



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 761489

ELSWICK NEWPORT,

.....Appellant

v.

FLORA NEWPORT,

.....Appellee

JOINT APPENDIX

Robert E. Swan, Esq.
10604 Warwick Ave.
Fairfax, Virginia 22030

Counsel For Appellant

Joseph L. Duvall, Esq.
George P. Blackburn, Jr., Esq.
Bank of Vienna Building
374 Maple Ave, East
Vienna, Virginia 22180

Counsel for Appellee

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BILL OF COMPLAINT FOR SEPARATE MAINTENANCE AND SUPPORT

TO: THE HONORABLE JUDGES OF SAID COURT:

COMES NOW your Complainant, FLORA NEWPORT, by Counsel, and respectfully represents to the Honorable Judges of this said Court as follows:

1. That the Complainant is a bona fide resident and domiciliary of the State of Virginia and County of Fairfax and has been so for more than one year preceding the filing of this suit.

2. That the parties hereto were lawfully married on the 16th day of September, 1947, in Reno, Nevada.

3. That there were two children born of the marriage; namely, Christopher Newport, born April 20, 1948, and Curtis Newport, born January 5, 1951.

4. That the parties hereto are both members of the Caucasian Race; that both parties are over the age of twenty-one (21) years; that the Complainant is not a member of the Armed Forces of the United States, but that the Defendant is a member of the Armed Forces of the United States, currently on active duty and stationed at: U. S. Army Aviation Systems Command, St. Louis, Missouri.

S

5. That prior to April 8, 1972, your Complainant and Defendant resided together as man and wife at 9917 Vale Road, Vienna, in the County of Fairfax, Virginia.

6. That there are property rights to be determined by this Court.

7. That on April 8, 1972, the Defendant was assigned to Viet Nam and was stationed there until November 14, 1972, at which time said Defendant, Elswick Newport, returned to this Country but did not resume cohabitation with the Complainant, but did voluntarily and willfully desert and abandon the Complainant, Flora Newport, without just cause or excuse; that there has been no resumption of marital cohabitation between the parties since the date of Separation.

8. That your Complainant was then and there left in necessitous circumstances. Further, that the Defendant has failed to provide sufficient support for your Complainant.

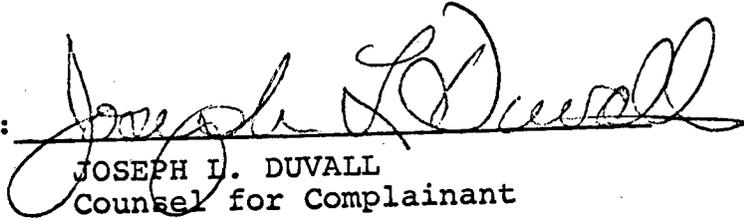
WHEREFORE, your Complainant, Flora Newport, prays this Honorable Court:

- (1) To enter an Order for the separate maintenance of the Complainant.
- (2) That the Defendant be ordered to pay the Complainant a reasonable sum, in excess of One Thousand, Two Hundred Fifty and 00/100 Dollars (\$1,250.00) per month for her support and maintenance during the pendency of this suit.
- (3) That on the final disposition of this suit that the Defendant be ordered to pay a sum of money in excess of One Thousand, Two Hundred and Fifty and 00/100 Dollars (\$1,250.00) for the Complainant's support and maintenance.
- (4) That the Complainant be awarded reasonable attorney fees and the costs of this cause.

Flora Newport
FLORA NEWPORT

DUVALL, TATE, BYWATER & DAVIS, LTD.
10560 Main Street, Penthouse Suite
Fairfax, Virginia 22030

By:



JOSEPH I. DUVALL
Counsel for Complainant

ANSWER TO BILL OF COMPLAINT FOR SEPARATE MAINTENANCE AND SUPPORT ✓

COMES NOW your Defendant, Elswick Newport, by Counsel, and respectfully files his Answer to the Bill of Complaint in this cause as follows:

1. The Defendant admits the statements in items 1, 2, 3, 4, and 6, noting that item 6 is set forth in Defendant's Cross-Bill.

2. The Defendant neither admits nor denies the allegation set forth in item 5; however, the Defendant states that for a period of several months the Complainant did not reside at the address given therein and refused to accept service from the sheriff of Fairfax County; wherefore it was made necessary that the Defendant serve the Complainant at 591 Capell Street, Oakland, Calif., the home of Complainant's mother, Mrs. Lucy Arakelian, upon ascertaining that the Complainant was living at that address at that time.

3. The Defendant neither admits nor denies the allegations set forth in item 7, but would show this Honorable Court that he has never been nor intends to be a resident of the State of Virginia; and further that on April 2, 1973, he was awarded an absolute divorce from the Complainant in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, Chancery Number 283491.

4. The Defendant denies the allegation set forth in item 8 of the Bill of Complaint.

WHEREFORE, your Defendant prays that the Bill of Complaint be dismissed with costs.


Elswick Newport by Counsel

FILED
APR 2 2 13 PM '73
H.K. BROWN, CLERK
BY ~~A. CAREY~~
DEPUTY

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND
JUDGMENT AND DECREE OF DIVORCE

The above-entitled cause coming on regularly for hearing on the 2nd day of April, 1973, upon the plaintiff's Complaint, the plaintiff appearing in person and by his attorneys, HALLEY AND HALLEY, and the defendant not appearing either in person or by attorney, and it further appearing that said action was filed and summons issued thereon on the 12th day of January, 1973, and it further appearing that the affidavit on said day filed stated that the defendant is not a resident of the State of Nevada, but defendant's last known address is 591 Capell Street, Oakland, California, and it further appearing to the Court that an order for publication of summons was made and entered herein on the 12th day of January, 1973, and that in conformity with said order, summons herein was duly and regularly served upon the defendant by publication thereof in the Nevada State Journal, a newspaper of general circulation published in the City of Reno, County of Washoe, State of Nevada, on February 4, 11, 18, and 25, 1973, and March 4, 1973, and on February 4, 1973, a copy of said Summons, attached to a copy of the Complaint, was mailed to the

defendant at the above address, by enclosing the same in a sealed envelope with first class postage fully prepaid and depositing it in the United States Postoffice at Reno, Nevada; and the defendant having failed to appear and having failed to answer or otherwise plead herein within the time allowed by law, her default in that behalf, was on the 30th day of March, 1973, duly and regularly entered by the Clerk of the Court, which said default has not been set aside or annulled; and the Court having heard the proof offered and made at the trial on behalf of the plaintiff in support of said complaint, and the testimony of the witnesses sworn and examined upon said trial, and having considered the same together with the papers and records in said cause, and said cause having been regularly submitted to the Court for decision, and the Court being fully advised in the premises and having duly considered the law and the evidence, finding therefrom:

(a) That plaintiff is a resident of the State of Nevada, and for a period of more than six weeks before this suit is brought and action commenced has, with the bona fide intent to make Nevada his residence for an indefinite period of time, resided, been physically present, and domiciled in the State of Nevada, and now so resides and is domiciled therein.

(b) That the plaintiff and defendant were married in Reno, Nevada, on September 13, 1947, and ever since have been, and now are, husband and wife.

(c) That there are no minor children the issue of the marriage of plaintiff and defendant.

(c) That there is no community property in the State of Nevada belonging to plaintiff and defendant. That plaintiff and defendant have certain property located outside of the State of Nevada and not subject to the jurisdiction of this Court.

(d) That since the marriage of the parties, the plaintiff and defendant have become incompatible and are no longer able to live together in harmony.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds that the plaintiff is entitled to the judgment and decree of this Court dissolving the bonds of matrimony heretofore and now existing between plaintiff and defendant and restoring each of them to the status of an unmarried person.

LET JUDGMENT BE ENTERED ACCORDINGLY.

JUDGMENT AND DECREE OF DIVORCE

NOW, THEREFORE, by virtue of the law and the facts, it is hereby ORDERED, ADJUDGED AND DECREED, that plaintiff be, and he is hereby, given and granted a final and absolute divorce from the defendant; that the marriage heretofore and now existing between the parties is dissolved absolutely and forever and each of the parties hereby is restored to the status of an unmarried person.

DONE in open Court, this 2nd day of April, 1973.

Thomas O. Craver

District Judge

STATE OF NEVADA, }
County of Washoe. } ss.

I, H. K. BROWN, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for Washoe County, said court being a court of record, having a common law jurisdiction, and a clerk and a seal, do hereby certify that the foregoing is a full, true and correct copy of the original, FINDINGS OF FACT, CONCLUSION OF LAW, AND JUDGMENT NAD DECREE OF DIVORCE CASE NO. 283491 DEPT.

ELSWICK NEWPORT, PLAINTIFF,
FLORA NEWPORT, VS. DEFENDANT.

which now remains on file and of record in my office at Reno, in said County.

IN TESTIMONY WHEREOF, I have hereunto set my

hand and affixed the seal of said court, at Reno,
this 2nd day of
April, A.D. 1973.

H.K. BROWN, Clerk.
By *R. Maehle* Deputy.

CC-C-13

REPORT OF COMMISSIONER IN CHANCERY

TO: THE HONORABLE JUDGES OF THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

The undersigned Commissioner in Chancery of the Circuit Court of Fairfax County, Virginia, to whom this cause was referred by Decree of Reference dated February 7, 1975, proceeded to execute the provisions of said decree by taking the depositions of Flora Newport, Elswick Newport and Curtis Wayne Newport.

And in consideration of the evidence, together with the proceedings in this cause, the undersigned respectfully reports his findings thereto as follows:

1. On May 24, 1974 the wife filed a Bill of Complaint for Separate Maintenance.

2. This Bill of Complaint was served upon the defendant in person on June 10, 1974 by the Sheriff of St. Louis County, Missouri.

3. On October 3, 1974, the husband filed an Answer to the Bill of Complaint in which he alleged that his wife was not eligible for support since a final decree of divorce was entered in his favor by THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE on April 2, 1973. The husband also filed a Cross-Bill of Complaint requesting partition of the real property owned jointly by the parties at 9917 Vale Road, Vienna, Virginia.

4. On October 25, 1974, the wife filed her Answer to the husband's Cross-Bill in which she denied the validity of the Nevada divorce decree on jurisdictional grounds.

5. At the Commissioner's Hearing the wife also contended that even if the Nevada divorce decree is valid, she is still

entitled to support and maintenance from her former husband.

6. Both the Complainant and the defendant were present at the hearing and were represented by counsel.

7. The statutory domicile, residence and venue requirements for this proceeding were alleged in Paragraph One of the Bill of Complaint filed in this cause. Said allegations were proven by the testimony of the Complainant, Flora Newport, and corroborated by the witness, Curtis Wayne Newport. This evidence established that the Complainant has been domiciled in the State of Virginia, County of Fairfax, for more than six months preceding the institution of this suit.

8. The parties hereto were married on the 16th day of September, 1947, in Reno, Nevada. There were two children born of the marriage, both of whom are legally emancipated.

9. The Complainant and the defendant last cohabited as man and wife at 9917 Vale Road, Vienna, Fairfax County, Virginia.

10. There are essentially two legal issues to be determined in this cause. (a) Is the Nevada divorce decree entered on April 2, 1973 valid and therefore entitled to full faith and credit in Virginia? (b) If the Nevada decree is valid, does Virginia recognize the legal doctrine which permits the wife's right to support and maintenance to survive the entry of a final decree of divorce? (i.e. "divisible divorce")

11. The burden of proof is placed upon the wife who challenges the validity of the Nevada divorce decree to establish that the residence of the husband in Nevada was not bona fide. Your Commissioner finds that the wife has not met her burden of proof on this issue and therefore your Commissioner finds that the Nevada divorce decree awarding the husband a divorce is valid and entitled to full faith and credit in Virginia.

12. The Nevada divorce decree in question is silent on the issue of support for the wife. It does not deny her right to alimony nor does it grant it. Unlike some other jurisdictions, Virginia does not have a statute which specifically permits survival of the right to alimony after the entry of a final decree of divorce. Your Commissioner could find no Virginia case precisely in point on the issue of the wife's right to support after the entry of a final decree. Your Commissioner has read the forty page annotation directly in point at 28 ALR 2d 1378 which recites in detail the varying positions that other jurisdictions in the United States have taken on this question. The wife relies heavily on the cases of Vanderbilt v Vanderbilt, 354 US 416 (1957) and Estin v Estin, 334 US 541 (1948) in alleging that she is entitled to support and maintenance. The Estin case appears to tell us that the wife may have the right to support after entry of a final decree depending upon the law of the jurisdiction involved. In the Vanderbilt case, the wife was successful in obtaining a support award after divorce, but New York State had a statute specifically in point. The ALR annotation referred to above contains a rather complete outline of the various social, moral and legal reasons for either permitting or denying support after divorce. One important distinction appears to be whether or not the support is sought before entry of a final decree, simultaneous with entry of a final decree or after entry of a final decree. There does not appear to be any question that the wife would be entitled to support in the "before" or "simultaneous with" situations.

The closest case in Virginia that I could find is the case of Osborne v Osborne, 207 SE 2d 875, which is a 1974 case

arising in the Circuit Court of Prince William County. The facts in skeleton form are as follows:

(a) Husband and wife lived in Manassas and husband moved to Texas.

(b) Husband sued wife for divorce in Texas.

(c) Wife filed divorce suit in Prince William County while Texas case was pending and a pendente lite support order was entered by the Circuit Court of Prince William County.

(d) Husband was granted a divorce in Texas which was silent as to alimony, but which decreed a division of the community property of the parties.

(e) Wife was then granted a permanent award of alimony and child support in Virginia.

The husband challenged this alimony award in Virginia and the Supreme Court of Virginia reversed this portion of the Court's Decree. In the course of its opinion, the Supreme Court of Virginia briefly discussed the doctrine of "divisible divorce". In their discussion it appears that the Court would distinguish between support decrees entered before the entry of a final decree of divorce as opposed to those that are entered after. It is the opinion of your Commissioner that under the law of Virginia, the entry of a final decree of divorce terminates the wife's right to support unless a support order pre-existed the entry of the final decree.

Your Commissioner therefore recommends that the wife's Bill of Complaint for Separate Maintenance be dismissed.

13. In fairness to the Court and the parties, your Commissioner found many inaccuracies in the transcript of the

proceedings which in some instances colored the testimony of the witness differently than intended. You may wish to take this into account in any future proceedings.

14. The husband's Cross-Bill for partition of the real property remains pending and was not considered in any way by the Commissioner.

Your Commissioner has not been asked to report on any other matter.

I certify that notice of the filing of this report has been given in accordance with the requirements of the statute.

I further certify that I have made an independent investigation and that the statutory requirements of domicile, residence and venue have been satisfied.

September 15, 1975
Date

William D. Cremins
William D. Cremins
Commissioner in Chancery

Commissioner's Fee - PAID

EXCEPTIONS TO REPORT OF COMMISSIONER

Exception taken by Flora Newport, above-named Complainant, to the report of Commissioner William D. Cremins, to whom this cause was referred by decree made herein on February 7, 1975, and which report bears date on the 15th day of September, 1975, to-wit:

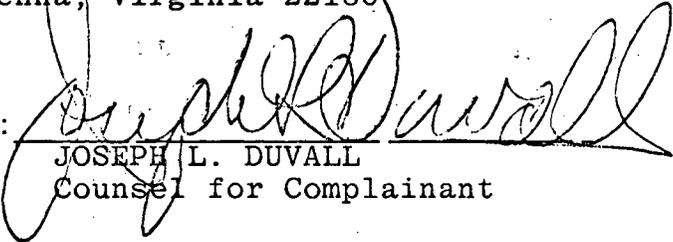
For that said Commissioner errs in his findings, interpretations and recommendations as set forth in Paragraphs No. 11 and 12 of said Report.

WHEREFORE, your Complainant doth except to the said Report of said Commissioner, and prays that her exceptions be sustained and a decree entered in accordance therewith.



FLORA NEWPORT
By Counsel

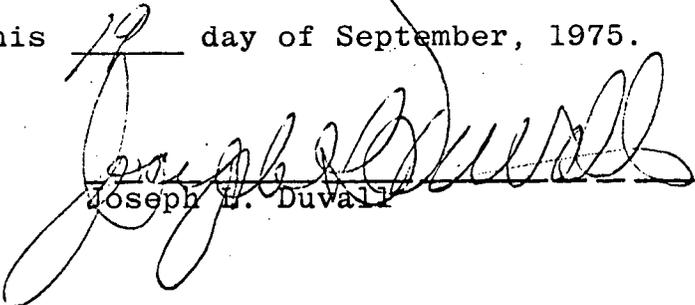
DUVALL, TATE, BYWATER & DAVIS, LTD.
374 Maple Avenue, East
Vienna, Virginia 22180

By: 

JOSEPH L. DUVALL
Counsel for Complainant

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was mailed, postage prepaid, to William D. Cremins, Commissioner in Chancery, 4055 Chain Bridge Road, Fairfax, Virginia 22030, and to Robert E. Swan, Esq., Counsel for Defendant, 10604 Warwick Avenue, Fairfax, Virginia 22030, this 19 day of September, 1975.



Joseph L. Duvall

Joseph L. Duvall, Esq.
374 Maple Avenue, E.
Vienna, Virginia 22180

Robert E. Swan, Esq.
10604 Warwick Avenue
Fairfax, Virginia 22030

FILED

DEC 5 1975

W. FRANKLIN GOODING
Clerk of the Circuit Court
of Fairfax County, Va.

Re: Newport vs. Newport - In Chancery No. 42741

Gentlemen:

I have reviewed the file in the above-captioned case, received and reviewed memoranda submitted by counsel, and heard argument of counsel. The opinions of the Court with respect to the exceptions made to the Report of the Commissioner in Chancery dated September 15, 1975, are as follows:

I. Complainant contends that the burden is upon defendant to establish that he moved to Nevada with the intention of living there and making his home there, i.e. establish domicile.

This contention is contrary to law. The rule is that a foreign divorce decree, even an ex parte decree, is presumptively valid and the burden of proving its invalidity rests upon the assailant. Esenuein v. Com. of Pennsylvania, 325 U.S. 279, 89 LEd 1608 (1945); Williams v. North Carolina, 325 U.S. 226, 89 LEd 1123 (1942); Dry v. Rice, 147 Va. 331, 137 S.E. 473 (1927); McFarland v. McFarland, 179 Va. 418, 19 S.E. 2d 77 (1942). The finding of the Commissioner is affirmed (Commissioner's Report Paragraph 11).

II. Defendant raises the issue of estoppel by laches. Laches is a legal ground sufficient by itself to bar a collateral attack on a foreign divorce decree. In Dry v. Rice, supra, a wife was granted a divorce in Nevada September 20, 1922. A suit

attacking the divorce was instituted March 2, 1925, by the husband after the former wife had remarried. The Court said that mere delay is not of itself laches. But where such delay is attended by the loss of material evidence by death of parties or a witness or by the change of the relation of parties or by injury to innocent third persons, it is laches and a court will not lend its aid to those who have slumbered on their rights. The Court decided that whatever rights the husband had to assail the Nevada decree were lost by his laches.

In Hodnett v. Hodnett, 163 Va. 644, 177 S.E. 106 (1934), a divorce was granted to the husband on January 8, 1928. It was attacked by the wife on July 23, 1931, a little more than three years later. Laches was applied to bar the attack.

In McNeir v. McNeir, 178 Va. 285, 16 SE2d 632 (1941), laches was applied after a delay of four (4) years.

In the instant case, husband was granted an ex parte divorce in Nevada on April 2, 1973. The wife filed a suit for separate maintenance in this Court on May 24, 1974, thirteen months later. Defendant's memorandum filed with this Court on September 15, 1975, states (at the bottom of Page 2) that the Defendant remarried on June 9, 1974. Such a statement does not appear in the transcript of the proceedings which took place before the Commissioner, nor was such an allegation made in the pleadings filed in this matter.

It does not appear from the evidence presented in this matter that delay of the wife in filing suit for separate maintenance is barred by laches. None of the changes enumerated in Dry v. Rice have been shown to exist in this matter.

III. Next to be considered is the validity of the Nevada decree and the effect of that decree upon the wife's right to maintenance and support.

Three United States Supreme Court cases deal with this issue:

Estin v. Estin, 334 U.S. 541, 92 LEd 1561 (1948);
Armstrong v. Armstrong, (Ohio) 123 NE2d 267, affd.
350 U.S. 568, 100 LEd 705 (1956); and
Vanderbuilt v. Vanderbuilt, 147 N.Y.S. 2d 125 affd.
354 U.S. 416, 1 LEd2d 1456 (1957)

In Estin v. Estin, supra, the wife obtained in the State of New York a decree of separation and maintenance from her husband. Husband subsequently moved to Nevada, became domiciled there, and in 1945 was granted an absolute divorce. Wife was not personally served and did not appear in the proceedings. The Nevada decree made no provision for alimony. Prior to that time, husband had been making payments of alimony under the New York decree. After entry of the Nevada decree, he ceased making alimony payments. Thereupon, wife sued in New York for a judgment for the amount of arrearage. Husband appeared in the action and moved to defeat the alimony provisions of the New York decree by reason of the Nevada decree. The highest court of the State of New York denied the motion and granted the wife a judgment for the amount by which the husband was in arrears.

The Supreme Court of the United States affirmed the New York decision which held that an ex parte divorce decree obtained by the husband was entitled to full faith and credit in the courts of a sister state with respect to the marital status of the parties. However, full faith and credit did not require that the state of last matrimonial domicile recognize the ex parte decree as one which terminated the wife's right under a previous

decree in that state for separate maintenance.

In reaching its decision, the Supreme Court looked to the law of New York and found that alimony may survive a divorce decree. The Supreme Court further held that the Nevada court could not adjudicate the question of alimony because the wife was not personally served with process and did not appear in Nevada. Since the Nevada court did not have the power to adjudicate the wife's rights in the New York judgment, New York need not give full faith and credit to that part of Nevada's judgment. Mr. Justice Douglas states in his opinion at page 1569:

"The result in this case is to make the divorce divisible to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony."

After the Estin decision, the states became divided as to whether the decision should be extended to include a wife's right to alimony not reduced to judgment prior to the entry of the ex parte divorce decree. See Annotation 28 ALR2d 1378. More recent decisions of the United States Supreme Court have resolved this issue.

In Armstrong v. Armstrong, 350 U.S. 568, 100 LEd 705 (1956), the husband, while residing in Florida, obtained on constructive service a divorce against his wife who had established a domicile in Ohio. The Florida decree provided that "no award of alimony be made" to the defendant. Later, wife obtained a judgment from an Ohio court granting her alimony.

The question before the Supreme Court was whether the Ohio courts by awarding the wife alimony had denied full faith and credit to the Florida decree. The Florida decree was construed by the Supreme Court as not having adjudicated the

issue of alimony and therefore Ohio had not in fact failed to give full faith and credit to the Florida decree. The Court stated that if there is doubt as to whether an ex parte divorce decree of a sister state purports to adjudicate the non-resident's right to alimony, the Supreme Court of the United States will construe the decree as a refusal to pass on the question.

A concurring opinion written by Mr. Justice Black, joined in by Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Clark agreed with the result. However, they found that Florida had dealt with the question of alimony. Their decision rested on the ground that a judgment denying alimony to a non-resident wife in ex parte divorce proceedings is invalid as a matter of due process. Consequently this part of the decree was not entitled to full faith and credit.

This concurring opinion cites the Estin case as controlling. On the issue of whether the wife's claim to support must be reduced to judgment prior to divorce, Mr. Justice Black states at page 713:

"The fact that Mrs. Estin's claim to support had been reduced to judgment prior to divorce while Mrs. Armstrong's had not is not a meaningful distinction. Mrs. Armstrong's right to support before judgment, like Mrs. Estin's right to support after judgment, is the kind of personal right which cannot be adjudicated without personal service."

In Vanderbuilt, supra, husband had obtained, on constructive service, a Nevada divorce decree freeing him from the bonds of matrimony and of "all duties and obligations thereof." Subsequently the wife brought proceedings in New York to obtain alimony. The New York Court entered an order under § 1170-6

of the N.Y. Civil Practice Act directing husband to make support payments. Husband appealed and again full faith and credit was the issue. Since the wife had not been personally served with process in Nevada and did not appear, the Nevada Court had no power to extinguish any right she had under New York law to financial support from her husband. The Supreme Court found that the New York Court was not obligated by full faith and credit to give recognition to the Nevada decree to the extent that it purported to terminate the wife's right to support.

Following the principles set forth in the Estin case, the Court stated in the majority opinion written by Mr. Justice Black that it was immaterial that wife's right to support had not been reduced to judgment in New York prior to the time of husband's Nevada divorce.

The preceding three cases indicate that while a marriage may be dissolved by proper ex parte proceedings (without personal service on the other party), the court cannot under such circumstances enter a decree granting or denying alimony against the nonresident party.

In Estin, Armstrong and Vanderbuilt, the Supreme Court looked to the law of the state where the wife was domiciled to determine the wife's rights with respect to support after a final divorce decree.

In Virginia, a wife's right to support, although modifiable, is permanent in the sense that it survives a final divorce decree. Virginia Code § 20-107; West v. West, 126 Va. 696, 101 S.E. 876 (1920); Osborne v. Osborne, 215 Va. 205, 207 SE2d 875 (1974). Jurisdiction of Virginia Courts to award alimony is not merely incidental to suits for divorce but is inherent,

and alimony may be awarded in an independent suit therefore. Bray v. Landergren, 161 Va. 699, 172 S.E. 252 (1934). The awarding of separate maintenance is a matter largely in the discretion of the chancellor. Hughes v. Hughes, 173 Va. 293, 4 SE2d 402 (1939); Plattner v. Plattner, 202 Va. 263, 117 SE2d 128 (1960).

The Commissioner opined that the entry of a final decree of divorce terminates the wife's right to support unless a support order pre-existed the entry of the final decree. The exception taken to that opinion is sustained.

It is the opinion of the court that the "divisible divorce" concept described in Osborne v. Osborne at page 210 when considered in conjunction with Supreme Court decisions described above, especially that of Armstrong v. Armstrong, is applicable to this case.

Therefore, the Nevada divorce decree of April 2, 1973, will be given full faith and credit with respect to the marital status of the parties. Further, the complainant will be entitled to maintain her suit for separate maintenance. The order issued for alimony pendente lite on November 20, 1974, is sustained.

IV. Finally, the motion made on behalf of the Defendant for partition of the real estate of the parties must be considered.

Jurisdiction in divorce suits is purely statutory. Bray v. Landergren (supra), Sec. 20-107 of the Code of Virginia states:

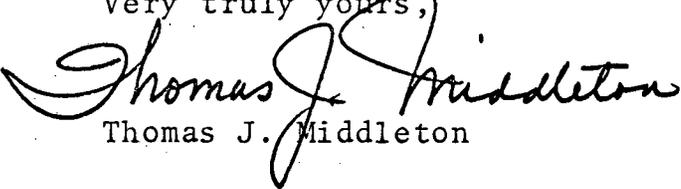
"The word "estate" as used in this section shall be construed to mean only those rights of the parties created by the marriage in and to the real property of each other...."

The decree of the divorce granted in Nevada on April 2, 1973, terminated the marital status of the parties but could not decree as to property rights of either spouse with respect to property located in Virginia.

Section 20-111 of the Code of Virginia creates a tenancy in common upon entry of a decree of divorce.

Based upon the foregoing, it appears that the parties now own the premises at 9917 Vale Road as tenants in common. This is not a property right or form of ownership created by the marriage. Therefore, this Court is without jurisdiction in this suit to enter a decree concerning partition of the property. The Cross-Bill, insofar as it requests partition of the property, is dismissed.

Very truly yours,


Thomas J. Middleton

TJM: jla

PROCESSED BY
BOCKLITE BY
EXAMINED BY

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FLORA NEWPORT)

Complainant and)
Cross-Defendant)

VS.)

IN CHANCERY NO. 42741

ELSWICK NEWPORT)

ORDER

Defendant and)
Cross-Complainant)

THIS CAUSE came on this day to be heard upon Complainant's motion for alimony, pendente lite, preliminary counsel fees and court costs, upon Defendant's motion for the appointment of a Commissioner in Chancery to make partition of the real estate owned by the parties hereto, the papers formerly read, the evidence heard ore tenus, and the cause argued by counsel.

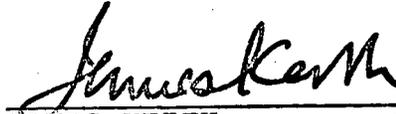
UPON CONSIDERATION WHEREOF, it is ADJUDGED, ORDERED and DECREED that the Defendant, Elswick Newport, pay to Complainant, Flora Newport, as alimony pendente lite the sum of Eight Hundred and Fifty (\$850.00) Dollars per month, commencing on the 1st day of November, 1974, and continuing monthly thereafter on the 1st day of each and every month until further order of this Court.

It is further ADJUDGED, ORDERED and DECREED that Defendant, Elswick Newport, pay to Joseph L. Duvall, Esq., Counsel for the Complainant, the sum of One Hundred and Fifty (\$150.00) Dollars on account of attorney's fees, within thirty days of the date of this decree.

It is further ADJUDGED, ORDERED and DECREED that Defendant's

motion for the appointment of a Commissioner in Chancery to make partition of the real estate owned by the parties hereto is denied pending the determination of the validity of the Nevada divorce decree presented to this Court.

ENTERED this 20 day of Nov., 1974.



JAMES KEITH
JUDGE OF THE CIRCUIT COURT

FLORA NEWPORT)	
Complainant)	
VS.)	IN CHANCERY NO. 42741
ELSWICK NEWPORT)	<u>FINAL DECREE</u>
Defendant)	

THIS CAUSE came on to be heard upon the papers formerly read and proceedings had herein, upon testimony heard by a Commissioner in Chancery of this Court and filed herein, upon the report of the Commissioner in Chancery filed herein, upon exceptions taken by Complainant to the report of said Commissioner, and upon argument of counsel.

AND IT APPEARING to the Court that the Nevada divorce decree of April 2, 1973, should be given full faith and credit with respect to the marital status of the parties hereto;

AND IT FURTHER APPEARING to the Court that the Nevada decree made no provision for alimony; that the Nevada court could not adjudicate the question of alimony because Complainant was not personally served with process and did not appear in Nevada; that the Nevada decree did not terminate Complainant's right to separate maintenance; and that Complainant's right to support survives the Nevada decree;

AND IT FURTHER APPEARING to the Court that the Commissioner herein erred in his finding that the entry of a final decree of divorce terminates the wife's right to support unless a support order pre-existed the entry of a final decree;

AND IT FURTHER APPEARING to the Court that the Complainant's suit for separate maintenance was challenged on the ground of laches, and that the necessary elements to constitute laches were not presented in evidence;

AND IT FURTHER APPEARING to the Court that the Complainant is entitled to maintain her suit for separate maintenance, and that the order issued herein for alimony pendente lite on November 20, 1974, should be sustained;

AND IT FURTHER APPEARING to the Court that the decree of divorce granted in Nevada terminated the marital status of the parties hereto thus creating, pursuant to Section 20-111 of the 1950 Code of Virginia, as amended, a tenancy in common in the real estate of the parties known as 9917 Vale Road, Fairfax County, Virginia; that this is not a property right or form of ownership created by the marriage, and that this Court is without jurisdiction in this suit to enter a decree concerning partition of said premises; and that the motion of the Defendant for partition of the real estate of the parties should be dismissed; it is, therefore,

ADJUDGED, ORDERED and DECREED that the Complainant's suit for separate maintenance is not barred by laches; and it is further

ADJUDGED, ORDERED and DECREED that the Nevada divorce decree of April 2, 1973, be and the same hereby is given full faith and credit with respect to the marital status of the parties hereto; and it is further

ADJUDGED, ORDERED and DECREED that exception taken by the Complainant to the report of the Commissioner in Chancery with respect to her right to support be and the same is hereby sustained; and it is further

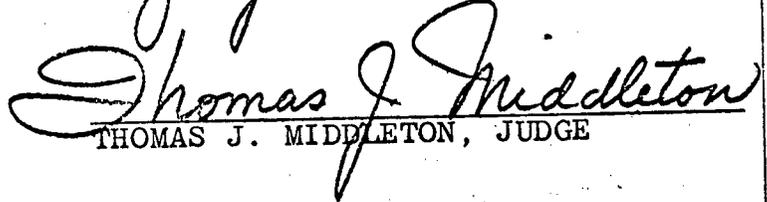
ADJUDGED, ORDERED and DECREED that the order entered by this Court for alimony pendente lite on November 20, 1974, is sustained and hereby enlarged into an order for permanent alimony,

and it is further

ADJUDGED, ORDERED and DECREED that the Cross-Bill filed herein by Defendant, insofar as it requests partition of the property of the parties hereto, is hereby dismissed.

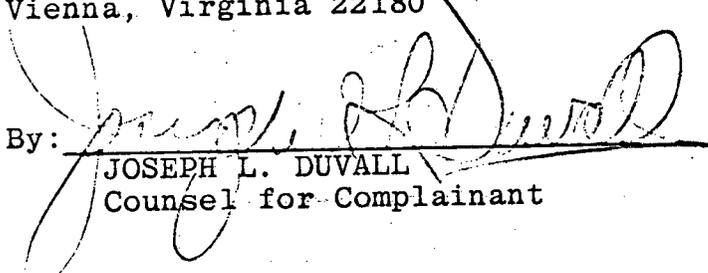
AND THIS DECREE IS FINAL.

ENTERED this 12th day of July, 1976.

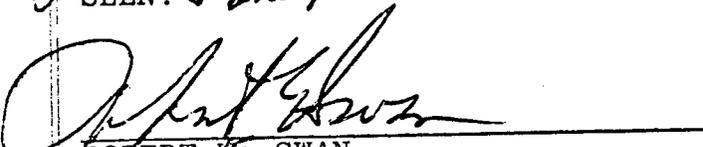

THOMAS J. MIDDLETON, JUDGE

I ASK FOR THIS:

DUVALL, TATE, BYWATER & DAVIS, LTD.
374 Maple Avenue, East
Vienna, Virginia 22180

By: 
JOSEPH L. DUVALL
Counsel for Complainant

✓ SEEN: & Accepted to


ROBERT E. SWAN
Counsel for Defendant
10604 Warwick Avenue
Fairfax, Virginia 22030

NOTICE OF APPEAL

Notice is hereby given that the Defendant, Elswick Newport, hereby appeals to the Supreme Court of Virginia from a final judgment entered in this action on the 12th day of July, 1976.

ASSIGNMENT OF ERROR

I

The Circuit Court Judge erred in finding that the Complainant's suit for separate maintenance was not barred by laches.

II

The Circuit Court Judge erred in overruling the findings of the Commissioner in Chancery with respect to the Complainant's right to support and maintenance. The award of permanent support and maintenance to the Complainant is contrary to law.

III

The Circuit Court Judge exceeded his discretion in ordering that the amount of support and maintenance in the pendente lite Order be enlarged into a permanent Order.

IV

A Statement of the facts and testimony adduced at the hearing for the permanent support and maintenance will be submitted forthwith.


Robert E. Swan, Counsel for Defendant


Robert E. Swan, Counsel for Defendant
10604 Warwick Avenue, Fairfax, Va. 22030