

*Meeting*

Date of Meeting: December 18-19, 1959

Date of Memo: December 11, 1959

Memorandum No. 8

Subject: Study No. 51 - Right to Support After Ex Parte Divorce.

The Commission directed the staff to make a recommendation as to the disposition of this study. Our consultant recommends that we drop the study; he believes that the Supreme Court decision in the Hudson case (52 A.C. 761) has taken care of the problem and that no legislation is necessary.

It is suggested that the dissenting opinion of Mr. Justice Traynor in the Dimon case be studied because it will aid you in understanding the Hudson case. See Dimon v. Dimon, 40 Cal.2d 516, 526, 254 P.2d 528 (1953).

The attached material includes an analysis of the Hudson case and the recommendation of the staff as to the disposition the Commission should make of this study.

Respectfully submitted,

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Executive Secretary

## ANALYSIS OF HUDSON CASE

Facts: Wife was domiciled in California and filed action in California for divorce and permanent alimony; husband was personally served in Idaho. Then husband filed divorce action in Idaho; wife was personally served in California but did not appear in the Idaho divorce action. Idaho granted a final decree of divorce to husband. Wife is now seeking permanent alimony in her action in California which she originally brought for divorce and alimony. Trial court in California action made an order granting the wife temporary alimony, attorney's fees, court costs and other relief (a restraining order to preserve the property until action for permanent alimony was determined). Husband appealed from order. Held: Decision of trial court affirmed.

Separate Maintenance. Hudson case indicates that, where the wife is domiciled in California at the time of the divorce, a prior separate maintenance decree will survive an ex parte divorce. When a wife has secured a judgment of separate maintenance in the state of her domicile, her right to support thereunder will survive a subsequent valid, ex parte, foreign decree of divorce secured by her husband if the law of her domicile so provides. Lewis v. Lewis, 49 Cal.2d 389, 317 P.2d 987 (1957). Thus, if a New Jersey wife seeks to enforce a New Jersey separate maintenance decree entered before the husband's ex parte Nevada divorce, the California court will determine whether under the New Jersey law the separate maintenance decree survived the ex parte divorce. Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19 (1955).

Where the separate maintenance decree is granted to a wife domiciled in California, the California court will apply the substantive law of California to determine whether the separate maintenance decree will survive a subsequent ex parte divorce. In the Hudson case the court states by way of dictum that the California law to be applied in this situation is that a foreign ex parte divorce does not terminate the right to support formally established and defined by a valid preexisting separate maintenance decree and that right continues until modified or terminated in appropriate proceedings. But there is a distinction between enforcement of a preexisting decree of separate maintenance and the securing of a decree of separate maintenance after a foreign ex parte divorce. The preexisting decree survives because a foreign ex parte divorce decree does not terminate the right to support arising out of the marriage. But, a spouse cannot secure a decree of separate maintenance after a foreign ex parte divorce decree; separate maintenance can be granted only to a person who is married.

Permanent alimony. The Hudson case establishes the basic principle that a spouse cannot be deprived by an ex parte divorce of whatever rights of support that spouse had under the law of that spouse's domicile at the time of divorce. When an ex parte divorce is granted, the court granting the divorce does not have jurisdiction to determine the question of support since it does not have personal jurisdiction over both spouses. The effect of the ex parte divorce decree on the right of support of a spouse is determined by reference to the law of the domicile of that spouse at the time of the divorce. Thus, if under the law of the domicile of such spouse the right to support is not terminated by the ex parte divorce, the spouse retains the right. Thus, if a wife domiciled in Connecticut obtains an

ex parte divorce in Connecticut and under the law of Connecticut the ex parte divorce does not terminate her right to support, the wife may enforce that right by an action for permanent alimony in California even though neither she nor her former husband were ever domiciled in California. Of course, the California court must have personal jurisdiction over both the husband and wife. But if, under the law of the domicile of the wife at the time of the ex parte divorce, the right to support does not survive an ex parte divorce, then the wife cannot receive support in an action for permanent alimony in California even though the California court has personal jurisdiction over both parties. See Dimon v. Dimon, 40 Cal.2d 516, 540-541, 254 P.2d 528 (1953) (dissenting opinion); Hudson v. Hudson, 52 A.C. 761, 766 (1959).

The following is quoted from the dissenting opinion in the Dimon case:

A former wife, however, would not be permitted to bring an action in California for support following an ex parte decree, if a similar action would not be entertained by courts of the state where she was domiciled at the time of the decree. If the wife was the plaintiff in the divorce action, and under the law of the state granting the decree the right did not survive divorce, the full faith and credit clause would compel California to give the same effect to the decree and hold that the decree not only dissolved the marriage status but terminated the wife's right to support. On the other hand, if the husband obtains the decree in another state and under the law of the state of the wife's domicile her right to support was lost when the marriage status terminated, she would likewise not be allowed, by migrating to another state, to revive a right that had expired.

The foregoing considerations are not present, however, if the husband leaves the wife, and the state of the wife's domicile holds that her right to support survives dissolution of the marriage. . . . Whether the wife obtains the decree in the state where she remains, or whether the husband obtains a valid decree in another state, we would be required to hold that the marriage status was dissolved . . . , but would not be required to deny the wife a right to bring an action in California for support and thus give the foreign decree greater

effect in California than it would have in the state of the wife's domicile.

The majority in the Dimon case did not apply the choice-of-law rule indicated above. The majority in that case did not determine whether the right to support survived the ex parte divorce under the law of the domicile of the wife at the time of the ex parte divorce decree. Rather, the majority applied the California substantive law to the facts of the case. The Dimon case is specifically overruled by the Hudson case, however, and a different choice-of-law rule is stated in the Hudson case.

Where the wife is domiciled in California at the time the ex parte divorce decree is granted, the California court in the subsequent action for permanent alimony will apply the substantive law of California to determine whether the right of support remains after the ex parte divorce. In the Hudson case, the court held that the California law to be applied in this situation is that the foreign ex parte divorce does not terminate the right to permanent alimony. Thus, a spouse retains a right to support even though the marriage is dissolved by an ex parte divorce decree. In the action for permanent alimony, the plaintiff may also receive temporary alimony, court costs and attorney's fees and the court may make such orders as a restraining order to preserve the property until the rights of the parties therein can be adjudicated.

California court in a permanent alimony action after an ex parte divorce is exercising general equity powers. The court is exercising its general equity powers in awarding permanent alimony after an ex parte divorce. (Hudson case) This probably means that the granting of support is subject to general equitable principles. Thus, the court could invoke

such equitable principles as laches on the part of the plaintiff as a grounds for refusing to grant permanent alimony. See Dimon v. Dimon, 40 Cal.2d 516, 542, 254 P.2d 528 (1953) (dissenting opinion). The California statutory provisions that provide for alimony as an incident to a divorce action are not applicable (Hudson case).

The Hudson case indicates that the plaintiff seeking permanent alimony after an ex parte divorce need not be domiciled in California. Permanent alimony may be granted even though neither the husband nor wife is domiciled in California. In the Hudson case, the wife seeking permanent alimony was domiciled in California. However, the court specifically overruled the Dimon case. In the Dimon case neither the husband nor wife was domiciled in California at the time of the ex parte divorce or at the time of the subsequent California action for permanent alimony. Thus it appears that by overruling -- rather than distinguishing -- the Dimon case (which held that the wife could not bring the action for support in California) the court has indicated that domicile in California is not a requisite to bringing an action for permanent alimony after an ex parte divorce decree. The Hudson case contains the statement: "California has a dominant interest in the well-being of her domiciliaries, and the courts of this state are open to adjudicate their support rights following an ex parte divorce (emphasis supplied)." This language is troublesome. However, because the Dimon case is overruled, it seems fairly clear that permanent alimony may be awarded in California after an ex parte divorce decree even though neither party to the permanent alimony action is or ever was domiciled in California. All that is required is personal jurisdiction over both parties. The language

quoted above probably should be considered as justification for the choice-of-law rule that the law of domicile of the wife at the time of the ex parte divorce decree is the substantive law that determines whether her right to support survives the ex parte divorce. In the Hudson case, since the applicable substantive law was the California law, this statement is a justification for the choice-of-law principle followed in the Lewis case (49 Cal.2d 389, 317 P.2d 987) and repeated in the Hudson case.

The Hudson case indicates that no distinction will be drawn based upon which spouse was the divorce plaintiff. In the Hudson case, the husband obtained the ex parte divorce and the wife was seeking support. However, it appears that the wife, for example, may bring a subsequent action for permanent alimony even though she was the divorce plaintiff. This follows from the fact that the court overruled -- rather than distinguished -- the Dimon case where the wife was the divorce plaintiff and was the party later seeking permanent alimony.

Uniform Reciprocal Enforcement of Support Act. There may be a choice-of-law problem if an action is brought by a spouse (after an ex parte divorce) under the Uniform Reciprocal Enforcement of Support Act. Under Cal. Code of Civil Procedure, § 1670, it is provided:

Duties of support enforceable under this title are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee.

Under the Hudson case it was stated that the wife cannot be deprived by the court granting the ex parte divorce of whatever "rights of support she had under the law of her domicile at the time of divorce." If the

obligor (husband) is present in California and an action is brought under the Uniform Act, would the California court require support if under the law of the domicile of the wife at the time of the ex parte divorce decree the decree had the effect of terminating any duty of support?

Procedure. The Hudson case does not outline the procedure to be followed by a spouse seeking permanent alimony after an ex parte divorce.

One of the real deficiencies of the Hudson decision is that it does not indicate what procedure is to be followed by a spouse seeking permanent alimony after an ex parte divorce. In the Hudson case the wife has commenced an action for divorce and alimony before the ex parte divorce decree was rendered and the wife's action for divorce and alimony was used as the means of granting permanent alimony. Where the ex parte divorce decree has been rendered, it is not clear what type of action is to be used. Also, some of the dicta in the Hudson case probably should be more firmly established -- such as the right of a wife not domiciled in California to bring an action in California for permanent alimony after an ex parte divorce.

Not clear whether spouse that obtained ex parte divorce can obtain permanent alimony after divorce if spouse could have obtained personal jurisdiction over other spouse in the divorce action. One problem not considered in the Hudson case is the situation where the wife obtains an ex parte divorce and later seeks permanent alimony. What is the effect of a showing by the husband that the wife could have obtained personal jurisdiction over him in the divorce action? Does the Hudson case permit the spouse to "split" her cause of action?

## STAFF RECOMMENDATION

The staff recommends that this matter be retained on the agenda of topics but that this topic be given no further consideration by the Commission until after the 1961 legislative session. The Hudson case has established the right to support after an ex parte divorce and that was the reason that this study was originally undertaken. It is true that much of the "law" set out in the Hudson case is dicta. However, the Hudson case should provide the trial courts with a fairly adequate guide. There are a number of problems remaining to be worked out by the court.

In making this recommendation the staff is influenced by the fact that the Commission now has on its agenda many topics that will not be considered by the legislature until 1963 or 1965. These topics represent problems of much greater magnitude than the problems that may remain after the Hudson case. Furthermore, it will be almost two years from the date of the Hudson case before the recommendations of the Commission would become law. During this period the court may resolve any remaining problems under the Hudson case.

Based on the present rate of progress of the Commission, we cannot be sure that the Commission will be able to complete even the 12 topics it has scheduled for presentation to the 1961 legislative session. To take the time of the Commission to work out in statutory form the law stated in the Hudson decision is not justified, in the opinion of the staff, when the other pending projects of the Commission are considered. For example, in the same amount of time the Commission probably could resolve the unlicensed contractor problem.

If, after the 1961 session, it appears that real problems still exist under the Hudson decision, the topic can be considered at that time and those problems resolved.