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Divorce: "Living Apart" Under the Same Roof?--Hawkins v. Hawkins

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DIVORCE: "LIVING APART" UNDER THE SAME ROOF?—HAWKINS v. HAWKINS

In *Hawkins* v. *Hawkins*[1] the Court of Appeals for the District of Columbia decided that a husband and wife, who had no marital relations or social life together for twenty years were entitled to a divorce under the statute making *"voluntary separation from bed and board for five consecutive years without cohabitation"*[2] a ground for absolute divorce, even though the parties had lived in the same house for the entire period. Although they did eat together, they neither spoke to each other nor occupied the same bedroom. The court pointed out that living under the same roof was not the essential element of cohabitation and that eating together at the same table sometimes does not connote "sharing a board". They construed the statute "to permit termination in law of certain marriages which have ceased to exist in fact".[3]

The view expressed in this decision does not correspond with the law in Kentucky, which has a similar statute providing that a divorce may be granted to either party where the spouses have lived apart without any cohabitation for five consecutive years next before applica-

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[1] 191 F. 2d 344 (App. D.C. 1951).

[2] D. C. CODE sec. 16-403 (1940).

[3] *Supra*, note 1 at 345. The *Hawkins* case is in accord generally with previous D.C. law. In *Boyce* v. *Boyce*, 153 F. 2d 229 (C.A.D.C. 1946), practically the same situation existed as was presented in the *Hawkins* case. Here the court decided that the District of Columbia statute, D.C. CODE sec. 16-403 (1940), entitled the wife to a divorce when the couple after separation continued to occupy separate rooms under the same roof but had no marital relations and ate at the same table though at different times. The court stated "Nor is the fact that the same roof sheltered both parties a condonation. The essential thing is not separate roofs, but separate lives. . . . These parties have been separated as effectively as though they were living in different homes." 153 F. 2d 229, 230 (C.A.D.C. 1946). The court has expressed the opinion in *Hurd* v. *Hurd*, 179 F. 2d 68 (1949), that the fact that the parties continuing to reside together in the same dwelling is merely evidentiary on the question whether they are living together as husband and wife. However, continued occupancy of the same dwelling may be evidence of harmonious relations or of compelling necessity on the part of one or both of the parties. As evidenced by earlier decisions, the Court of Appeals for the District of Columbia in interpreting the statute in question states clearly that there is no dispute as to the parties living separate and apart, without cohabitation, in all such similar cases, but the main question is whether the separation was voluntary. Buford v. Buford, U.S. 156 F. 2d 567 (C.A.D.C. 1946); Martin v. Martin, 160 F. 2d 20 (C.A.D.C. 1947); Helfgott v. Helfgott, 179 F. 2d 39 (C.A.D.C. 1949). In another case, *Butler* v. *Butler*, 154 F. 2d 203 (C.A.D.C. 1946), the court went so far as to say that it was not necessary even to discuss the definition of the word "cohabitation" as it appears in the District of Columbia statute. Therefore the Court in the *Hawkins* case seems justified under its precedents in not considering the requirements of separation from bed and board to mean separation from bed and board under the same roof.

tion.[4] In *Ratliff* v. *Ratliff*[5] the husband sued his wife for divorce on the ground that they lived separate and apart without cohabitation for five consecutive years. Testimony tended to indicate that for some eight or ten years prior to this action the couple were not on good terms in that they did not eat together and seldom spoke to each other. The husband testified that they did not room together and did not cohabit for more than five years before instituting this suit. The chancellor gave the husband an absolute divorce. The Court of Appeals in reversing the alimony award by the chancellor stated that the Court had "several times written that where a couple live together in the same house and hold themselves out as husband and wife, the fact that they did not indulge in sexual relations for five years would not entitle them to a divorce under KRS 403.020."[6] It seems that the main basis for not allowing the divorce in the Kentucky cases is the fact that the parties still live together in the same house, and the facts that they have no sexual intercourse during the statutory period and that they do not eat together or sleep in the same room are not determinative.[7] However, the District of Columbia Court comes to the opposite conclusion in the *Hawkins* case, holding that living in the same house is not the essential factor, and even implies that occasionally eating together would have no effect upon the granting of the divorce.[8]

The majority of jurisdictions with similar legislation have held that such statutes absolutely require that the parties live apart under separate roofs. Living in the same dwelling precludes divorce however strained the relationship.[9] In *Quinn* v. *Brown*,[10] "living apart" was interpreted by the Louisiana court to mean living apart so that the neighborhood may see that the parties are not living together. The Rhode Island court was faced with an even more difficult problem. There the husband and wife lived in separate apartments in the same building. Seemingly the Rhode Island court came to the conclusion

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[4] KY. REV. STAT. 403.020, sec. (1), subsec. (b) (1948).

[5] 312 Ky. 450, 227 S.W. 2d 989 (1950).

[6] *Id.* at 453, S.W. at 991. *See* Colvin v. Colvin, 300 Ky. 781, 190 S.W. 2d 473 (1945); McDaniel v. McDaniel, 292 Ky. 56, 165 S.W. 2d 966 (1942); Gates v. Gates, 192 Ky. 253, 232 S.W. 378 (1921).

[7] McDaniel v. McDaniel, 292 Ky. 56, 165 S.W. 2d 966 (1942). *See* 17 AM. JUR. 232 (1938).

[8] The law is very clear in Kentucky that a divorce will be granted for living apart without any cohabitation for five consecutive years no matter which party is at fault. Ward v. Ward, 213 Ky. 606, 281 S.W. 801 (1926); Parker v. Parker, 31 Ky. Law Rep. 1228, 104 S.W. 1028 (1907); Clark v. Clark, 21 Ky. Law Rep. 955, 53 S.W. 644 (1899); Logan v. Logan, 7 Ky. Opin. 89 (1873).

[9] See the extensive annotations in 51 A.L.R. 768 (1927); 111 A.L.R. 871 (1937); 166 A.L.R. 508 (1947).

[10] 159 La. 570, 105 So. 624 (1925).

that the main distinction was between failure of the parties to maintain marital relations and failure to live separate and apart from each other thereby evidencing that the separate roof argument is not infallible. The court cast aside as of little importance the fact that the husband owned the building in which both parties lived and gave a divorce to the wife.[11]

The language of the Kentucky and District of Columbia statutes can be reconciled so that contrary judicial decisions seem unwarranted. The "living apart without any cohabitation" in the Kentucky statute is construed to mean that the parties are precluded from cohabiting together and also from living under the same roof. The "voluntary separation from bed and board" clause in the District of Columbia statute can reasonably be interpreted to mean that, for the parties to be separated from bed and board, they must not share a board by living together under the same roof.

It is submitted that Kentucky, even if its statute contained exactly the same wording as the District of Columbia statute, would still maintain that it should not be interpreted to allow the parties to live in the same dwelling and then insist that they had not cohabited together. Such a result would expand the statute further than could posibly have been intended, without boldly stating that the parties may remain together under the same roof and still satisfy the requirements for absolute divorce simply by discontinuing the usual marital relations and associations. Although the law in Kentucky in the past was somewhat doubtful where the parties continued to live in the same house, but sexual intercourse was refused,[12] it is now clear that the requirement of living apart without cohabitation is to be literally construed as meaning living under separate roofs without any cohabitation.[13]

If it is necessary that one or the other of the parties be granted a divorce, although they have lived together in the same dwelling but without normal relations, then there are other grounds that can be brought under the existing circumstances, such as mental cruelty, in some states for the denial of reasonable marital intercourse and constructive desertion.[14] Any of these grounds will be sufficient for divorce

[11] Stewart v. Stewart, 45 R.I. 375, 122 A. 778 (1923).

[12] *See* Evans v. Evans, 247 Ky. 1, 56 S.W. 2d 547 (1933); Gates v. Gates, 192 Ky. 253, 232 S.W. 378 (1921); Witt v. Witt, 188 Ky. 45, 220 S.W. 1065, (1920); Burton v. Burton, 184 Ky. 268, 211 S.W. 869 (1919).

[13] McDaniel v. McDaniel, 292 Ky. 56, 165 S.W. 2d 966 (1942).

[14] As to mental cruelty, see Wermeling v. Wermeling, 217 Ky. 126, 288 S.W. 1050 (1926); Purcell v. Purcell, 197 Ky. 627, 247 S.W. 760 (1923); Riggins v. Riggins, 191 Ky. 22, 228 S.W. 1030 (1921); Hooe v. Hooe, 122 Ky. 590, 92 S.W. 317 (1906). As to denial of reasonable marital intercourse, see Ritter v. Ritter,

if provided for by statute and if the spouse seeking the decree is innocent of any wrongdoing, although they may have resided together under the same roof throughout the period. The ground of mental cruelty is predicated upon a repetition of less serious acts by the guilty spouse combined with a course of marital unkindness other than physical violence, the cumulative effect of which is to make impossible the continuance of cohabitation by the spouses.[15] Denial of reasonable marital intercourse can be charged and a divorce granted though the parties at all times remained living under the same roof and in a sense cohabited together. Although by the weight of authority desertion usually means a cessation of cohabitation with an intent to abandon, if one spouse by his or her misconduct gives the other justifiable cause for leaving then this conduct amounts to a constructive desertion though the one charged therewith does not actually leave.[16]

It is urged that the better view holds with the Kentucky court and the majority of jurisdictions in not allowing an absolute divorce under this type of statute where the parties live together in the same dwelling.

JAMES F. HOGE

EVIDENCE: ADMISSIBILITY OF UNCOMMUNICATED THREATS OF A DECEASED PERSON – GRIFFIN v. UNITED STATES

It is entirely probable that in more than half the cases of prosecution for murder which have arisen in our courts, a plea of self-defense has been presented by the accused. Suppose there is some evidence of acts on the part of the deceased in this situation which might have justified the attack by the defendant? Should evidence of an uncommunicated threat by the deceased be admitted by the court, where it can be shown that the deceased did some act, even though circumstantial, which indicates that he may have been the aggressor?

This specific question confronted the United States Circuit Court of Appeals for the District of Columbia in the comparatively recent

103 Cal. App. 583, 284 Pac. 950 (1930); Nordlund v. Nordlund, 97 Wash. 475, 166 Pac. 795 (1917); Campbell v. Campbell, 149 Mich. 147, 112 N.W. 481 (1907). As to constructive desertion or abandonment, see Evans v. Evans, 247 Ky. 1, 56 S.W. 2d 547 (1933); Reynolds v. Reynolds, 224 Ky. 668, 6 S.W. 2d 1078 (1928); Axton v. Axton, 182 Ky. 286, 206 S.W. 480 (1918).

[15] MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS, 269 (1931).

[16] *Supra* note 15 at 280.