Kentucky Law Journal

Volume 43 | Issue 2 Article 12

1954

Domestic Relations--Bed and Board Divorce in Kentucky

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DOMESTIC RELATIONS—BED AND BOARD DIVORCE IN KENTUCKY—The opinion in the recent case of *Coleman* v. *Coleman*[1] may shed some light on the present attitude of the Court of Appeals of Kentucky concerning the advisability of a bed and board divorce instead of an absolute divorce. The plaintiff husband filed suit for divorce alleging the statutory ground of cruel and inhuman treatment. The defendant wife by counter-claim asked for divorce and alimony. The chancellor declined to grant an absolute divorce to either party because proof of any statutory ground was insufficient. He did grant a divorce from bed and board and awarded the wife alimony in the amount of $350.00 per month.

The plaintiff was a wealthy fifty-eight year old physician and the wife was forty-nine years of age. Each had been married once before. The conflicting testimony given by both parties showed, if nothing else, the utter hopelessness of reconciliation. There was ample evidence that plaintiff was a man of placid manner and that defendant was of a more mercurial temperament. There was no evidence, however, that he was without fault. On cross-appeal the plaintiff contended that the chancellor should have granted him an absolute divorce. The wife insisted that the amount of alimony should be increased. The Court of Appeals reversed with directions to the chancellor to grant an absolute divorce to the husband and to make a suitable award of alimony to the wife.

The appellate opinion stated that the chancellor had based his conclusion that the husband was not entitled to an absolute divorce on the line of Kentucky cases of which *Purcell* v. *Purcell*[2] is typical. In that case it was said that unless there is evidence of physical violence, it is only persistent, studied and habitual conduct which will be treated as "cruel and inhuman treatment" as those words are used in the divorce statute.[3] Justice Combs pointed out that this was not a correct interpretation of the full meaning of the statute. He said that the last part of subsection (d) of the statute is in the alternative. That is, the cruel and inhuman treatment may be either such as to indicate a settled aversion to him or to destroy permanently his peace or happiness.[4] It was the latter that was found by the appellate court in the instant case. The court was undoubtedly sound in its decision.

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[1] 269 S.W. 2d 730 (1954).
[2] 197 Ky. 627, 247 S.W. 760 (1923).
[3] KY. REV. STAT. sec. 403.020(4) provides in part
"(4) A divorce may be granted to the husband for the following causes:
(d) Habitually behaving toward him, for not less than six months, in such cruel and inhuman manner as to indicate a settled aversion to him *or* to destroy permanently his peace *or* happiness; . . ." (Emphasis supplied by writer.)
[4] *Supra* note 1.

It is to be noted that the opinion emphasized the fact that, although the statutory requirement for a divorce based on cruelty to the wife is that she be without like fault, there is no such limitation upon the right of a husband who seeks a divorce on the ground of cruel and inhuman treatment. The fact that the plaintiff here may or may not have been guilty of the same misconduct should have had no bearing on the chancellor's decision.

Under Kentucky's legal separation statute[5] a divorce from bed and board may be granted for any cause sufficient for an absolute divorce, or for any other cause that the court in its discretion considers sufficient. In the exercise of that discretion in this case, the chancellor must have had reasonably sufficient grounds to believe that the marriage could not be happy. He did what he thought was best under the circumstances. His conclusion on the facts of the case was right but his remedy was wrong.

A judicial separation or limited divorce is commonly called a bed and board divorce in Kentucky. It does not dissolve the marriage bond nor effect the property rights of the parties. In most instances maintenance is provided but this depends upon the individual case.

The practice of resorting to the bed and board divorce as a cure-all for an unhappy marriage has been long standing in the Kentucky divorce courts, with affirmance by the appellate court.[6] There is a possibility that many bed and board divorces were granted because of the misinterpretation of the absolute divorce statute as evidenced in the present case.

A bed and board divorce should be limited to the exceptional case where it is the best possible solution.[7] It might be that a judicial separation would be best if there were religious beliefs of one or both of the parties that a dissolvement of the marriage would be an offense against God.

A limited divorce does not dissolve the marriage tie. It is a mere legal separation. It does not grant either party the right to marry again. It is no defense to a civil or criminal charge of adultery, either between the parties themselves or with any other person. If children are born they may be considered illegitimate. Mr. Justice Swift has stated:

> It places them [the parties] in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more

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[5] KY. REV. STAT. sec. 403.050.

[6] Nall v. Nall, 287 Ky. 355, 153 S.W. 2d 909 (1941); Ball v. Ball, 217 Ky. 337, 289 S.W. 259 (1926); Cecil v. Cecil, 200 Ky. 453, 255 S.W. 64 (1923); Phillips v. Phillips, 173 Ky. 608, 191 S.W. 482 (1917); Zumbiel v. Zumbiel, 113 Ky. 841, 69 S.W. 708 (1902); Evans v. Evans, 93 Ky. 510, 20 S.W. 605 (1892).

[7] *Supra* note 1.

> frigidity, or more virtue than generally falls to the share of human beings.[8]

Mr. Bishop says:

> It is destitute of justice and one of the most corrupting devices ever imposed by serious natures on blindness and credulity. It was tolerated only because men believed as a part of their religion that dissolution would be an offense against God, whence the slope was easy towards any compromise with good sense, and as the fruits of compromise we have this ill-begotten monster.[9]

A typical statement of justification for the granting of a limited divorce rather than an absolute divorce was stated by the court in *Nall* v. *Nall:*

> We have reached the conclusion, however, that the record before us clearly indicates that appellant and appellee have become so estranged as to render it impossible, or at least highly improbable, that a reconciliation may be affected, or that they could hereafter live together in peace and happiness.[10]

In *Ball* v. *Ball* the Court said:

> We have concluded that they doubtless can not live together as husband and wife in the peace and happiness that should attend such a union.[11]

It is to be noted that in both cases the court had reached a definite conclusion that there was nothing left to the marriage. No peace nor happiness could attend it. There was no chance for a reconciliation. Why, then, should the marriage not be absolutely dissolved? It is this writer's contention that people should not be thrown back upon society shackled with a marriage bond which prevents them from having normal relations with society. By law both parties are now bound to celibacy. Should the law erect a barrier such as this? Both parties are prevented from obtaining that share of happiness which one or both might find with someone else.

There is no feasible argument that the rights of both cannot be protected by an absolute divorce. The opinion in the present case points out that a limited divorce may give an innocent wife protection from a cruel or drunken husband, but that the same result could be obtained by divorce, alimony, and a restraining order and injunction.[12]

Divorce could and should be the beginning of a new life for each party. A limited divorce leaves them dead to each other and a menace to society.

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[8] KEEZER, MARRIAGE AND DIVORCE 306 (Morland's 3rd ed., 1946).
[9] *Ibid.*
[10] *Supra* note 6, at 363, 153 S.W. 2d at 914.
[11] *Supra* note 6, at 338, 289 S.W. at 259.
[12] *Supra* note 1.