newmarch v. Newmarch* [1977] 3 W.L.R. 832, and *Lawrence v. Lawrence* [1985] 2 W.L.R. 86.

Since the convention is not binding in the United States, results such as those reached in *Wolstencraft v. Wolstencraft*, N.Y. Sup. Ct. Westchester County, 8/21/81 [7 F.L.R. 2709], avoid the potential negative impact of the convention as described in *Torok*. Here, the New York Supreme Court permitted the wife to bring her own divorce action in New York despite the fact that the husband had obtained a divorce in England. The court would not grant an injunction against the husband from proceeding with a support hearing in England, nor would it nullify the foreign decree.

The advent of no-fault divorce in the United States undoubtedly will limit the use of the "quickie" divorce by United States domiciliaries in foreign courts. However, increased intermarriage between U.S. citizens and foreign nationals and between foreign nationals who may satisfy minimum residency requirements in the United States or elsewhere, requires that family lawyers be prepared to shift from the implications of multistate to multinational divorce practice. ■