Case Western Reserve Law Review

Volume 11 | Issue 3 Article 13

1960

Domestic Relations

Hugh Alan Ross

The majority failed to consider whether, under the murder-felony rule, one charged with a murder committed by a co-conspirator can exculpate himself by proving that he was under duress at the time of the commission of the felony.[41] Further, it is not possible to determine from the court's opinion whether its decision would have been the same had Milam not been under duress, *i.e.*, was the basis of the court's decision that Milam was under duress, or that the robbery and/or the conspiracy had terminated prior to the killing of Lentz?

These two cases, both difficult to resolve, sharply contrast differing concepts of the scope of review. No value judgment can be made as to the verity of either approach; nor is it possible to appraise the societal benefit of the result — namely, the punishment of the questionable sodomist and the vindication of the errant bumpkin. Only this can be concluded: The Aristotelian maxim, 'A government of laws is preferable to that of men,' if amended to conform to reality would read, 'Government is the rule of men within the framework of the laws.'

SHELDON L. GREENE

DOMESTIC RELATIONS

INTERSTATE DIVORCE

A substantial number of courts have held that laches and estoppel are important factors when foreign *ex parte* divorces are attacked on jurisdictional grounds. In *Davis v. Davis*,[1] the court upheld a Mexican divorce based upon the personal appearance of the plaintiff-husband, plus two weeks residence in Mexico. The Ohio court pointed out that the Mexican finding of jurisdiction over subject matter was entitled to a strong presumption of validity; the court also emphasized that the wife knew of the Mexican decree, but waited nineteen months before bringing suit to attack it.[2]

DIVORCE

Procedure in Divorce Cases

Both cases in this area involved the interrelationship between the law of divorce and the law of minority. In *Johnson v. Johnson*,[3] the court held that a minor wife can establish a domicil for divorce purposes different from that of her husband, and implied that she can establish a domicil different from that of her parents. The other case held that where a husband cross-petitions for a divorce against his minor wife, the wife must be represented by a guardian *ad litem*.[4]

41. See State v. Moretti, 66 Wash. 537, 120 Pac. 102 (1912), which held that participation in a robbery under duress was not a defense in a prosecution for murder.

Alimony

In *Goetzel v. Goetzel,*[5] the supreme court pointed out that since the statutory amendment of 1953 which granted equity powers to the divorce courts,[6] the court has authority to order the transfer of real property in an alimony only action. In this case the wife petitioned for alimony and asked the court to compel performance of an agreement by the husband to convey certain real estate to her. The divorce court granted alimony but did not mention the realty in its decree. The supreme court held that the decree was an implied denial of the request for conveyance, and res judicata barred a subsequent action in equity for specific performance of the contract.

Child Support and Custody

The courts of appeals have been in disagreement over the power of a divorce court to handle issues of child support and custody where the court has denied the petition for divorce or alimony. Three courts of appeals[7] have held that the court had no such jurisdiction, either to handle the child by its own order, or to certify the question to the juvenile court. Two courts of appeals[8] have held that there was jurisdiction and that the divorce court must make some disposition of the child. The conflict has finally been settled in *Haynie v. Haynie,*[9] where the supreme court held that the divorce court could not certify the case to the juvenile court. The decision also implies that the divorce court has no authority to settle the issue by its own decree.

In *Bastian v. Bastian,*[10] the trial court found that the father was best suited to have custody of the child, but gave custody to the mother because the separation agreement, incorporated in the divorce decree, so provided. The court of appeals reversed, pointing out that the provisions of an agreement relative to alimony are binding

1. 156 N.E.2d 494 (Ohio C.P. 1959). See also discussion in *Conflict of Laws* section, p. 354 *supra.*

2. Laches not a factor: Bobala v. Bobala, 68 Ohio App. 63, 33 N.E.2d 845 (1940); Smerda v. Smerda, 74 N.E.2d 751 (Ohio C.P. 1947). Laches a factor: *In re* Sayle's Estate, 80 N.E.2d 221 (Ohio P. Ct. 1947), *aff'd,* 80 N.E.2d 229 (Ohio Ct. App. 1948).

3. 159 N.E.2d 820 (Ohio C.P. 1959). See also discussion in *Conflict of Laws* section, p. 354 *supra.*

4. Evans v. Evans, 161 N.E.2d 401 (Ohio Ct. App. 1959). See also discussion in *Civil Procedure* section, p. 348 *supra.*

5. 169 Ohio St. 350, 159 N.E.2d 751 (1959).

6. OHIO REV. CODE § 3105.20.

7. Lewis v. Lewis, 144 N.E.2d 887 (Ohio Ct. App. 1956); Ainsworth v. Ainsworth, 21 Ohio L. Abs. 590 (Ct. App. 1936); Gatton v. Gatton, 41 Ohio App. 397, 179 N.E. 745 (1931).

8. Muntzinger v. Muntzinger, 89 Ohio App. 281, 101 N.E.2d 227 (1950); South v. South, 5 Ohio L. Abs. 594 (Ct. App. 1927).

9. 169 Ohio St. 467, 159 N.E.2d 765 (1959).

10. 160 N.E.2d 133 (Ohio Ct. App. 1959).

on the court, but that the welfare of the child is the governing factor in a custody decision, and this issue cannot be controlled by agreement of the parties.

In *Noble v. Noble*,[11] a case of first impression in Ohio, a common pleas court held that it had jurisdiction to determine child custody incident to an *ex parte* Ohio divorce, where the mother and child were residents of Ohio and the father was a non-resident over whom the court had no personal jurisdiction. The court conceded that the decree would not be entitled to full faith and credit in other states,[12] but concluded, and in the writer's opinion correctly so, that the status of the parties should be settled insofar as Ohio is concerned, and that the decree might be entitled to recognition elsewhere on the principle of comity.[13]

The converse of the *Noble* case is the *ex parte* Ohio divorce where the defendant and the child, being outside the jurisdiction, make no personal appearance; the court awards custody to the non-resident defendant and orders the Ohio plaintiff to pay for the child's support. This procedure was upheld in *Handelsman v. Handelsman*[14] by the court of appeals.

Modification and Enforcement — Alimony, Support and Custody Decrees

The Ohio Supreme Court has held that where a continuing alimony decree is based upon a separation agreement, and neither the agreement nor the decree reserves jurisdiction to modify, alimony cannot be modified or terminated by a decree based upon changed circumstances.[15] In *Hunt v. Hunt*,[16] the supreme court established an exception to the rule, holding that alimony could be terminated by the court on proof that the wife had remarried. The court treated the remarriage as an election by the wife to look to her new husband for support. In this case the court terminated the alimony obligation of the husband as of the date of the termination decree, although other jurisdictions have made the termination order retroactive to the date of the remarriage.[17]

The supreme court also held that the statute of limitations did

11. 160 N.E.2d 426 (Ohio C.P. 1959). See also discussion in *Conflict of Laws* section, p. 355 *supra.*

12. May v. Anderson, 345 U.S. 528 (1953).

13. See Mr. Justice Frankfurter's concurring opinion in *May v. Anderson, supra* note 12, at 535.

14. 108 Ohio App. 30, 160 N.E.2d 543 (1958).

15. Mozden v. Mozden, 162 Ohio St. 169, 122 N.E.2d 295 (1954); Newman v. Newman, 161 Ohio St. 247, 118 N.E.2d 649 (1954).

16. 169 Ohio St. 276, 159 N.E.2d 430 (1959). See also discussion in *Equity* section, p. 378 *infra.*

17. See Annot., 6 A.L.R.2d 1306 (1949).

not apply to the enforcement of child-support payments, and laches did not bar enforcement fourteen years after the last installment became due.[18]

MARRIAGE

Marriage between first cousins is prohibited by an Ohio statute,[19] and there are conflicting decisions as to whether such a marriage is void or voidable. In *Mazzolini v. Mazzolini*,[20] the supreme court decided that the marriage was voidable. In this case the marriage was between Ohio residents, but it took place in Massachusetts, which does not prohibit first-cousin marriages. The Ohio court followed the orthodox conflicts rule: look to the law of the state of marriage, *including its conflicts law*.[21] Massachusetts (by statute) follows the minority conflicts rule that a marriage within the state is void if it is void in the state of residence of the parties, but is valid if the marriage would have been voidable in the state of residence. This Massachusetts rule referred the Ohio court back to Ohio substantive law, and the court then determined the effect of such a marriage in Ohio. The court did not pass on the issue, but presumably a marriage which is voidable for choice-of-law purposes is voidable rather than void for other purposes, *i.e.*, collateral attack would not be allowed, laches or unclean hands would bar annulment, and so forth.

A condition in a will or deed which tends to encourage the termination of a marriage is generally held to be void as against public policy, although a condition which provides financial support for a party who might suffer economically from the termination is valid. This distinction was made in *Fineman v. Central National Bank of Cleveland*,[22] where the testator established a trust to pay the income to his son for the duration of the trust, with a contingent remainder interest in the corpus to the son upon termination of the trust. The termination clause provided for termination upon the dissolution of the son's present marriage, either by death *or divorce*. The court held that the termination clause was a monetary inducement to divorce, and struck out the divorce phrase, leaving the son as beneficiary until the death of his wife.

GUARDIANSHIP

In a 1957 decision, the Ohio Supreme Court held that where a child was physically present in the state, the Ohio court could rede-

18. Smith v. Smith, 168 Ohio St. 447, 156 N.E.2d 113 (1959). See also discussion in *Equity* section, p. 378 *infra*.

19. OHIO REV. CODE § 3101.01. See OHIO REV. CODE § 2905.07, criminal statute on incest.

20. 168 Ohio St. 357, 155 N.E.2d 206 (1958).

21. GOODRICH, CONFLICT OF LAWS 357 (3d ed. 1949).

22. 161 N.E.2d 557 (Ohio P. Ct. 1959). See also discussion in *Wills and Decedents' Estates* section, p. 451 *infra*.

termine the issue of custody, and was not bound by a California divorce decree which attempted to settle the issue.[23] The court's rationale was that the policy basis of a custody determination, "what is for the best interest of the child," outweighs the interest of certainty and finality of litigation, which is the basis of the full faith and credit clause. In *Fore v. Toth*,[24] the supreme court extended the same rule to the guardianship of a minor child. In the *Fore* case, both parents were dead and the child resided with an aunt in Ohio. The child's domicile, as determined by the common-law rules, was in Louisiana, which was the domicile of the deceased parents and the grandparents. The probate court in Louisiana appointed the grandmother guardian of the person and estate, and the probate court in Ohio appointed the aunt guardian of the person and estate. The grandmother came to Ohio and asked for custody in a habeas corpus action, demanding recognition of her guardianship decree under the full faith and credit clause. The supreme court denied the grandmother's claim, pointing out that the primary interest was the welfare of the child, that this was as true in guardianship cases as it was in divorce cases, and that Ohio has just as much interest in the welfare of its residents as Louisiana has in persons domiciled within its jurisdiction.

Whether the decision would be upheld by the United States Supreme Court is not certain. In the cases in which child custody was an incident of the divorce decree, the United States Supreme Court has not yet decided whether the state of residence can pass on custody where no changes in circumstances have occurred since the issuance of the foreign decree.[25]

ILLEGITIMACY

There were three interesting cases in this area. In a criminal nonsupport case, the defendant was permitted to contest paternity, even though he had already been adjudicated the father in a paternity action.[26] The court did not give the reason for the decision, other than to cite an ambiguous statute.[27] The reason that res judicata does not apply is that the standard of proof in the latter case (criminal) is higher than it is in the paternity case (civil). In the second case of interest, the Ohio Supreme Court pointed out that a paternity action is essentially civil in nature, and that liberal amendment of the pleadings should be allowed.[28] In the third case, a court of appeals was

23. Cunningham v. Cunningham, 166 Ohio St. 203, 141 N.E.2d 172 (1957), Ross, *Domestic Relations, Survey of Ohio Law — 1957*, 9 WEST. RES. L. REV. 315 (1958).

24. 168 Ohio St. 363, 155 N.E.2d 194 (1958).

25. Kovacs v. Brewer, 356 U.S. 604 (1958), Ross, *Domestic Relations, Survey of Ohio Law — 1958*, 10 WEST. RES. L. REV. 394 (1959).

26. State v. Lockwood, 160 N.E.2d 131 (Ohio Ct. App. 1959).

27. OHIO REV. CODE § 3111.17.

28. Taylor v. Scott, 168 Ohio St. 391, 155 N.E.2d 884 (1959). See also discussion in *Civil Procedure* section, p. 347 *supra*.