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Kentucky Law Journal

Volume 38 | Issue 1 Article 9

1949

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Recommended Citation
Larkin, John J. (1949) "Kentucky Procedure--Reviewability of Trial Court Decrees in Divorce," *Kentucky Law Journal*: Vol. 38 : Iss. 1 , Article 9.
Available at: https://uknowledge.uky.edu/klj/vol38/iss1/9

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KENTUCKY PROCEDURE—REVIEWABILITY OF TRIAL COURT DECREES IN DIVORCE

In *Damron* v. *Damron*,[1] a divorce suit was filed by the wife for an absolute divorce and custody of the couple's two infant children. On counterclaim, the court granted the absolute divorce and custody of the children to the husband. An award of alimony was made to the wife and one-half interest in the joint property. The Court of Appeals held the Pike Circuit Court had made a mistake in granting the absolute divorce to the husband, as the proper ruling should have been a divorce from bed and board, but even so, they were without power to reverse the part of the judgment granting the divorce. However, the court did have jurisdiction of the rest of the judgment and a reversal was made with directions to grant the wife an allowance for maintenance and custody of the children, with a proper amount for the support of each.

The writer intends in this note to make a short examination of the uniqueness of the Kentucky divorce procedure, to point out unusual limitations existing in the procedure of three other states, to give a brief resume of the general method of procedure and to suggest a method to remedy the evils existing in the present divorce procedure in Kentucky

The *Damron* case typifies the usual problems raised on appeal in the majority of divorce suits in Kentucky. It is especially noticeable that even though the chancellor[2] has erred in granting the divorce, that the Court of Appeals is without jurisdiction to reverse the decree.[3] This has included cases where the judgment awarding the divorce was not warranted by the evidence,[4] fraud practiced in procedural matters not sufficient to divest the court of jurisdiction,[5] insufficiency of the petition,[6] or impropriety of the manner of taking proof.[7] Apparently, the only situations where the decree granting the divorce can be reviewed are those where the court lacks jurisdiction.[8] Yet, even in this instance, the decree will not be reversed where the marital status has been changed by remarriage.[9]

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[1] 301 Ky 649, 192 S.W 2d 473 (1945).

[2] "A jury shall not be impaneled in any action for divorce, alimony or maintenance, but courts having general equity jurisdiction may grant a divorce for any of the causes enumerated in KRS 403.020. A judgment of divorce authorizes either party to marry again." Ky. R. S. sec. 403.010 (1948).

[3] Distler v. Distler, 301 Ky 331, 191 S.W 2d 226 (1945).

[4] Ratliff v. Ratliff, 307 Ky 282, 210 S.W 2d 969 (1948), Baker v. Baker, 302 Ky. 396, 194 S.W 2d 825 (1946).

[5] Winfrey v Winfrey, 286 Ky 245, 150 S.W 2d 689 (1941).

[6] Bushong v Bushong, 272 Ky. 474, 114 S.W 2d 735 (1938).

[7] *Ibid.*

[8] *See* Maher v. Maher, 295 Ky. 263, 174 S.W 2d 289 (1943)

[9] Moran v Moran, 281 Ky 739, 137 S.W 2d 418 (1940).

The right to review the decree granting the divorce is expressly denied by statute.[10] When this statute was first enacted by the general assembly in 1816,[11] its primary purpose was to prevent an injustice to the party remarrying and to the children.[12] In *Thornberry v.Thornberry*,[13] the court for the first time defined the limitations imposed upon the Court of Appeals by this statute in reviewing divorce litigation. In this case, both the divorce and the division of the estate were granted in favor of the wife. The husband brought writ of error for a revision of the part of the decree dividing the estate. The court in interpreting the statute stated:

> "It is true, the divorce and division of estate may be written in one decree; but it is equally true, that the subjects are different and may or may not be so blended, and each requires a different adjudication from the court below; and, therefore, we conceive that only so much as directs a divorce, is taken from this court on a writ of error."[14]

The Court of Appeals has applied this basic principle in determining that the following matters relating to divorce were not within the scope of the statute: alimony,[15] property rights,[16] restoring to the wife her maiden name,[17] attorney's fees,[18] and the awarding of the custody of the children.[19] Thus, it can be seen that there will be few, if any, divorce cases in which the parties do not have a limited right of appeal. With this power to reverse the decree in other respects, it is arguable that the appellate court can indirectly accomplish the same result although without power to reverse the divorce decree. In *Lester* v. *Lester*,[20] the court held that the wife should not complain because the divorce was granted to the husband, even though the evidence warranted a divorce in her favor, since the judgment had the effect of freeing her from the duties of the marriage. However, this assumption by the court is not always correct. In a small community the self respect of the wife, as well as the respect of the community, is dependent upon the wife's being granted the divorce, notwithstanding the fact that a fair and just settlement in other respects was ordered on appeal.

Further investigation discloses that in many instances, the procedural statute preventing appeal defeats the purpose of the substantive statute which sets forth the grounds sufficient for granting

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[10] KY. R.S. sec. 21.060 (1) (b) (1948)
[11] 1 DIGEST OF THE STAT. LAWS OF KY. 136 (Morehead and Brown, 1834).
[12] *See* Thornberry v Thornberry, 14 Ky. (4 Litt.) 251,252 (1823).
[13] *Ibid.*
[14] *Ibid.*
[15] Smith v. Smith, 297 Ky. 395, 180 S.W 2d 275 (1944).
[16] Pleasnick v. Pleasnick, 215 Ky. 281, 284 S.W 1070 (1926).
[17] Rayburn v. Rayburn, 300 Ky. 209, 187 S.W 2d 804 (1945).
[18] Clay v. Clay, 301 Ky 209, 191 S.W 2d 819 (1946).
[19] *Ibid.*
[20] 296 Ky. 691, 178 S.W 2d 423 (1944).

a divorce. In several cases the appellate court has acknowledged there was insufficient evidence to grant an absolute divorce, but even so, they could not reverse the decree.[21] Yet, it is a fundamental principle of domestic relations law that the state is interested as a third party in maintaining the marital status.[22] The legislature has expressly provided that no absolute divorce will be granted unless the certain prescribed statutory causes are shown.[23] Even though the granting of divorces is not viewed in the same light as it was several decades ago, nevertheless, marriage " is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[24] It is essential in many cases where doubt exists that divorce be limited or refused because of the presence of children, religious obligations, property rights and chances of reconciliation. Therefore, it is important in cases of divorce where many issues are involved that review be had.

In other jurisdictions, similar unusual procedural limitations have existed. For example, until recently, the Georgia Statutes[25] required two concurrent verdicts rendered at different terms of court, prior to the granting of an absolute divorce. Despite the necessity for two concurrent verdicts, the first verdict was deemed a final order for the purpose of appellate review.[26] The necessity for concurrent verdicts was eliminated by the following statute:

> "Total divorces in proper cases may be granted by the superior court. Unless an issuable defense is filed, or jury trial demanded in writing by either party on or before the call of the case for trial, the judge shall hear and determine all issues of law and fact in all petitions for divorce and permanent alimony, and any other issues made in the pleadings. If a verdict or judgment is rendered authorizing the grant of a total divorce or for total divorce and permanent alimony, the verdict or judgment shall not become final for a period of thirty days. At the expiration of said period of thirty days the said verdict or judgment, either or both, shall become of full force and effect, unless some person at interest shall file in said court a written petition setting forth good and sufficient grounds for the modification or setting aside of such verdict or judgment. If such a petition is filed it shall be decided by the judge, unless a jury trial of the issues raised thereby is demanded by any party"[27]

[21] Damron v. Damron, 301 Ky. 649, 192 S.W 2d 473 (1945), Distler v Distler, 301 Ky. 31, 191 S.W 2d 226 (1945).
[22] *See* Widders v Widders, 207 Ark. 596, —, 182 S.W 2d 209, 211 (1944), Hove v Hove, 219 Minn. 590, —, 18 N.W 2d 580, 582 (1945), Smith v Smith, 69 R.I. 403, —, 34 A. 2d 726, 728 (1944).
[23] KY. R. S. sec. 403.020 (1948).
[24] Maynard v Hill, 125 U.S. 190, 211 (1887).
[25] Dugas v. Dugas, 201 Ga. 190, —, 39 S.E. 2d 658, 659 (1946).
[26] *Id.* at —, 39 S.E. 2d at 660.
[27] *Id.* at —, 39 S.E. 2d at 659.

In *Dugas* v. *Dugas*,[28] the Georgia court decided the question under this statute as to whether an appeal would lie prior to the expiration of the thirty day period. The court was not unanimous in its opinion. The majority of the court felt that the effect of the filing of the petition subsequent to the verdict was substantially equivalent to another trial. Under this view, upon the filing of the petition, the statute provides practically the same procedure as that of the antecedent legislation. If this interpretation of the majority opinion is correct, then the writer believes that their holding is wrong and he agrees with that part of the dissent which contends that the primary purpose of the act was to prevent the necessity of concurrent verdicts. It would seem that if the statute is interpreted correctly, that the controlling part of the act is whether the petition sets forth good and sufficient ground to require another trial. Whether the petition has set forth sufficient grounds is within the discretion of the trial judge, and a second trial is available only if sufficient cause is shown. If the petition is not accepted for this reason, then a bill of exceptions could be taken after the expiration of thirty days, both to the denial of the petition and any other exception taken at the trial. Despite the unique trial procedure in the lower court, this method does provide an adequate remedy for appeal.

An unusual limitation also exists in the Louisiana divorce procedure. A decree from bed and board is granted in the first instance where sufficient proof is supplied to meet the statutory grounds for an absolute divorce.[29] After the expiration of one year,[30] the party in whose favor the separation from bed and board was entered may bring a second action and obtain an absolute divorce.[31] The granting of the absolute decree is founded upon a matter of right and the only evidence admissible is that there has been no reconciliation during the probation period provided by statute.[32]

In like manner, unique limitations exist in Tennessee divorce procedure. In this state the law and equity courts have concurrent

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[28] 201 Ga. 190, 39 S.E. 2d 658 (1946).

[29] LA. CIV. CODE, art. 139 (Dart, 1939).

[30] However, in cases where the party has been sentenced to an infamous punishment, or guilty of adultry, the one year limitation is not required and the absolute divorce decree is granted in the same decree which pronounces the separation from bed and board. LA. CIV. CODE, art. 139 (Dart, 1939).

[31] Failure to make application within one year and sixty days subsequent to the judgment of separation entitles the other party to a right to secure the absolute divorce. However, the obtaining of the divorce will not affect any rights granted by the first decree. August v. Blache, 200 La. 1029, 9 So. 2d 402 (1942).

[32] August v. Blache, 200 La. 1029, 9 So. 2d 402 (1942). Appeal is provided within thirty days following the granting of either a separation from bed and board or an absolute divorce. LA. GEN. STAT. sec. 2210 (Dart, 1939)

jurisdiction over divorce proceedings.[33] However, where the case is tried in a law court, the judge must try the case by equity proceedings.[34] Either party to the action has a statutory right to have the issues tried by a jury,[35] and the proceedings are conducted as other jury trials at law.[36] Thus, appeal may be taken from the denial of a motion for a new trial.[37] In those instances where the right to a jury is waived, and the proceedings are conducted as in other equity trials, the record is reviewable *de novo*.[38]

A wide variance in divorce procedure is to be expected because jurisdiction must be expressly conferred upon the courts by statute or constitutional provision.[39] Vernier classifies procedural authority in the different jurisdictions as follows: those states where the section on divorce contains specific rules of procedure for divorce actions; those states where the rules for divorce procedure are found in the general chapter on procedure; those states providing that divorce procedure, except as otherwise stated, shall be as in equity, as in other civil actions, or as in ordinary suits; and those states where the procedure must be ascertained from the type of procedure followed by the court given jurisdiction.[40]

Statutes conferring jurisdiction upon the courts in divorce proceedings may be divided into two general groups: statutes specially designating that probate,[41] county,[42] superior,[43] circuit,[44] or district court,[45] shall have jurisdiction and those statutes providing that courts of chancery,[46] or equity,[47] shall have jurisdiction to try divorce cases.[48]

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[33] TENN. CODE ANN. secs. 10325, 10379 (Williams, 1934)

[34] *Id.* sec. 10329. Hall v Jacocks, 52 Tenn. (5 Heiskell) 84 (1871).

[35] *Id.* sec. 8436.

[36] *Id.* sec. 10575.

[37] *Id.* sec. 9037. Broch v Broch, 164 Tenn. (11 Smith) 219, 47 S.W 2d 84 (1932)

[38] TENN. CODE ANN. sec. 9036 (Williams, 1934).

[39] Right to a divorce did not exist in this country as a common law right. McGowin v McGowin, 122 Fla. 394, 165 So. 274 (1936), State ex rel. Knapp v. Cowan, 230 Mo. App. 226, 88 S.W 2d 424 (1935), Reisman v Reisman, 46 N.Y.S. 2d 335 (1944).

[40] 2 VERNIER, AMERICAN FAMILY LAWS 130 (1932)

[41] 2 MASS. GEN. LAWS c. 215 sec. 3 (1932)

[42] County court has jurisdiction when the alimony asked does not exceed two thousand dollars, otherwise the district court has jurisdiction. 2 COLO. STAT. ANN. c. 56 sec. 3 (1935).

[43] 2 ARIZ. CODE sec. 27-801 (1939), 2 CONN. GEN. STAT. sec. 5174 (1930)

[44] ILL. REV. STAT. c. 40, sec. 5 (1945).

[45] 2 IDAHO CODE ANN. sec. 31-715 (1932).

[46] ARK. STAT. sec. 4381 (Pope, Supp. 1944).

[47] KY. R. S. sec. 403.010 (1948), MD. ANN. CODE art. 16, sec. 38 (Flack, 1939)

[48] Many venue statutes require that the divorce be heard in the county where the parties reside at the time of their separation, or where the defendant resides if within the state, or where the plaintiff resides. Mo. REV. STAT. sec. 1515 (1939), TENN. CODE ANN. sec. 8429 (Williams, 1934), VA. CODE ANN. sec. 5105 (1942), W VA. CODE ANN.

The divorce action is begun by the filing of a petition,[49] libel,[50] or complaint[51] setting forth the cause for seeking the divorce. The usual practice is that the defendant after answer may file a cross action[52] for a divorce, thereby permitting the settlement of the controversy in one action.

Although divorce proceedings are not purely common law or equitable proceedings,[53] the courts generally follow rules of equity and apply equitable principles.[54] Thus, divorce cases in the trial court are usually tried before a chancellor or judge without a jury[55] Upon sufficient findings, judgment is entered in favor of the party establishing sufficient grounds for a divorce.

A very common practice in granting the absolute decree is to provide either for an interlocutory decree which shall become final upon the expiration of a definite time,[56] or for a final decree to be entered by the trial court where there is a statute prohibiting remarriage until the lapse of a specified time.[57] Either of these procedures prevents remarriage until the expiration of a definite period thereby providing an adequate time during which an appeal may be taken.

Errrors in divorce cases are generally reviewable by appeal,[58] or writ of error.[59] On appeal, a presumption of correctness exists in favor of the decree as rendered[60] and the party appealing has the

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sec. 4709 (1943) In some states, compliance with the statute is not a prerequisite to give the court jurisdiction and may be waived by the parties. King v. King, 237 Mo. App. 764, 170 S.W 2d 982 (1943), McFerrin v McFerrin, 28 Tenn. App. 552, 191 S.W 2d 946 (1945) *But cf.* White v. White, 181 Va. 162, 24 S.E. 2d 448 (1943), Morgan v. Vest, 125 W Va. 367, 24 S.E. 2d 329 (1943).

[49] Allen v. Allen, 194 Ga. 591, —, 22 S.E. 2d 136, 137 (1942).

[50] PA. STAT., tit. 23, sec. 25 (Purdon, 1936)

[51] Fowler v. Fowler, 156 Fla. 316, —, 22 So. 2d 817, 818 (1945).

[52] Klumpp v Klumpp, 289 Mich. 97, 286 N.W 171 (1939)

[53] State *ex rel.* Couplin v Hostetter, 334 Mo. 770, 129 S.W 2d 1 (1939).

[54] *Id.* at —, 129 S.W 2d at 2.

[55] 2 VERNIER, *op. cit. supra* note 40, 134. In Texas, a jury is optional and if parties request a jury, its finding is only advisory and may be accepted or rejected at the discretion of the court. Scannell v. Scannell, 117 S.W 2d 538 (Tex. Civ. App. 1938).

[56] WIS. STAT. sec. 247.37 (1943), CALIF. CIV. CODE secs. 131, 132 (Deering, 1941), DEL. REV. CODE secs. 3518, 3519 (1935), 2 COLO. STAT. ANN. c. 56, sec. 13 (1935)

[57] ARIZ. CODE sec. 27-807 (1939), 2 ORE. COMP. LAWS ANN. sec. 9-916 (1940), W VA. CODE ANN. sec. 4722 (1943).

[58] ALA. CODE tit. 7, sec. 789 (1940), ARIZ. CODE ANN. sec. 27-817 (1939).

[59] 2 COLO. STAT. ANN, c. 56, sec. 16 (1935), MO. REV. STAT. sec. 1524 (1939).

[60] Stephens v. Stephens, 233 Ala. 178, 170 So. 767 (1936), Bagwell v. Bagwell, 153 Fla. 471, 14 So. 2d 841 (1943), Clardy v. Clardy, 23 Tenn. App. 608, 136 S.W 2d 526 (1940), Hurley v Hurley, 127 W Va. 744, 34 S.E. 2d 465 (1945)

burden of proving that the findings and judgment are against the clear weight of the evidence.[61] In a few jurisdictions, the entire record is reviewable *de novo*,[62] but even in these jurisdictions great weight is given to the findings of the trial judge because of his opportunity to observe the parties and to be familiar with the problems of the case.[63]

As previously noted, some change is needed in the Kentucky procedure which denies a right to review the absolute decree. It is submitted that K.R.S. 21.060 (1) (b) be repealed and replaced with a more desirable method of procedure. Such a procedure should contain a provision authorizing the granting of an appeal and the prohibiting of a remarriage until an appeal can be taken. This can be accomplished by enacting legislation modeled after the Wisconsin Statute[64] which provides for an interlocutory decree. Upon the entering of the decree, the parties are barred from cohabitation.[65] However, authority is given the court to vacate or modify the decree upon its own motion or upon application of either party. Vacation of the decree restores the parties to the former marital status. Upon the expiration of one year the decree becomes final unless an appeal is pending, and in this case the decree becomes final upon determination of the appeal unless reversed.[66] This type of procedure would provide several advantages over the present existing procedure. Foremost, a right is provided for review and in addition the delay in granting the final decree allows adequate time during which the court may discover any fraud or collusion. It further affords time for reconciliation and reduces the possibility of a hasty divorce.

In concluding, it is noted that a wide variance exists in divorce procedure in the various jurisdictions. Further, the Kentucky divorce procedure does not afford an adequate remedy to accomplish the result that is needed for the protection of the parties or for the benefit of society. It is suggested that K.R.S. 21.060 (1) (b) preventing the right of review of the absolute decree should be re-

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[61] Forrester v Forrester, 193 Okla. 59, 141 P 2d 92 (1943).

[62] Mewbern v Mewbern, 201 Ark. 741, 146 S.W 2d 708 (1941), Davis v. Davis, 228 Iowa 764, 292 N.W 804 (1940), Isham v. Isham, 311 Mich. 240, 18 N.W 2d 702 (1945), Bova v. Bova, 135 S.W 2d 384 (Mo. App. 1940), Lippincott v. Lippincott, 141 Neb. 186, 3 N.W 2d 207 (1942), Rose v. Rose, 124 Pa. Super. 437, 188 Atl. 595 (1937).

[63] Lewis v Lewis, 235 Iowa 639, 17 N.W 2d 407 (1945), Ferguson v Ferguson, 310 Mich. 630, 17 N.W 777 (1945)

[64] WIS. STAT. sec. 247.37 (1943)

[65] The parties are subject to punishment for cohabitation following the entry of the interlocutory decree. WIS. STAT. sec. 247.37 (1943).

[66] In case of death of either party during the intermediate period, the decree, unless vacated, is deemed to have severed the marital relation immediately before death. This provision provides for adequate protection of property rights. WIS. STAT. sec. 247.37 (1943).

pealed and replaced by a statutory provision providing for an interlocutory decree and a right to review the decree by the Court of Appeals.

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