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11/15/65

Second Supplement to Memorandum 65-72

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

The first supplement to this memorandum is Commissioner McDonough's memorandum relating to the same subject. It is the purpose of this supplement to discuss some of the issues raised by Commissioner McDonough's memorandum

The number of questions presented in Commissioner McDonough's memorandum and the complexity of the fact issues that may be involved in particular cases seems to us to obscure the fact that very few policy decisions are involved. It seems to us that if the Commission thinks through the questions asked to determine the underlying policy question that is being asked, the Commission can arrive intelligent answers to the policy questions and can articulate them in a statute. For example: Of what significance is it whether the husband is suing for support? Presumably, the question is asked because the laws of various states differ on whether wives must support their husbands. Accordingly, the question being asked is whether the law of the support forum, or the law of the domicile of one of the parties as of some particular time should be applied. Each of these potential choices of law should be explored in the light of the policy considerations that might be applicable to each one. Eventually you should be able to answer the question whether it makes any difference whether the husband or wife is suing for support. Many of the possible problems are eliminated by the fact that full faith and credit must be given to prior judgments. Thus, a judgment binding on the wife that terminates her right to support probably terminates her right to support everywhere. Hence, in such a situation, where the support action defendant is domiciled when the support action is filed, where the support action plaintiff is domiciled when the support action is filed,

what the law or policy of the support action plaintiff's domicile is, etc., are all irrelevant.

If the divorcing court had jurisdiction over both parties, the courts have had little difficulty in working out the full faith and credit problems applicable. And, in fact, full faith and credit seems to have taken care of virtually all of the cases that have arisen.

We think it is important to decide the questions legislatively. The number of questions posed by Commissioner McDonough indicates that it will be decades before the courts supply the answers. Each decision establishes the law only in regard to its own limited facts. Before any new question can be resolved, a case must be appealed to the Supreme Court. Some parties must be found who have enough money at stake in the question to warrant taking the case up that far. In the meantime, parties will have little idea as to what their rights and duties are. A husband who has been divorced cannot be advised with certainty as to whether his former wife can ever claim support from him again or not. He will wonder whether he should undertake the obligations of a new wife and family. A wife who has divorced her husband because he was incapable of providing support for them both will wonder whether he will at any time be able to come back and claim support from her.

The subject matter of the study being what it is, we think it is important that the respective parties' rights be relatively ascertainable. It is bad enough that the marriage has broken up. We should attempt to alleviate their further problems to the extent that we can by settling their rights so that they may plan ~~and~~ confidently for the future undisturbed by any fear that their plans may be upset by an unanticipated claim by the former spouse.

At the July meeting, the Commission considered the matrimonial domicile of the parties, the identity of the divorce plaintiff, whether personal jurisdiction over the divorce defendant could have been obtained, the domicile of the wife at the time of the divorce, the domicile of the husband at the time of the divorce, the domicile of the wife at the time support is sought, the domicile of the husband at the time support is sought. Although the staff has disagreed with some of the decisions that were made, nonetheless the Commission considered each of these factors and arrived at a decision on the extent to which it should have a bearing on the post-divorce right of support. If there are any other factors to be considered, we suggest that the same approach be taken and that a policy decision be made that could be reflected in a statute. The fact that these various factors can be arranged into a large number of complicated fact situations should not prevent the Commission from deciding the relatively few policy questions that are presented.

Respectfully submitted,

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