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Divorce--Increasing Support Award under Foreign Decree

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It would appear anomalous to allow service on a defendant while appearing as a witness in an out-of-state court, but having to quash such summons on a similar defendant appearing in an Oklahoma court, in a county not of his residence. To refuse Oklahoma plaintiffs the right to serve defendants who are appearing in out-of-state judicial proceedings is unfair if such defendants are amenable irrespective of the litigation.

Perhaps the Oklahoma statutory immunity rule has continued to extend immunity beyond the reason upon which it was founded. Judicial necessity, in light of modern longarm statutes, no longer demands immunity from service of process for defendants who are appearing in an out-of-state judicial proceeding when such defendants could be served even if not involved in those proceedings.

Robert D. Frank

DIVORCE—INCREASING SUPPORT AWARD UNDER FOREIGN DECREE. *Parker v. Parker*, 497 S.W.2d 572 (Tenn. 1973).

Recently, Tennessee joined a growing number of states which permit the modification of a foreign divorce decree by increasing the amount of child support payments in the state where the non-custody parent is amenable to suit. The plaintiff must demonstrate a legitimate need for such an increase and that relief could not be granted by the sister state originally pronouncing the divorce decree. These factors being present, the Tennessee Supreme Court has joined the highest judicial bodies in Florida,[1] New Jersey,[2] Wisconsin,[3] Mississippi,[4] and North Carolina,[5] in holding that a foreign divorce decree may be modified as to an increase in child support payments, by the plaintiff's initiating a suit in the state where the defendant is amenable to action.

Mrs. Nancy Lee Parker, petitioner, a resident of the state of Georgia, filed her suit, seeking an increase in the child support pay-

1. Lopez v. Avery, 66 So. 2d 689 (Fla. 1953).
2. Goodman v. Goodman, 119 N.J. 134, 194 A. 866 (1937).
3. Setzer v. Setzer, 251 Wis. 234, 29 N.W.2d 62 (1947).
4. Turnage v. Tyler, 183 Miss. 318, 184 So. 52 (1938).
5. Thomas v. Thomas, 248 N.C. 269, 103 S.E.2d 371 (1958).

ments for her two minor children, in the Chancery Court of Rutherford County, Tennessee. The original divorce decree, incorporating an agreement between the petitioner and respondent respecting the custody and support of their two children, was rendered on April 17, 1963, in the Superior Court of DeKalb County, Georgia. The decree provided that the petitioner be awarded custody of the children and that the respondent should pay the plaintiff $150.00 per month for their support.

After the divorce pronouncement, respondent made all the monthly payments decreed by the Georgia Court. But following the 1963 decree, respondent moved to Rutherford County, Tennessee and was thus not amenable to suit by the courts of the state of Georgia.

Petitioner in the action before the Rutherford County chancery court clearly established that it had become much more expensive to provide support for the children than had been the case in 1963, and that the income of her former husband had increased from about $5,000.00 to more than $11,000.00 per year. Upon these facts, the Chancellor increased the Georgia decreed support payments to $225.00 per month and provided that beginning on July 10, 1973, and on each July 10th thereafter, the amounts be increased by $3.75 per month for each child, to reflect the increase in the cost of living. Respondent excepted to this finding and appealed to the court of appeals.

The court of appeals, following the still generally accepted belief that the decrees of a sister state's court must be given full faith and credit under the provisions of article IV, section I of the United States Constitution, held that the chancery court was without jurisdiction to award the decree appealed from, reversed and dismissed the complaint at the cost of the petitioner. The Tennessee Supreme Court granted certiorari.

In an opinion rendered by Justice McCanless, the Tennessee Supreme Court placed particular reliance on the 1953 Florida Supreme Court decision of *Lopez v. Avery*,[6] which presented a similar fact situation. The court in that action held that "decrees for child support and custody are usually regarded, in fact, as being impermanent in character, and hence, by their very nature, are res judicata of the issues only so long as the facts and circumstances of the parties remain the same as when the decree was rendered." In this light the Tennessee Supreme Court held that:

6. Lopez v. Avery, 66 So. 2d 689 (Fla. 1953).

> It further appears that because of the changed income and financial status of the defendant, the plaintiff is entitled to relief and that unless the courts of Tennessee can grant it the plaintiff will be left without remedy . . . . The Chancery Court of Murfeesboro had jurisdiction of the subject matter of the complaint and it acquired jurisdiction of the defendant by personal service of process upon him.[7]

The supreme court struck down the holding of the chancery court as it applied to the increases for the cost of living, and the requirement that support payments be continued until each child respectively should reach the age of twenty-one years.[8]

Oklahoma has not had occasion to rule on a situation exactly similar to that illustrated by the *Parker* decision. Reported Oklahoma decisions tend to concentrate on the inability of the court to vacate or modify past due payments for child support awarded in a foreign decree[9] or the impropriety of a court modifying an award of custody under the decree of a sister state unless there has been a material change in the conditions affecting the welfare of the child in Oklahoma.[10]

The Oklahoma Supreme Court has held that a judgment rendered in another state is entitled to full faith and credit only if it is a final judgment, a final judgment being defined as one not subject to modification in the state where it was rendered.[11] Decisions involving guardianship, custody, support, and education of minor children rendered pursuant to a divorce, legal separation, or annulment are not final decisions and, at least in Oklahoma, are subject to modification should the circumstances warrant such action.[12] Thus, in a situation similar to that in *Parker*, the applicable statutes of a sister state must be examined as to the ability of that state's courts to modify decrees for child support based upon change in circumstances. If the ability to modify exists then it would appear to be correct for an Oklahoma court to acquire jurisdiction in a proper situation.

In child custody cases, Oklahoma has been willing to modify foreign decrees even without the benefit of statute. The Oklahoma

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7. Parker v. Parker, — Tenn. —, 497 S.W.2d 572 (1973). [hereinafter cited as Parker].

8. *Id.* at —, 497 S.W.2d at 575.

9. Catlett v. Catlett, 412 P.2d 942 (Okla. 1966); Clark v. Clark, 380 P.2d 241 (Okla. 1963); Clester v. Heidt, 353 P.2d 699 (Okla. 1960).

10. Black v. Miller, 201 Okla. 499, 207 P.2d 290 (1949); Chapman v. Walker, 144 Okla. 83, 289 P. 740 (1920).

11. Greenhouse v. Hargrove, 509 P.2d 1360 (Okla. 1973).

12. OKLA. STAT. tit. 12, §1279 (1971), *construed in* State v. Lohah, 434 P.2d 928 (Okla. 1967).