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Domestic Relations

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DOMESTIC RELATIONS

INTERSTATE ASPECTS

One frequently litigated issue is the extent to which a court should recognize an out-of-state child custody or support decree. It seems to this author that such a decree is never binding (except for a decree which finally terminates parental rights for cause) but that as a matter of comity a court ought to give great weight to an out-of-state decree, absent a major change in circumstances. The constitutional issue is whether the court must recognize the foreign decree. Clearly the decree is not entitled to full faith and credit when it is subject to modification where made, and a change in circumstances can be shown.[1] A convincing argument can be made for the proposition that, when the child and one parent are domiciled in Ohio, the Ohio court can redetermine issues of custody and support, without any showing of a change in circumstances since the date of the foreign decree. The argument is that the policy basis of the custody determination, *i.e.,* the best interest of the child, outweighs the interest in finality of litigation, the policy basis of the full faith and credit clause. This problem came before the United States Supreme Court in 1958, and the Court avoided the question.[2] In 1962 the Court was again faced with the issue, and again it was able to avoid passing on the question by apparently finding that the original decree was subject to modification without a change in circumstances where rendered, so it could be changed elsewhere on the same basis.[3]

The same problem arose in two Ohio cases. In *Ex parte Elliott*[4] a court of appeals held, where no change in circumstances had occurred, that a Maryland decree of child custody would be enforced in Ohio. It is not clear from the opinion whether the court followed the Maryland decree because of comity or because it felt compelled to do so under the full faith and credit clause. In the second case the court referred to the possibility that an Ohio decree could be relitigated in New York as one reason for not allowing the father to take the child to New York on visitation.[5]

DIVORCE

Procedure

When a husband is sued for divorce he will occasionally convey or mortgage his property while the suit is pending, either in an attempt to

1. Halvey v. Halvey, 330 U.S. 610 (1947); Cunningham v. Cunningham, 166 Ohio St. 203, 141 N.E.2d 172 (1957).
2. Kovacs v. Brewer, 356 U.S. 604 (1958).
3. Ford v. Ford, 371 U.S. 187 (1962).
4. 114 Ohio App. 533, 183 N.E.2d 804 (1961).
5. Anonymous v. Anonymous, 180 N.E.2d 205 (Ohio C.P. 1962).

put the property beyond his wife's reach or in a good faith attempt to secure the costs of the divorce action. *Foundation Sav. & Loan v. Rosenbaum*[6] points out that such an attempt, whether in good faith or not, is ineffective as against the wife. The *lis pendens* statute, Ohio Revised Code section 2703.26, provides that while an action is pending no third person can acquire an interest in the "subject of action" as against the plaintiff's title. Apparently the wife's action for alimony is construed as placing all of the husband's property into the category, "subject of the action."

Grounds and Defenses

In theory the grounds for divorce are mutually exclusive, but there is a wide divergence between theory and practice. Alcoholism is not a ground, but habitual intoxication is, although the courts are reluctant to grant a divorce on this ground except for chronic alcoholism. However, a recent case points out that heavy drinking, although not interfering with the husband's job, is cruelty when it is coupled with quarrels and nagging.[7]

It is clear that the resumption of a normal marital relationship following an act of marital aggression is a condonation of the aggression and is a valid defense to an action for divorce. It is not so clear that it is also a defense to an action for alimony only, nor is it clear whether condonation is an affirmative defense which must be pleaded. A related issue is whether a single act of sexual intercourse constitutes condonation. On all three issues the court is concerned with public policy and with the possibility of fraud on the court.

The Ohio cases illustrate that public policy is a test that varies with the specific situation. The two leading cases involving cohabitation during an alimony action came to opposite conclusions.[8] As to divorce, the best known Ohio case is *Huffine v. Huffine*,[9] in which the Van Wert County Common Pleas Court held that a single act of sexual intercourse is condonation. On the other hand, in *Lowman v. Lowman*[10] the

6. 113 Ohio App. 501, 171 N.E.2d 359 (1960). In this case the wife had a legal interest in the property which prevailed as against a judgment creditor of the husband. The same rule would apply where the wife has no legal interest but claims an equitable interest and asks for the property as alimony. Cook v. Mozer, 108 Ohio St. 30, 140 N.E. 590 (1923).

7. Hardt v. Hardt, 182 N.E.2d 9 (Ohio Ct. App. 1961).

8. In England v. England, 92 Ohio App. 527, 110 N.E.2d 35 (1952), the court held that a resumption of a regular marital relation would bar an alimony action, but the court had no objection to the parties living under the same roof, apparently without resumption of sex relations. The court raised no presumption of condonation as it was hopeful that reconciliation would occur. In Smith v. Smith, 86 Ohio App. 479, 92 N.E.2d 418 (1949), the court held that an action for alimony is barred by condonation, cohabitation is condonation, and cohabitation will be presumed from the living together of husband and wife in the same house.

9. 74 N.E.2d 764 (Ohio C.P. 1949).

10. 166 Ohio St. 1, 139 N.E.2d 1 (1956).

supreme court found that a single act of sexual intercourse was not condonation because there was no other evidence of a resumption of normal relations. In the latest case the Tuscarawas County Common Pleas Court followed *Huffine* without mentioning *Lowman* and held that condonation is a defense to both alimony and divorce, that it need not be pleaded, and that a single act of intercourse amounts to condonation.[11]

ALIMONY

In most states a valid marriage is a jurisdictional prerequisite to an action for divorce. The rule does not apply in Ohio, as our divorce statute sets forth bigamy as a ground for divorce. It had been assumed for many years that the victim of a bigamous marriage had an option. She could waive alimony by asking for an annulment, or she could get a divorce and alimony. But in 1952 in *Eggleston v. Eggleston*[12] the Ohio Supreme Court held that the wife could get alimony although the marriage was void as bigamous and, further, that the divorce statute was the exclusive remedy. In *Jones v. Jones*[13] a court of appeals held that a wife who had entered into a good faith marriage with a man who already had a wife could not sue for alimony only. Without discussion or citation the court held that an alimony action, unaccompanied by a suit for divorce, could not be maintained unless there was a legally valid marriage. The only prior case on this issue was a 1923 court of appeals decision which antedates *Eggleston.*[14]

It seems to the author that the alimony statute does not require this result and that it is inconsistent to hold that the good faith victim of a bigamous marriage can get alimony through a divorce action but not through an alimony action. Even in states which do not provide divorce as a remedy in the bigamy situation, the courts have held that, where the husband knew that the marriage was bigamous and the second wife did not, the husband is estopped from denying her the right of support.[15]

Although appellate courts have been generally reluctant to upset a finding of a trial court on the amount of alimony, there appears to be a clear trend toward finding an abuse of discretion when the trial court, in fixing alimony for a middle-aged and presumably unemployable wife, relies primarily on a division of property rather than on continuing support. One of the best illustrations of this development is a 1955 Wiscon-

11. Maughan v. Maughan, 184 N.E.2d 628 (Ohio C.P. 1961).

12. 156 Ohio St. 422, 103 N.E.2d 395 (1952).

13. 115 Ohio App. 358, 180 N.E.2d 847 (1962).

14. Wolfer v. Wolfer, 19 Ohio App. 12 (1923) (wife of bigamous marriage cannot recover in action for alimony only).

15. See Astor v. Astor, 107 So. 2d 201 (Fla. Dist. Ct. App. 1958), and cases cited therein.

sin case.[16] The result of a 1962 court of appeals case[17] indicates that the trend has reached Ohio.

In 1954 a court of appeals held that a separation agreement could cut off the wife's right to alimony, but, on the theory that everyone is entitled to his day in court and counsel is needed to make this right effective, the court held that it would be contrary to public policy to allow such an agreement to cut off her right to attorney's fees in a subsequent divorce case.[18] The same reasoning should invalidate a separation agreement clause which restricts the allowance for counsel to a set amount, but a 1962 opinion held that such a restriction is valid.[19]

HUSBAND AND WIFE

Two recent Ohio cases[20] emphasize the necessity of obtaining a complete inventory of property owned by the spouses before a separation agreement is drafted. In both cases the courts held that the separation agreement, which did not clearly spell out the ownership of insurance on the husband's life, did not cut off the wife's right to the insurance proceeds where the husband had failed to notify the insurance company of a change of beneficiary.

In determining the validity of both antenuptial and separation agreements the test is not fairness, but the absence of fraud, and fraud is tested by a high standard because of the fiduciary relationship that the parties bear toward one another. However, the burden of establishing fraud is imposed on the party who tries to set aside the agreement.[21] In *Pniewski v. Przybysz*[22] the trial court tried to ease the burden by holding that the antenuptial agreement could be set aside where one party had not had independent counsel. In reversing, the court of appeals went further than necessary by stating, not only that independent counsel was not required, but also that when the parties to such an agreement are mature individuals they do not stand in a confidential relationship to each other.[23] It seems clear that this statement was dictum and unnecessary because there was no breach of a confidential relation. The only case cited in the opinion on this point[24] did not hold that there is no confi-

16. Gordon v. Gordon, 270 Wis. 332, 71 N.W.2d 386 (1955). See 2 NELSON, DIVORCE AND ANNULMENT § 14.44 (rev. vol. 1961).

17. Johnson v. Johnson, 115 Ohio App. 387, 181 N.E.2d 494 (1962).

18. Sinclair v. Sinclair, 98 Ohio App. 308, 129 N.E.2d 311 (1954).

19. Conner v. Conner, 184 N.E.2d 476 (Ohio Ct. App. 1962).

20. Cannon v. Hamilton, 174 Ohio St. 268 (1963); Carpenter v. Carpenter, 185 N.E.2d 502 (Ohio C.P. 1962).

21. Miller v. Knight, 115 Ohio App. 485, 185 N.E.2d 770 (1961) (separation agreement); Hawkins v. Hawkins, 185 N.E.2d 89 (Ohio P. Ct. 1962) (antenuptial agreement).

22. 183 N.E.2d 437 (Ohio Ct. App. 1962).

23. *Id.* at 439 (dictum).

24. *In re* McCready's Estate, 316 Pa. 246, 175 Atl. 554 (1934).

dential relationship in such a situation, but only that the relationship was not violated in that case.

CHILD CUSTODY AND SUPPORT

For the second time, an Ohio court has held that the duty of support and the right of visitation are independent.[25] Therefore, a mother who has custody is entitled to support from the father even though she has violated the custody order by removing the child from the state or by denying the husband his visitation rights.[26] This question has been the subject of conflicting decisions in other states, but it seems that the better view is the one which is developing in Ohio, *i.e.,* that the mother's violation of a court order should not operate to deprive the child of needed support.

Under normal conditions the parent's right of custody includes the right to make major decisions involving the future of the child. Two cases point out that situations exist in which the decision of the parent may be overruled by a court. In one case[27] a probate court ordered the sterilization of a mentally-retarded teenager who had already had one illegitimate child. Although Ohio does not have a statute expressly authorizing involuntary sterilization, as do twenty-six other states,[28] the court acted under its general equity power and its statutory power to supervise and care for mentally retarded children. The other case held that the court could order necessary medical treatment for a child although the parents were opposed for religious reasons.[29]

The lower courts have continued to work out the division of responsibility in child custody cases between the divorce court and the juvenile court. Thus it was held that the juvenile court, not the divorce court, has jurisdiction over a stepchild whose parents are before the divorce court.[30] And, where the juvenile court's jurisdiction has been invoked to determine custody, it will not be ousted by a subsequent divorce action in the common pleas court[31] or by a habeas corpus action in the common pleas court.[32]

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25. Lenzer v. Lenzer, 115 Ohio App. 442, 183 N.E.2d 144 (1962). An Ohio court reached this conclusion for the first time in Elkind v. Harding, 104 Ohio App. 322, 143 N.E.2d 752 (1951), discussed in Ross, *Survey of Ohio Law — Domestic Relations,* 9 W. RES. L. REV. 321 (1958).

26. Lenzer v. Lenzer, *supra* note 25.

27. *In re* Simpson, 180 N.E.2d 206 (Ohio P. Ct. 1962).

28. For a recent survey of sterilization procedures on a national basis, see LINDMAN & MCINTYRE, THE MENTALLY DISABLED AND THE LAW 183-97 (1961).

29. *In re* Clark, 185 N.E.2d 128 (Ohio C.P. 1962).

30. Hartshorne v. Hartshorne, 185 N.E.2d 329 (Ohio Ct. App. 1959).

31. *In re* Small, 114 Ohio App. 248, 181 N.E.2d 503 (1960).

32. *In re* Ruth, 176 N.E.2d 187 (Ohio C.P. 1961).

MODIFICATION, TERMINATION, AND ENFORCEMENT OF DOMESTIC RELATIONS DECREES

In two cases reported during the survey period, it was contended that a divorce decree should be vacated for fraud.[33] Although it is now clear that an Ohio divorce can be vacated, even after term, both cases held that the decree would not be vacated: in one case because the moving party in the action to vacate was aware of the alleged fraud at the time of the divorce and did not object then,[34] and in the other case because the moving party failed to comply with section 2325.02 of the Ohio Revised Code.[35] That section applies to fraud as to service, imposes a five-year statute of limitations, and requires the moving party to file an answer to the original action.

It is clear that an award of continuing alimony is subject to modification for changed circumstances[36] and that an award of a lump sum is not, in the absence of a clause in the decree reserving jurisdiction to modify.[37] It would seem, therefore, that when a court awards a lump sum, its jurisdiction is at an end and enforcement should be by execution rather than contempt. However, in *Peters v. Peters*[38] the Court of Appeals for Butler County held that contempt was a proper remedy to enforce payment of a lump-sum alimony award, payable in installments. The court added, in effect, that it would have held the same way even if the lump sum were not payable in separate installments,[39] on the grounds that contempt is a swifter and surer method of enforcement than execution, and that the public interest requires that alimony be preferred, as to enforcement measures, over other debts.

ILLEGITIMACY

As in past years, 1962 brought reports of cases involving the burden of proof in paternity actions,[40] the presumption of legitimacy which attaches when a child is born to a married woman,[41] and one case which held that an illegitimate child does not qualify as a "child" under a life insurance beneficiary designation.[42] The only case which represents a

33. McGill v. McGill, 179 N.E.2d 523 (Ohio Ct. App. 1962); Dreitzler v. Dreitzler, 115 Ohio App. 231, 184 N.E.2d 679 (1961).

34. Dreitzler v. Dreitzler, *supra* note 33.

35. McGill v. McGill, 179 N.E.2d 523 (Ohio Ct. App. 1962).

36. Braund v. Braund, 183 N.E.2d 641 (Ohio Ct. App. 1962); Clelland v. Clelland, 110 Ohio App. 546, 166 N.E.2d 428 (1959).

37. Aultman v. Aultman, 167 N.E.2d 377 (Ohio Ct. App. 1960).

38. 115 Ohio App. 443, 183 N.E.2d 431 (1962).

39. *Id.* at 447-48, 183 N.E.2d at 434.

40. State *ex rel.* Allen v. Wagoner, 182 N.E.2d 328 (Ohio Ct. App. 1961).

41. State *ex rel.* Satterfield v. Sullivan, 115 Ohio App. 347, 185 N.E.2d 47 (1962).

42. Aetna Life Ins. Co. v. McMillan, 171 F. Supp. 111 (N.D. Ohio 1958).