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Domestic Relations - Strength of Presumptions in Marriage. DeRyder v. Metropolitan Life Insurance Company, 206 Va. 602 (1965)

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Domestic Relations—Strength of Presumptions in Marriage. In *DeRyder v. Metropolitan Life Insurance Company*[1] the Supreme Court of Appeals of Virginia raised a strong presumption in favor of the validity of a second marriage and held that plaintiff's evidence was not sufficient to rebut this presumption.

Plaintiff, the first wife of deceased, filed suit to recover on a life insurance policy, alleging wrongful payment by defendant life insurance company to a second wife. The evidence showed that plaintiff had consummated a valid marriage with deceased, who deserted her and subsequently married a second wife. The Circuit Court of the City of Hampton granted defendant's motion for summary judgment on the grounds that plaintiff had not met the burden of proving that the first marriage had remained undissolved.

The Supreme Court of Appeals, relying upon an earlier Virginia case,[2] affirmed. The Court stated that in deciding the question of whether or not a divorce had been obtained, the party attacking the second marriage has the burden of proving that the first marriage was valid and that it had not been dissolved.

In reaching this decision the Court encounters a conflict of authority over the question of whether a divorce can be presumed to have been obtained by a person who subsequently remarries. A substantial majority of the courts which have decided this issue raised a presumption in favor of the validity of the second marriage,[3] even though this pre-

1. 206 Va. 602, 145 S.E.2d 177 (1965).

2. Parker v. American Lumber Corporation, 190 Va. 181, 56 S.E.2d 214 (1949). The second wife of deceased, Hezekiah Parker, claimed recovery under Workman's Compensation as his lawful widow, but she was denied recovery because of a prior marriage of deceased. The Supreme Court of Appeals reversed this decision and allowed the second wife to share recovery with two minor children of the first marriage on the grounds that the first wife had not rebutted the presumption in favor of the validity of the second marriage. The first wife had remarried, but she alleged that she had not gotten a divorce and had not received notice of a divorce proceeding. The case stated that:

> The decided weight of authority and we think the correct view is that where two marriages of the same person are shown, the second is presumed to be valid, . . . so that the person who attacks a second marriage has the burden of producing evidence of its invalidity. Where both parties to the first marriage are shown to be living at the time of the second marriage, it is presumed in favor of the second marriage that the first was dissolved by divorce. These presumptions arise, it is said, because the law presumed morality and legitimacy, not immorality and bastardy.

3. Smith v. Smith, 169 Or. 650, 131 P. 2d 447 (1942); Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22 (1949); Pilcher v. Pilcher, 141 Utah 72, 197 P.2d 143 (1948); Holman v. Holman, Tex. Comm. App., 288 S.W. 413 (1926); Pittinger v. Pittinger, 28 Colo. 308, 64 Pac. 195 (1901).

sumption conflicts directly with another, i.e. that once a valid marriage is proven it is presumed to continue. The weight of authority holds that when these two presumptions conflict, that in favor of the validity of the second marriage is considered to be the stronger.[4] In *Smith v. Smith*[5] the Oregon Supreme Court stated that the presumption in favor of the validity of a second marriage is one of the strongest disputable presumptions known to law. However strong some courts have held this presumption to be, it is not conclusive and may be overcome by clear evidence that the first marriage was not dissolved.[6]

The minority viewpoint is based on the theory that no valid second marriage can be presumed unless the first marriage is shown to have been dissolved. In Iowa the courts have long refused to raise a presumption of the validity of the second marriage in the absence of some facts to prove its legitimacy.[7] The presumption itself was recognized in the Iowa courts, but the application was strictly limited. On the other hand, the North Carolina Supreme Court refused to raise the presumption in the case of *Williams v. Williams*,[8] where the second wife was held to have the burden of establishing the validity of her marriage.

Where the courts raise the presumption in favor of the validity of a second marriage a conflict arises over the sufficiency of evidence necessary to rebut this presumption. This is normally held to be a question of fact which must be decided on a case to case basis. Nearly all jurisdictions would agree that mere proof of a former valid marriage

4. Shreyer v. Shreyer, 113 Colo. 219, 155 P. 2d 990 (1945); Massenga v. Rosso, 87 Cal. App. 2d 790, 197 P. 2d 770 (1948); Doertch v. Folwell Engineering Company, 252 Mich. 76, 233 N.W. 211 (1930).

5. *Supra*, note 4.

6. Gainery v. Fleming, 279 F. 2d 56 (1960); Batts v. United States, 120 F. Supp. 26 (1954); Dorsey v. Dorsey, 259 Ala. 220, 66 So. 2d 135 (1953); Quinn v. Miles, Fla., 124 So. 2d 883 (1960).

7. Ellis v. Ellis, 58 Iowa 720, 13 N.W. 65 (1882) (It was held that there must be facts to show the first marriage ended before the presumption would be raised.); Gilman v. Sheets, 78 Iowa 499, 43 N.W. 299 (1889) (Court held that the conduct of both spouses would have to be inconsistent with the marriage to raise the presumption.); *Contra*: Blanchard v. Lambert, 43 Iowa 228, 22 Am. Rep. 245 (1876) (Court raised the presumption where both parties subsequently remarried.); Farr v. Farr, 190 Iowa 1005, 181 N.W. 268 (1921) (In an annulment proceeding the court held the presumption valid and the husband would have to show that the former marriage was not dissolved.).

8. 254 N.C. 729, 120 S.E. 2d 68 (1961). (In this case the second wife was a voluntary intervenor in the suit which the Court interpreted as putting the burden of proof on her to show that her husband, the defendant, had obtained a divorce from his first wife before marrying the second wife.).

is not sufficient to rebut the presumption.[9] On the other hand, where there is evidence to show that no divorce proceedings were completed in any of the jurisdictions where either party lived, it is usually held that this would amount to almost plenary proof that the marriage had not been dissolved.[10] Between these two extremes the conflict arises over what factors should be weighed most heavily to uphold or rebut the presumption.[11]

The present case, while following the majority rule in raising the presumption in favor of the validity of a second marriage, extended the Virginia rule concerning the sufficiency of evidence necessary to rebut the presumption.[12] This case held that a strong presumption in favor of the validity of the second marriage could only be rebutted by proving that no divorce had been recorded anywhere that either spouse had been domiciled.[13] While the Court in practice requires this strong evidence to rebut the presumption, the language laid down in the opinion implies the use of a more lenient attitude with respect to the requirement of evidence necessary to rebut this presumption. The Court states that:

> . . . (T)he one contending against the legality of the second marriage is not required to make plenary proof of a negative averment. It is enough that he introduce such evidence as in the absence of all counter testimony, will afford reasonable grounds for presuming the allegation is true. . . .[14]

9. Pittinger v. Pittinger, *supra*, note 4; New Amsterdam Casualty Company v. Seals, 55 Ga. App. 569, 190 S.E. 870 (1937).

10. Brokeshoulder v. Brokeshoulder, 84 Okla. 249, 204 Pac. 284 (1921) (Although a divorce proceeding had been started, none was completed in any of the counties where either the first wife or her husband wre domiciled. This rebutted the presumption in favor of the validity of the second marriage.).

11. Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1894) (The presumption was held rebutted where the first wife remained faithful, gave no grounds for divorce or desertion, and had no knowledge of divorce proceedings against her, and none were instituted in the state where she lived.); Travelers Insurance Company v. Lester, 173 Ga. App. 465, 36 S.E.2d 880 (1946) (Presumption held rebutted where both parties recognized the continued existence of the relationship, as evidenced by the husband's return to the first wife from time to time, and his continued support of her.); Hale v. Hale, 40 Okla. 101, 135 Pac. 1143 (1913) (Presumption upheld where there was no evidence of divorce proceedings in certain counties where deceased lived, but no proof that these were the only counties where deceased could have gotten a divorce.).

12. Parker v. American Lumber Corporation, 190 Va. 181, 56 S.E.2d 214.

13. DeRyder v. Metropolitan Life Insurance Co., 206 Va. at 609, 145 S.E.2d at 182.

14. *Id.* at 608, 145 S.E. 2d at 181.

Also: Brokeshoulder v. Brokeshoulder, supra note 11, 204 Pac. at 287.

The Supreme Court of Appeals should continue to uphold the validity of a second marriage in the absence of strong evidence that a prior marriage had not been dissolved, but in so doing the Court should use language which would be consistent with the actual standard of evidence required to rebut this presumption.

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Procedure—STATUTE OF LIMITATIONS—EFFECT OF NONRESIDENT MOTORIST SERVICE ON TOLLING PROVISIONS. In *Bergman v. Turpin*,[1] Mitchell E. Bergman, plaintiff, and Iford L. Turpin, defendant, were involved in an automobile accident in Botetourt County, Virginia on May 30, 1959, whereby the plaintiff sustained personal injuries. At the time of the accident the defendant was a resident of Virginia but shortly thereafter, on November 1, 1959 he became a resident of the District of Columbia. The plaintiff was, at all times pertinent to the controversy, a resident of North Carolina.

On May 29, 1961, plaintiff instituted an action against the defendant in the proper federal court in Virginia. Service was made on the defendant pursuant to the Virginia nonresident motorist statutes.[2] The

1. 206 Va. 539, 145 S.E.2d 135 (1965).

2. VA. CODE ANN., Sec. 8-67.1 (1950).

The acceptance by a nonresident of the rights and privileges conferred by article 6 (46-110 et seq.) of chapter 3 of Title 46 as evidenced by his operation, either in person or by agent or employee, of a motor vehicle, trailer or semitrailer hereunder, or the operation by a nonresident, either in person or by an agent or employee, of a motor vehicle, trailer or semi-trailer in this State otherwise than under such article, shall be deemed equivalent to an appointment by such nonresident of the Commissioner of the Division of Motor Vehicles or his successors in office to be the true and lawful attorney of such nonresident upon whom may be served all lawful process against and notice to such nonresident in any action or proceeding against him growing out of any accident or collision in which such nonresident or his agent or employee may be involved while operating a motor vehicle, trailer or semi-trailer in this Commonwealth, and such acceptance or operation shall be a signification of his agreement that any such process against or notice to him which is served shall be of the same legal force and validity as if served upon him personally in the county or corporation in which such accident or collision occurred or in which a resident defendant, if any, resides.

The term 'nonresident' includes any person who though resident when the motor vehicle accident or collision occurred, has been continuously outside the State for at least sixty days next preceding the day on which notice or process is left with the Commissioner.