

# **SILENT PARTNER**

## **COUNSELING ON FOREIGN DIVORCE**

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

“I got my last divorce in Mexico, ma’am,” said the client rather nonchalantly. “Quite honestly, it was a whole lot faster -- and cheaper -- than those stateside divorces some people get.” CPT Carla Krenwinkel sat back and sighed. “When will they ever learn?” she asked herself. Recently it seemed that her office was being deluged with foreign divorce cases.

### **What is “Foreign Divorce”?**

“Foreign divorce” is a phrase all too familiar to military legal assistance attorneys. It is not uncommon for a client to explain how easy it was and how very few other soldiers knew about this inexpensive alternative to a “stateside divorce.” Just contact an attorney in Mexico, the Dominican Republic or even Reno, Nevada. They’re listed in classified ads in most major newspapers, and you can even find them on the Internet. Today there’s a big demand for quick, pain-free and inexpensive divorces, and the ease of access to Mexico and the Dominican Republic, two notorious “divorce mills,” further compounds the problem. Is it all that easy? And, as some clients say, is it just too good to be true?

### **The Jurisdictional Basis for Divorce**

“Not by a long shot,” answers CPT Krenwinkel. “A foreign divorce is usually nothing more than a fancy piece of paper that costs a lot of money and is probably worthless. That’s what most Mexican divorces are... as well as a divorce granted in any place other than the home state or native country of one of the spouses. The fact is, if you’re not a legal resident there and your spouse doesn’t reside there, you just aren’t getting a divorce. You’re going through a lot of paperwork that’s going to have to be cleared up down the line by some lawyers... and boy, will they charge you royally for the mess you’ve made!”

## **Practical – and Legal – Problems with a Foreign Divorce**

CPT Krenwinkel knew what she was talking about. She had just finished helping a German national client, Mrs. Klein, get an American attorney to serve divorce papers on her husband. Only he thought he was her ex-husband!

You see, retired staff sergeant (SSG) Bill Klein had come to the same conclusion as many fellow soldiers. In his own words, “It’s faster, simpler and less expensive to get a divorce in the Dominican Republic than to shell out \$500 or even \$1,000 to hire one of these local attorneys to do the divorce here in South Carolina.” So he’d gotten himself a Dominican Republic divorce -- it only took three weeks -- and then he got “remarried” to his girlfriend, Frieda Rome, a danseuse at the local NCO club.

SSG Klein had been quite surprised when Mrs. Klein’s attorney served him with the “new” divorce papers. “That idiot lawyer (as if those words aren’t redundant!) -- I’m already divorced!” he told Frieda when the papers came to his door courtesy of the local sheriff’s deputy. But when he took them to his friend, CPT Jake Jenkins, the chief of legal assistance at the nearby Army base, he received a rude awakening.

“You see,” explained CPT Jenkins, “A foreign divorce is basically a cheap thrill. It’s a paper shuffle that makes you feel like you’re divorced when, in the eyes of the law, you’re not. Back about half a century ago, the U.S. Supreme Court said so in a case called Williams v. North Carolina. Whenever you get a divorce, one of the parties must be domiciled in the state or country which grants the decree or else it’s just no good.<sup>1</sup> Domicile, of course, means your legal residence -- and I assume that you’re not a legal resident of the Dominican Republic!”

“N-n-n-no,” answered a shaken Klein. “But does that mean that this divorce is no good?”

“I guess it depends,” answered Jenkins, a savvy legal assistance attorney. “Was your wife, Mrs. Klein, somehow a Dominican Republic national? No? I didn’t think so. Let’s see what else might be of help to you – did she file papers stating that she agreed with the divorce?”

### **A Possible Exception**

Usually American courts take a dim view of foreign divorces and don’t recognize them.<sup>2</sup> One possible way out for SSG Klein, however, is based not on the validity of the divorce but rather on the theory of estoppel.

Here’s how it works. Where both of the parties participate in the foreign dissolution action, they may be estopped to challenge its validity in a subsequent court action. This would be the case, for example, if the husband files for divorce in the Dominican

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<sup>2</sup> See generally Annot., 13 A.L.R.3d 1423 (1967); Edward B. Borris, “Recognition of Foreign Country Divorce Decrees Pursuant to the Doctrine of Comity,” 8 *Divorce Litigation* 61 (1996).

Republic and then serves the divorce petition and summons on the wife, who responds after accepting service and notifies the court that she's in agreement and wants the divorce also.<sup>3</sup>

Under these circumstances, the divorce could probably not be challenged later in a collateral attack by either party since both had participated in obtaining it. They are both estopped from attacking the divorce because they both participated in obtaining it.

That doesn't mean it's really legal or even a good idea. It simply means that the courts won't allow a divorce that was invalid in its inception to be later attacked by either of the parties who had participated in the illegality. This is also known as the "clean hands" doctrine.

Another argument would be ratification by the non-filing party. The husband may contend that, even if the wife didn't participate in the divorce at the time it was granted, her acting in reliance on it would bar an attack on the divorce later on. This would be the situation where she then remarries after the divorce is granted or takes some other substantial action that is inconsistent with her being married and shows that she is acting in reliance on the divorce being valid.<sup>4</sup>

Finally, some courts have held that the failure of the divorce defendant to challenge the foreign divorce after many years will bar her from attacking it. A timely attack on the foreign decree is essential in these appellate decisions.<sup>5</sup>

This is, of course, a far cry from saying that the divorce is valid. Rather, these approaches concentrate on the divorce being immune from attack by either party. The divorce can, however, be attacked by an outsider, a person who's not a party to the illegal transaction. This could involve a prior or subsequent spouse or the child of a party.

### **When in Doubt, DON'T**

This is the best advice to give a soldier or spouse each and every time the topic of foreign divorce comes up. "Undoing one," or dealing with the consequences after it's obtained, is ordinarily far worse than the cost and inconvenience of getting a proper divorce in the first place.

In the above case, the true wife, Mrs. Klein over in Germany, will be suing her husband for pension division (which he thought was "buttoned-up and bulletproof" after the Dominican Republic decree), alimony and attorney's fees. He'll have to get a "real divorce" in South Carolina and then face the music on each of these issues. If he's not

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<sup>3</sup> See, e.g., *In re Marriage of Silvestri-Gagliardoni*, 186 Ill. App. 3d 46, 542 N.E.2d 106 (1989) (both parties participated in proceedings and executed a marital settlement agreement which was submitted to the Italian court and approved; wife's challenge to husband's action for judicial separation in Italy was dismissed)

<sup>4</sup> See, e.g., *Lowenschuss v. Lowenschuss*, 396 Pa. Super. 531, 579 A.2d 377 (1990).

<sup>5</sup> See, e.g., *Keller v. Keller*, 521 So. 2d 273 (Fla. DCA 1988) (husband waited 20 years before challenging divorce, held unable to attack Mexican divorce decree)

too lucky, he'll be facing a huge amount of retroactive alimony if the judge decides to "go retroactive" with him and impose a support obligation for Mrs. Klein since the parties' separation – which is always a possibility. And if SSG Klein happened to be on active duty, then there's always a chance that there will be a "pay problem" associated with getting a "divorce," (which makes him unmarried for pay purposes), then showing up on the rolls as married (to Frieda Rome), and then getting "undivorced" later on, which means he was married the entire time to "Wife #1" (as he might call her).

### **Another "Foreign Divorce" Problem**

Now let's change the scenario a bit. What happens when it's Mrs. Klein who wants the divorce? She has just contacted a German attorney, and she informs CPT Krenwinkel that she's decided to file for divorce herself, right here in Germany!

At this point, CPT Krenwinkel needs to question her client about the unresolved issues to see if any of them will suffer "collateral damage" because of the upcoming German divorce action. Here are some of the questions to be asked:

- What about alimony? Can a German court award alimony to Mrs. Klein? If so, can she enforce the alimony award against SSG Klein (who, you remember, is now back in South Carolina)? Is it likely that he's going to pay the alimony award voluntarily to her? Mrs. Klein needs to know that DFAS (Defense Finance and Accounting Service) will not honor a foreign court decree for alimony garnishment.
- How about custody? If the children are with Mrs. Klein in Germany, the German courts can exercise jurisdiction over them. But what if they go to the states to visit SSG Klein... and he decides to keep them there? Will a South Carolina court honor a German custody order? Was the foreign custody order entered in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act? As was its predecessor, the Uniform Child Custody Jurisdiction Act, this statute is routinely used in deciding whether to enforce a foreign court's custody decision.<sup>6</sup> Was the foreign decree entered in compliance with the Hague Convention on the Civil Aspects of International Child Abduction (if the foreign country was a signatory nation)? This doesn't mean that Mrs. Klein should not request custody in the German courts; but it does mean that CPT Krenwinkel should advise her of the consequences of foreign visitation and parental kidnapping.
- How about child support? Will American courts recognize and enforce a German decree?<sup>7</sup> Will DFAS enter a wage assignment from SSG Klein's retired pay for the child support he was ordered to pay under a German decree? The answers – a resounding MAYBE for both questions. This is not too comforting to Mrs. Klein.

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<sup>6</sup> See, e.g., Webb v. Webb, 546 N.E.2d 306 (Ind. Ct. App. 1989).

<sup>7</sup> An American court need not recognize a foreign country's support order unless that court had personal jurisdiction over the support payor-defendant. Kulko v. Superior Court, 436 U.S. 84 (1978). In addition, the foreign judgment must also be entered consistent with principles of comity.

- Does Mrs. Klein want to ask the court for property division? Will the German court be able to exercise jurisdiction over, for example, the parties' Ford truck located in South Carolina? How about the savings account (acquired during the marriage) that's at Pentagon Federal Credit Union in Washington, D.C.? Or the mutual funds in Chicago?
- Finally, and perhaps most importantly, what about pension division? DFAS will not honor a foreign decree on the division of military retired pay. Under USFSPA (the Uniformed Services Former Spouses' Protection Act), the court order that divided military retired pay must be from an American court if DFAS is to honor it and take the pension division payments from the retiree's pay. The same goes for SBP (Survivor Benefit Plan), which would cover Mrs. Klein in case SSG Klein dies. There's no way to guarantee coverage for Mrs. Klein, regardless of what the German court decrees, if DFAS doesn't have an American court order for SBP coverage and a request for coverage from the member or a "deemed election letter" from her.

### **Conclusion**

All in all, you can see how much trouble a client walks into when arranging a foreign divorce. These cases can be almost as much of a headache for the legal assistance attorney as for the client himself. Go the extra mile and get the word out on what problems these can be! For more information on this topic, see the SILENT PARTNER titled "Should I Get a Divorce Overseas?"

[rev. 1/24/08]

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