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During 1963, the Tennessee Supreme and Appellate Courts faced a wide variety of problems in the domestic relations field, but handed down no decisions of outstanding significance. The legislature made several minor revisions in relevant statutes, one of which may prove to be a rather important change in this state's divorce law.

I. DIVORCE

The few divorce cases which went beyond the trial court level raised none of the more common issues such as divorce jurisdiction, grounds, or defenses. A reading of the opinions leaves the impression that the contesting parties were not interested in preventing the dissolution of their marriage. Instead, the issues were whether the divorce should be granted to the complainant or the cross-complainant, what alimony and child-support provisions should be made, and who should have custody of the children. These collateral matters will be covered in subsequent parts of this discussion.

The only case in which a party actually objected to the dissolution of the marriage was *Coleman v. Coleman*,[1] in which the wife brought an action to set aside a divorce sixteen years after the decree was entered, the husband having died in the meantime. Fraud was the ground advanced for setting aside the deeree. The wife alleged that the husband had in 1945 persuaded her to go to Wisconsin for an

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1. 369 S.W.2d 557 (Tenn. 1963).

extended visit, and while she was there he had obtained an ex parte divorce on the ground of desertion, with no notice to her except by publication in a newspaper which she never saw. While still in Wisconsin she had been given some indication that he had divorced her and when she returned to Chattanooga she found him cohabiting with another woman, the defendant in this action. This apparently did not surprise or disturb her, however, because the parties had already been separated for five years, during some of which period the "other woman" had been keeping company with the husband. The wife made some inquiries of her lawyer as to whether a divorce had been granted, but he knew nothing of it, and she pursued the matter no further. When the husband died in 1962, she learned that he had left a will naming defendant as his executrix, and bequeathing his children by complainant only one-hundred dollars each. It was apparently the latter factor which spurred complainant to take action, because she had expected the husband to carry out his promise to provide for the children.

The chancellor sustained defendant's demurrer, and the supreme court affirmed. The court noted that since the wife had been proceeded against by publication when she was in fact a resident of Tennessee and out of the state only temporarily, she could have had the decree set aside if she had brought the action within a reasonable time and proved her charges of fraud. Certainly, there is no doubt that a divorce decree may be collaterally attacked and set aside on grounds of fraud.[2] However, the court here observed that " 'nothing can call forth the Court of Chancery into activity but conscience, good faith and reasonable diligence.' "[3] Giving due regard to complainant's failure to act more promptly in ascertaining that her husband had in fact obtained a divorce and to her motivation for desiring to have the decree set aside in order that her children might get more of the husband's estate, the court concluded that she had not acted with reasonable diligence, good conscience or good faith. The decision is entirely consistent with earlier cases in which Tennessee courts have held attacks on divorce decrees to be barred by delays of considerably less than sixteen years.[4]

2. Martin v. Martin, 200 Tenn. 196, 292 S.W.2d 9 (1956); Rose v. Rose, 176 Tenn. 680, 145 S.W.2d 773 (1940); Barbra v. Barbra, 170 Tenn. 559, 98 S.W.2d 89 (1936); Hill v. Hill, 46 Tenn. App. 196, 326 S.W.2d 851 (W.S. 1958); Sturdavant v. Sturdavant, 28 Tenn. App. 273, 189 S.W.2d 410 (M.S. 1944).

3. Coleman v. Coleman, *supra* note 1, at 561.

4. Cagle v. Cagle, 190 Tenn. 360, 229 S.W.2d 514 (1950) (5 years); Hill v. Hill, *supra* note 2 (1 year); Kelley v. Kelley, 4 Higgins 597 (Tenn. Ct. Civ. App. 1914) (3 years).

II. Child Custody

A. *Change of Custody*

In two proceedings by fathers to obtain custody of minor children whom the previous divorce decrees had placed in the custody of the mothers, the most significant problem was whether the Tennessee courts had jurisdiction. In *Dearing v. Dearing*,[5] the divorce had been granted by a Florida court, which awarded custody of the children to the wife. However, though it was conceded that the Florida decree was binding in Tennessee, it was held that inasmuch as the children and mother were now domiciled here, the Tennessee courts had the power to order a change in custody if necessary for the welfare of the children. In *Talley v. Talley*,[6] on the other hand, the divorce and custody decree had been entered by a Tennessee court, and the mother had subsequently taken the child to Ohio and established domicile there. In spite of the fact that the child was no longer a resident of this state, it was held that the Tennessee court retained the power to order that the child be turned over to the custody of the father, who continued to be a resident of Tennessee. The two cases together pose a potentially delicate situation in that both the court of the state granting the divorce and originally awarding custody, and the court of the state to which the children were later moved might assert their authority to control the future custody of the children, and might make inconsistent awards. The *Talley* case is discussed further in *Conflict of Laws* section of this *Survey*.[7]

Once the jurisdiction of the court had been established, the only question remaining in the *Dearing* case was whether sufficient change of circumstances had occurred to warrant a change of custody. On this point, it was found that because the mother was neglecting the children, because the youngest child was required to live apart from the rest, and because the father had remarried and could provide a good home for all of them, the welfare of the children would be served by awarding custody to the father.

5. 362 S.W.2d 45 (Tenn. App. M.S. 1962).

6. 371 S.W.2d 152 (Tenn. App. E.S. 1961), *cert. denied*, 375 U.S. 915 (1963).

7. See Cheatham, *Conflict of Laws—1963 Tennessee Survey*, 17 Vand. L. Rev. 937, 941 (1964). See Clothier v. Clothier, 22 Tenn. App. 532, 232 S.W.2d 363 (E.S. 1950), in which, because the custody of the child was divided between mother and father, the court faced the problem of whether it had jurisdiction over the custody of the child when his domicile remained in Tennessee because that was the father's domicile, but the child's actual residence was in California where he was living with his mother. The court ultimately concluded: "While there is authority for the view that the courts of either state may have jurisdiction, we need not decide that question. . . . '*Where there is no outstanding judicial award of custody by a foreign court*, the courts are unanimous in holding that even though the children may be physically without the state, power in the court exists to make an award of custody of children domiciled within the state.'" *Id.* at 546-47, 232 S.W.2d at 370.

In the *Talley* case a collateral problem arose out of a contempt citation against the mother. After the father had obtained an order granting him custody of the child, the mother returned to Tennessee and appealed this adverse judgment. Though she first voluntarily turned the child over to the father, later, pending her appeal, she surreptitiously regained possession, and as a result of this act the trial court adjudged her to be in contempt, but withheld punishment because she again surrendered the child. Slightly over two years later she sought a writ of error to review the contempt judgment. Since the Code requires that an application to an appellate court to bring up a proceeding from the circuit court must be made within two years,[8] the father filed a motion to dismiss the petition for writ of error. In rebuttal, the mother argued that since she had been a minor until a few months before the petition was filed, she could take advantage of section 27-606, which allows infants to prosecute writs of error within two years after their disability is removed.[9] The court of appeals granted the motion to dismiss the petition for writ of error, reasoning that since the petitioner had, though still a minor, filed the divorce suit in her own name without intervention of a guardian or next friend, she must be treated as if she were an adult in regard to subsequent proceedings growing out of that suit. Inasmuch as she could, therefore, have filed the petition for review of her contempt conviction in her own right, she was not under the disability referred to in the section allowing infants to prosecute writs of error anytime within two years after reaching majority.

Though no precedent was cited for this ruling, it seems to give proper effect to a statute which has the purpose of preserving the rights of persons who are not able to act in their own behalf in bringing proceedings within the prescribed time limit. The legislative history of an analogous section of the Code, section 28-107,[10] which tolls the running of statutes of limitations as to persons under disability to sue, also supports the court's decision by implication. Section 28-107, having been enacted at a time when a married woman was generally incapable of suing in her own name, formerly included married women, along with infants and mental incompetents, within its protection. Though the common law disability to sue was removed in 1913 by the Tennessee Married Women's Act,[11] section 28-107 was not amended to delete the reference to married women until 1932.[12] This belated amendment seems to have been based on the

8. TENN. CODE ANN. § 27-605 (1956).
9. TENN. CODE ANN. § 27-606 (1956).
10. TENN. CODE ANN. § 28-107 (1956).
11. TENN. CODE ANN. § 36-601 (1956).
12. Tenn. Acts 1901 ch. 15, 31 included married women, but in TENN. CODE ANN. § 8574 (1932) the reference to married women was deleted.

premise that when a person's disability to sue in his or her own name is removed, the exemption from being required to pursue legal rights within the regular limitations period should be withdrawn.

B. *Meaning of "Exclusive Custody"*

The Tennessee Supreme Court was called on to pass on a custody problem in quite a different context in *Damron v. Damron*.[13] The mother had obtained a divorce in 1959, and the decree had approved a property settlement agreement of the parties which provided that the mother should have "exclusive care, custody and control" of the minor daughter, but the father was to have the right to visit the child "on reasonable occasions and at reasonable times and for reasonable lengths of time." In its decree, the court had stated that custody of the child was awarded to the mother "in accordance with [the] agreement"; but the court's statement of the agreement did not insert the word "exclusive" before the words "care, custody and control." The child was killed three years later, and the mother, as administratrix, obtained a recovery of damages for the wrongful death of the child. The present litigation was a declaratory judgment action to determine how the damages recovery should be distributed.

The Tennessee Wrongful Death Act provides merely that the "damages shall go to the widow and next of kin . . . to be distributed as in the case of the distribution of personal property."[14] Section 31-201[15] provides that if the deceased leaves no surviving spouse or children, the mother and father take the deceased's personal property in equal shares; but if the parents have been divorced and the custody of the child was committed "to one of the parents to the exclusion of the other," the parent having such custody takes all of the child's personal property. In the *Damron* case, the trial court held that the mother had had exclusive custody of the child, and should receive the entire wrongful death recovery. On appeal, the father apparently advanced three arguments that the mother's custody was not exclusive, but the supreme court properly overruled all of them, and affirmed the judgment. The father first contended that since the divorce court's decree did not use the word "exclusive," the custody awarded to the mother was not intended to be exclusive in character. However, the supreme court concluded that the divorce court's intention in this regard was indicated by its statement that custody would be awarded in accordance with the parties' settlement agreement, which agreement clearly provided that the mother should have exclusive custody. Further, the father argued that extensive rights conferred

13. 367 S.W.2d 476 (Tenn. 1963).
14. TENN. CODE ANN. § 20-609 (1956).
15. TENN. CODE ANN. § 31-201 (1956).

on him to visit the child indicated that the custody of the child was divided between mother and father. In answer, the court pointed to the obvious distinction between visitation rights, which merely give the parent the privilege of enjoying a limited, temporary companionship with the child, and custody, which vests the care and control of the child in the parent, gives the right to establish the child's domicile, and imposes the responsibility for the child's education, health, training and welfare.[16] The court did not consider the matter of the point at which a parent's rights in regard to the child become substantial enough to go beyond mere visitation privileges; but in view of the disfavor with which the law views divided custody of children between divorced parents,[17] a finding that the father had had any custody of the child was extremely unlikely. Finally, the father contended that since under the decree the divorce court retained the cause for such further orders as may be necessary with respect to the custody and support of the child, the custody order was not permanent, but only temporary and subject to change, and so the mother should not be held to have exclusive custody for purposes of section 31-201. But, as the court pointed out, under Tennessee law all divorce decrees which include child custody and support provisions are retained in court so that further action may be taken in the future, whether the decree expressly so provides or not,[18] and this automatic retention of authority to change the decree as needed to meet changes in circumstances does not prevent a decree from being final. Thus, the father could not invoke the ruling of *Shelton v. Shelton*,[19] in which it was held that the parent who had been awarded temporary custody of the child pending further proceedings did not have exclusive custody so as to preclude the other parent from sharing in the damages recovered in a subsequent wrongful death action.

16. See Lerner v. Superior Court, 38 Cal. 2d 676, 242 P.2d 321 (1952); McFadden v. McFadden, 206 Ore. 253, 292 P.2d 795 (1956).

17. Logan v. Logan, 26 Tenn. App. 667, 674, 176 S.W.2d 601, 603 (M.S. 1943); "It is generally very unwise to divide the custody of a child between contending parties because it is hardly possible for a child to grow up and live a normal, happy life under such circumstances." See also, Clothier v. Clothier, *supra* note 7; Rowles v. Reynolds, 29 Tenn. App. 224, 196 S.W.2d 76 (E.S. 1946).

18. TENN. CODE ANN. § 36-828 (1956); Johnson v. Johnson, 185 Tenn. 400, 206 S.W.2d 400 (1947); Davenport v. Davenport, 178 Tenn. 517, 160 S.W.2d 406 (1942); Cravens v. Cravens, 30 Tenn. App. 487, 207 S.W.2d 593 (M.S. 1947); Hicks v. Hicks, 26 Tenn. App. 641, 176 S.W.2d 371 (M.S. 1943).

19. 198 Tenn. 346, 280 S.W.2d 803 (1955). Though the court decreed temporary custody in the father only until the next term of court, since neither parent made further application for a custody order, the child stayed with the father for eight years before he was killed.

III. Alimony and Child Support

A. *Property Settlements*

The most numerous and most difficult problems which the Tennessee courts had to face in matrimonial controversies during the survey period related to mundane matters of alimony, child support, and property settlements between contesting spouses. In *Hoyt v. Hoyt*,[20] a dispute arose as to the validity of an unusual dual-purpose arrangement which started out as a reconciliation agreement but ended up as a separation agreement. After about five years of marriage the wife had brought suit for divorce, but while the action was pending the parties made a written agreement under which they would become reconciled, resume cohabitation and dismiss the divorce proceeding. Part of the terms concerned a property settlement, under which certain jointly held property was to be sold and the proceeds paid to the wife, and the wife was also to be provided with a specified monthly allowance for household expenses and support. It was stipulated that the property division was accepted by the wife in complete satisfaction of all claims arising out of the marriage, the reconciliation *and any subsequent action for divorce or separation,* and that the wife waived all rights to any present or future alimony and support, and that the agreement should constitute a property settlement in the event that either party subsequently sued for a divorce. The parties resumed cohabitation and the wife received forty-five thousand dollars as the proceeds of the property sale; but after about six or seven months the reconciliation proved to be unsuccessful, the parties separated again, and the husband filed a divorce action, and the wife filed a cross bill. In this action, the husband maintained that the prior agreement barred the wife from any right to alimony and support. The wife contended that the agreement was against public policy and therefore void.

The court's dilemma lay not so much in determining what the relevant law was as in deciding how to classify the facts to which the law was to be applied. If the parties' arrangement was to be classified as a "reconciliation agreement," it would be favored by the law as promoting the stability of marriage, and would be upheld if the provisions were fair and reasonable,[21] although a few courts have

20. 372 S.W.2d 300 (Tenn. 1963).

21. Woodruff v. Woodruff, 121 Ky. 784, 789, 90 S.W. 266, 268 (Ct. App. 1906): "The law delights in the settlement of lawsuits. It favors reconciliation of husband and wife. A contract for the re-establishment of a ruined home is one which equity is swift to approve. . . . The contract brought them together, and, taken as a whole, it is in aid of the marital relation, and is therefore not opposed to public policy, but in accord with it." See also Tyson v. Tyson, 61 Ariz. 329, 149 P.2d 674 (1944); Young v. Cockman, 182 Md. 246, 34 A.2d 428 (Ct. App. 1943); Terkelsen v. Peterson, 216 Mass. 531, 104 N.E. 351 (1914); Campbell v. Prater, 64 Wyo. 293, 191 P.2d 160 (1948).

looked with disfavor upon even bona fide reconciliation agreements as being bargains which cheapen the marriage concept and which are sources of future dissension.[22] However, if the arrangement was to be regarded as a "separation agreement," it would be invalid as against public policy, because, not having been entered into when a separation was immediately in prospect or already in effect, it would be struck down as tending to encourage separation and therefore as undermining the stability of marriage.[23]

Since the provisions of the agreement which were the subject of the controversy constituted the part which was to take effect in case a future separation should occur, it would seem that the only matter in issue was the validity of a separation agreement, and the wife's contentions would prevail. However, the court took notice of the fact that the complete agreement was made to affect a reconciliation and that the parties called it a "reconciliation agreement"; and the entire arrangement was sustained on the rationalization that its primary purpose was to bring the parties back together and restore the marriage, whereas the provisions referring to further separations were "secondary," "incidental," and should not be "controlling."[24] Had the question been whether the reconciliation features of the agreement were made unenforceable by the incorporation of incidental separation provisions as an afterthought, this reasoning would have been persuasive. But it is not entirely clear how the good parts of the arrangement, which were no longer of any effect because they had been repudiated by the parties, could cancel the invalidity of the part

22. Wiegand v. Wiegand, 410 Ill. 533, 103 N.E.2d 137 (1951); Miller v. Miller, 78 Iowa 177, 42 N.W. 641 (1889); Merrill v. Peaslee, 146 Mass. 460, 16 N.E. 271 (1888); *In re* Kesler's Estate, 143 Pa. 386, 22 Atl. 892 (1891).

23. "From a consideration, then, of the authorities we take it as established that articles or deeds of separation are permissible where the separation has already taken place or immediately follows, but that agreements looking to a future separation of husband and wife will not be sustained . . . ." Archbell v. Archbell, 158 N.C. 408, 414, 74 S.E. 327, 329 (1912); *accord*, Thornton v. Rodgers, 251 Ala. 553, 38 So. 2d 479 (1949); Beverly v. Beverly, 209 Ca. 468, 74 S.E.2d 89 (1953); Reynolds v. Owen, 328 Mass. 451, 104 N.E.2d 146 (1952); Terkelsen v. Peterson, *supra* note 21; Fisher v. Fisher, 53 N.D. 631, 207 N.W. 434 (1926); MADDEN, DOMESTIC RELATIONS § 100 (1931).

In some jurisdictions, a separation agreement is held to be invalid unless the parties have actually separated before entering into the agreement; an agreement made any time before separation is regarded as conducive to causing a separation, and is therefore against public policy. People v. Walker, 409 Ill. 413, 100 N.E.2d 621 (1951); Maynard v. Maynard, 329 Mich. 247, 45 N.W.2d 56 (1950).

24. The same result was reached in regard to a similar dual-purpose agreement, in Terkelsen v. Peterson, *supra* note 21: "Its [the agreement's] purpose was to re-establish the family and provide for its support and the support of the wife. . . . An agreement made under these circumstances is not invalid merely because it provides for support for the wife and family in the possible recurrence of conditions existing at the time it is made. . . ." *Id.* at 536, 104 N.E. at 353.

which violated public policy.[25] Nevertheless, it is difficult to find fault with the result of the decision, since it prevented the wife from taking advantage of the provisions which were favorable to her and then repudiating the provisions which restricted her from obtaining further advantages. As the court observed, both parties were adults experienced in matrimonial matters, were represented by counsel in the negotiations which led to the reconciliation, and were satisfied that the settlement was fair and reasonable to both. Whether it was to be called a "separation agreement" or by another name, there seems to be good reason to require the parties to abide by such an arrangement reached under such circumstances.

B. *Modification of Support Decrees*

Two decisions have been handed down which seem to limit unnecessarily the power of the divorce courts to modify alimony and support decrees so as to increase the amount of the allowances previously fixed. Though it is said that courts have no inherent power to modify final alimony awards in absolute divorce decrees,[26] this authority is generally granted by statute, as is true in Tennessee; questions concerning the scope of the modification power and its application to individual cases thus become a matter of statutory construction. In the two recent decisions, restrictive interpretations were put on the provisions of the Tennessee Code which relate to revision of support decrees. In *Johnson v. Johnson*,[27] the wife had been granted a divorce and given custody of the child; the husband was ordered to pay a weekly sum as alimony and child support; and the wife was awarded the husband's share in their residence and furnishings which they owned as tenants by the entireties. When he fell into arrears on the payments, the wife brought contempt proceedings and asked that the court order the husband to transfer a portion of his interest in certain realty to her in lieu of further monthly alimony payments. The divorce court dismissed the contempt citation, apparently on finding that the husband's inability to pay was through no fault of his own, and held that it had no jurisdiction to award the realty in place of periodic payments. This decree was

25. The case of Copeland v. Boaz, 68 Tenn. 223 (1877), presented a further obstacle to the reaching of this decision. That case held that a note executed by husband, while separated from his wife, to induce his wife to return to him, was unenforceable because it "contravenes public policy, is primitive [sic] of separation of husband and wife, and not tolerable in law." *Id.* at 224. In the *Hoyt* case, the supreme court took notice of the changes in the law since 1877 regarding the status of the parties to a marriage, expressly ruled that reconciliation agreements fairly entered into are not "conducive to the breaking up of the marriage relation," and overruled the *Copeland* case insofar as it is in conflict with the present decision.

26. MADDEN, DOMESTIC RELATIONS 328 (1931).

27. 366 S.W.2d 141 (Tenn. App. W.S. 1962).

affirmed by the court of appeals. Section 36-820,[28] dealing with "Alimony for support of Wife and Children," empowers a divorce court to make an order

> for the suitable support and maintenance of the complainant and her children . . . by the husband, or out of his property, according to the nature of the case and the circumstances of the parties, the order or decree to remain in the court's control; and, on application of either party, the court may decree an increase or decrease of such allowance on cause being shown.

Since this section empowers the court initially to make a support award "out of his [the husband's] *property*" (emphasis added) and also to modify the support award when good cause is shown, it would seem to authorize a subsequent decree modifying the support order to provide for needed maintenance of the wife and child through an award of an interest in the husband's realty. However, the court of appeals, conceding that this matter had never been passed upon in Tennessee cases, failed to indicate why the statutes should not be so construed. The court ruled: "The language of T.C.A. § 36-820 relating to increases and decreases in allowances for alimony and child support *refers only to allowances of money* and does not contemplate the further award of the husband's property in solido after a decree of absolute divorce."[29] The court then assumed without reference to any authority, that section 36-821[30] is the only part of the statute which empowers a divorce court to make an award to the wife out of the husband's property, and pointed out that the latter section makes no provision for increasing or decreasing the amount of such property awards.[31] No reason appears why section 36-821 should have this exclusive effect, since section 36-820, enacted subsequent to 36-821, expressly refers to the making of support awards out of the property of the husband.

The unfortunate consequences of such a restrictive interpretation of the statute are demonstrated by the *Johnson* case situation. Here the husband was apparently unemployed and had no present or prospective source of income out of which to make the periodic alimony payments, and thus the wife had no means of compelling him to meet his obligations in the future. Yet the husband was allowed to retain a seemingly valuable interest in real estate, while his former wife and child were left without support.

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28. TENN. CODE ANN. § 36-820 (1956).

29. Johnson v. Johnson, *supra* note 27, at 144. (Emphasis added.)

30. TENN. CODE ANN. § 36-821 (1956).

31. TENN. CODE ANN. § 36-821 (1956) provides: "[T]he court may decree to the wife such part of the husband's real and personal estate as it may think proper. In doing so, the court may have reference and look to the property which the husband received by his wife at the time of the marriage, or afterwards, as well as to the separate property secured to her by marriage contract or otherwise."

In *Ellis v. Ellis*,[32] the Tennessee Supreme Court completely ignored section 36-820 as a basis for modifying the terms of a decree which had incorporated an agreement of the parties regarding disposition of their property, child custody, and support obligations reached by the parties prior to the divorce. About four months after the divorce was granted, the wife petitioned the court for a modification of the decree to require the husband to keep up the installment payments on an automobile. Though this automobile was not mentioned in the agreement, the wife had received possession of it after the divorce, and she alleged that the parties had in fact agreed that she should become the owner of it and that the husband should keep up the payments. The lower court overruled the husband's demurrer, but on appeal the supreme court reversed the judgment, sustained the demurrer and dismissed the case. The reasoning behind this decision was that a modification could be justified only if the matter came under the terms of section 36-828, which deals with decrees for custody and support of children.[33] Since the making of the payments on the car seemed to bear no relation to child support, the supreme court concluded that this section did not apply and therefore the divorce court had no authority to make a change in the decree originally entered. No mention was made of section 36-820, which empowers the divorce court to make alimony and child support awards and to increase or decrease them subsequently if good cause is shown.[34] As was observed in *Perry v. Perry*: "The power of the court at a future date to modify the provisions in a divorce decree for the support of the wife or children cannot now be gainsaid. The statute [§ 36-820] keeps the cause in court as effectually as that could be accomplished by express retention thereof."[35] And the fact that the support decree incorporates the terms of an agreement by the parties does not preclude a later change by the court.[36] Since the agreement

The award which the court makes to the wife out of the husband's property has several times been characterized as "alimony." Terrell v. Terrell, 192 Tenn. 317, 241 S.W.2d 411 (1951); White v. Bates, 89 Tenn. 570, 15 S.W. 651 (1891).

32. 368 S.W.2d 292 (Tenn. 1963).

33. TENN. CODE ANN. § 36-828 (1956) provides: "In a suit for annulment, divorce or separate mainteuance, where the custody of a minor child or minor children is a question, the court may . . . award the care, custody and control of such child or children . . . as the welfare and interest of the child or children may demand, and the court may decree that suitable support be made by the father. Such decree shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require."

34. Relevant exeerpts from this section are quoted at page 1048 *supra*.

35. 183 Tenn. 362, 364, 192 S.W.2d 830, 831 (1946). See also Davenport v. Davenport, 178 Teun. 517, 160 S.W.2d 406 (1942); Thomas v. Thomas, 46 Tenn. App. 572, 330 S.W.2d 583 (E.S. 1959); Osborne v. Osborne, 29 Tenn. App. 463, 197 S.W.2d 234 (E.S. 1946).

36. "When such agreements or their terms are adopted in the decree fixing alimony they are not absolute and bindiug when the court retains jurisdiction for their modifica-

in the *Ellis* case specified that it was entered into as a settlement of "all claims, rights and duties arising out of said marital relations," it must have been intended as providing for the support of the wife as well as for the children, and the decree incorporating it would seem to be within the terms of section 36-820.

Though it was nowhere mentioned in the opinion, the court may have had in mind the view adhered to in many jurisdictions that if the parties have entered into a contract settling their property rights and if that contract has been approved by the court and incorporated into the decree, it is not subject to modification under the general authority to revise a decree for alimony.[37] Since the agreement in the *Ellis* case provided for a stipulated weekly payment by the husband for support of the children, but not for any periodic payments to the wife, the decree incorporating it could be regarded as not related to "the support and maintenance" of the wife, and therefore not within section 36-820.

This questioning of the failure by the court to notice the relevancy of section 36-820 in establishing the power of the court to modify the decree does not amount to a reflection on the propriety of the result in the case. Even if the court had the power to revise its support award, it seems unlikely that any change of circumstances had occurred during the lapse of four months which would have justified an increase in the support decreed for the wife's benefit.

C. *Contempt Proceedings*

In a pair of cases, the Tennessee Eastern Section Court of Appeals was called on again to define the scope of the divorce courts' contempt powers against divorced husbands who have failed to obey alimony and child support decrees. Confusion seems to have arisen from the fact that two provisions of the Code appear on their faces to be at least overlapping and perhaps inconsistent. Section 23-903 states that: "The punishment for contempt may be by fine or imprisonment, or both; but where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars . . .

tion or the statute law of the state provides that such decrees remain open and subject to modification. . . . [T]he courts do not take the agreements of the parties as conclusive but merely use them as a basis on which an alimony decree is fixed. When the circumstances of the parties change the court's decree may be changed [quoting section 36-820]." Osborne v. Osborne, *supra* note 35, at 467, 197 S.W.2d at 236. See also, Thomas v. Thomas, *supra* note 35; Doty v. Doty, 37 Tenn. App. 120, 260 S.W.2d 411 (W.S. 1952). See Annot., 166 A.L.R. 675, 676 (1947).

37. See Annot., 166 A.L.R. 675, 693 (1947). If the parties make a property settlement and provision for alimony and support in the same agreement, the two parts may be held separable so that the court may modify the alimony and support provision even though it could not revise the terms of the property settlement. *Id.* at 695. No Tennessee cases adopting the general rule have been found, though Doty v. Doty, *supra* note 36, recognizes the existence of such a rule.

and imprisonment not exceeding ten . . . days . . . ."[38] Section 23-904 provides: "If the contempt consists in an omission to perform an act which it is yet in the power of the person to perform, he may be imprisoned until he performs it."[39]

In both of the recent contempt cases, it was explained that the power conferred in these two sections is to be exercised in different situations and to serve different purposes.[40] Under section 23-903 "punishment is for criminal contumacy in resisting the established authority of the Court."[41] Since the statute expressly sets the maximum penalties, a fifty dollar fine and ten days in jail is the most severe sentence the judge can impose, regardless of the seriousness of the contemptuous conduct;[42] and since the penalty is levied as punishment for a past flouting of the court's authority, the matter of whether the defendant is presently capable of performing the original decree is immaterial.[43] Section 23-904, on the other hand, "confers upon the courts essential powers of coercion to enable them to enforce their judgments and decrees."[44] A proceeding under this section is civil in nature, and the court has no power to commit the defendant to prison for any definite duration, but only until he purges himself of contempt by obeying the original decree or by performing whatever modified order the court may make.[45] Since the purpose of the imposition is to force the defendant to carry out his obligations, the court should not imprison him unless he has the present ability to comply with the original or modified decree.[46] However, while different objectives are sought under the two sections, they are not necessarily mutually exclusive in their application to a given case.[47] Thus, if a defendant's refusal to pay alimony constituted a contumacious flouting of the court's authority, and if he is shown to have the

38. TENN. CODE ANN. § 23-903 (1956).

39. TENN. CODE ANN. § 23-904 (1956).

40. Some of the difficulties of the lower courts may stem from earlier statements in Tennessee Supreme Court opinions which fail to distinguish between exercise of the contempt power for punishment for past acts and for coercion to induce future performance. See, *e.g.*, Clark v. Clark, 152 Tenn. 431, 440, 278 S.W. 65, 67 (1925): "[W]here a party is guilty of willful disobedience, or obstinacy to an order of the court or judge, the court or judge is empowered to punish for contempt and sentence him to imprisonment until the specified sum and costs are paid."

41. Black v. Black, 362 S.W.2d 472, 474 (Tenn. App. E.S. 1962).

42. Mowery v. Mowery, 363 S.W.2d 405 (Tenn. App. E.S. 1962); Black v. Black, *supra* note 41. See also Leonard v. Leonard, 207 Tenn. 609, 341 S.W.2d 740 (1960).

43. Mowery v. Mowery, *supra* note 42.

44. Black v. Black, *supra* note 41, at 474; Mowery v. Mowery, *supra* note 42.

45. Black v. Black, *supra* note 41; Cannon v. Cannon, 34 Tenn. App. 568, 241 S.W.2d 435 (E.S. 1951); Sullivan v. Sullivan, 23 Tenn. App. 644, 137 S.W.2d 306 (M.S. 1939).

46. Mowery v. Mowery, *supra* note 42. See also Leonard v. Leonard, *supra* note 42; State *ex rel.* Wright v. Upchurch, 194 Tenn. 657, 254 S.W.2d 748 (1953); Gossett v. Gossett, 34 Tenn. App. 654, 241 S.W.2d 934 (W.D. 1951).

47. Mowery v. Mowery, *supra* note 42; Black v. Black, *supra* note 41.

present ability to pay as ordered, it would seem that the court could invoke its authority under section 23-903 to punish defendant for his criminal contumacy, and also under section 23-904 to coerce him to obey the alimony decree.

Though these guidelines delineating the functions of the contempt sections seem clear and precise, uncertainties continue to arise in regard to their application in specific cases. In *Black v. Black*,[48] a husband who had in eight years fallen eight thousand dollars in arrears in child support payments was held in contempt because of wilful failure to pay without reasonable excuse, and was committed to jail "until the arrears accrued . . . are paid, or until an adjustment thereof satisfactory to both parties and satisfactory to the court has been made." On appeal, he argued: first, that since his failure to pay had been found to be wilful and without excuse, the court should have acted under section 23-903, and so could sentence him to no more than ten days in jail; second, that since he had not the present ability to pay the arrearages, he should not be imprisoned under section 23-904; and third, that since he had no prospect of ever raising eight thousand dollars to make up the defaulted payments, the sentence imposed on him amounted to life imprisonment. The court of appeals rejected all three contentions. The first was snmmarily dismissed as having "no merit," apparently because it must be true that a court does not lose its right to use its contempt power under section 23-904 to enforce compliance with a support decree merely because the default was contumacious and would justify punishment being imposed under section 23-903. As to the other two points, defendant's arguments would have been effective if the contempt order had unqualifiedly required commitment until the arrearages were paid, since defendant's inability to perform in full was fairly clear. However, the court of appeals ruled that since it was possible for defendant to purge himself by making an adjustment short of full payment, if satisfactory to the wife and the court, the order was not improper. Though the recalcitrant defendant here involved may have deserved no better fate, it should be noted that this decision enables the court to shape its order so as to keep a defaulting husband in jail until satisfied that it has forced him to come forward with as much of the arrearages as he can contrive to pay. While the coercive element of such an ambiguous decree may be quite effective, the fact remains that it provides a means of committing a non-contumacious defaulter to jail without finding that he has present ability to pay, seemingly in violation of both the letter and spirit of section 23-904.

In *Mowery v. Mowery*,[49] the husband had been imprisoned in

48. *Supra* note 41.
49. *Supra* note 42.

previous contempt proceedings for wilful failure to make child-support payments but had soon been released under a promise to make up the arrearages according to a stipulated plan. Several months later, the wife filed a second contempt action, and the court found that defendant had wilfully failed to carry out his earlier arrangement, and on this basis ordered him committed to jail until he performed by paying according to the terms of that agreement.

Apparently confusing its powers under the two contempt sections, the court made this order without any finding as to defendant's present ability to pay, because the court thought this matter to be immaterial when the default was deliberate and contumacious, as it was found to be here. Finding this action to be in error, the court of appeals remanded the case to allow the divorce court either to act under section 23-904 by commiting defendant until he paid the arrearages if it finds that he has the present ability so to pay, or to act under section 23-903 by sentencing him to a fifty dollar fine and ten days in jail if it finds him presently unable to pay. The opinion indicated that, if the record had clearly shown defendant's inability to pay, the appellate court could have assessed the criminal punishment under section 23-903 without remanding the case.

D. *Paternity Determination*

The remaining case which involved child support issues is noteworthy mainly in relation to the application of the statute allowing blood grouping tests to be employed when the paternity of a child is in question.[50] In *Nicks v. Nicks*,[51] the wife sued for a divorce, custody of the minor children, and an award for support of the children, but the husband contended that he was not the father of the youngest child (born while the suit was pending), and so was under no obligation to provide support for it. Since the only legal problem of significance concerned the admissibility of evidence as to the results of the blood grouping test requested by the husband, this case is discussed in the *Evidence* section of this *Survey*.[52]

IV. ADOPTION

A. *Interlocutory Decrees*

An ambiguity of eight years standing in regard to the application of a provision of the adoption statute was cleared up by the decision in *Jackson v. Goad*.[53] The mother of the children in question had divorced the father and been given custody of the children. Subsequently she remarried, and about eighteen months later she and her

50. TENN. CODE ANN. § 24-716 (Supp. 1963).
51. 369 S.W.2d 909 (Tenn. App. M.S. 1962).
52. Patterson, *Evidence—1963 Tennessee Survey*, 17 VAND. L. REV. 1060-61 (1964).
53. 364 S.W.2d 906 (Tenn. 1963).

second husband filed a petition to adopt the children. The chancellor eventually found that all of the requirements for approving the adoption had been satisfied and indicated that he was willing to waive the granting of an interlocutory decree and grant a final order, if such could be done; but since no interlocutory decree had been issued within six months of the filing of the petition as provided for in section 36-119 of the Code,[54] he concluded that he did not have the authority to enter a final order under section 36-124.[55] The chancellor dismissed the petition, and the court of appeals affirmed, both courts apparently desiring the specific question to be passed on by the supreme court.

Section 36-119 provides that the court may issue "an interlocutory decree of adoption giving the care and custody of the child to the petitioners," and that such decree must be entered within six months of the filing of the petition, but then adds: "unless a final order is entered as provided in § 36-124 . . . ." This qualifying clause seems to indicate clearly that the interlocutory decree is not necessary in all cases, but in a 1956 case the Tennessee Supreme Court had made an assertion which has been assumed to mean that it is mandatory that an interlocutory decree be issued.[56] In the *Jackson* case, however, the court has ruled specifically that no interlocutory decree need be issued if, as in this case, the situation comes within the third paragraph of section 36-124, which provides: "[T]he court may, in its discretion, waive the entering of the interlocutory decree and the probationary period and grant a final order of adoption when the child is by blood a grandchild, a nephew or niece of one of the petitioners or is the stepchild of the petitioner."[57] As the court observed, there is really no conflict between the terms of the two sections; and the reason for allowing a court to dispense with the interlocutory decree in the situations covered by paragraphs three and four of section 36-124 appears to be obvious and sound. The purpose of the interlocutory

54. TENN. CODE ANN. § 36-119 (1956).

55. TENN. CODE ANN. § 36-124 (1956).

56. *In re* Clements' Petition, 201 Tenn. 98, at 104, 296 S.W.2d 875, at 878 (1956). Actually, it seems doubtful that the court there meant to say that an interlocutory decree entered within six months of the petition is mandatory in every case; but in the *Jackson* case, the court concedes that this was the import of its statement, but points out that the case was decided prior to the amendment of § 36-124 in 1961. 364 S.W.2d at 907. However, the 1961 amendment to § 36-124 seems not to have made any changes which would affect the application of the terms of § 36-119 in this regard.

57. TENN. CODE ANN. § 36-124 (Supp. 1963), in paragraph four provides for waiver of the interlocutory order in other situations not pertinent to the *Jackson* case; but under this paragraph, the final order of adoption may not be entered until after the child has resided in the home of petitioners for a year or more, nor until six months after the filing of the petition. These conditions do not apply to actions under paragraph three.

decree is to establish a preliminary trial period so that the court may see how the child and prospective parents will get along together.[58] When the child has already been living with the petitioners for a year or is a blood relative of the petitioners, or when the petitioner is the stepfather of the child, married to the natural mother, as in the *Jackson* case, this trial period may not be needed if all other factors point to the conclusion that the adoption will serve the welfare of the child.

B. *Estoppel by Contract*

The rule that the welfare of the child must be the primary consideration in adoption cases was given an unusual application in *Baughman v. Department of Public Welfare*,[59] an action brought by a couple to adopt a child. When the child was four months old, it had been placed in the couple's home by the welfare department, to be boarded on a temporary basis. Fifteen months later, in accordance with routine procedure, the couple signed a form contract with the department acknowledging that the child would not be available for adoption by them. After the child had remained continuously in their home for more than four years, the couple filed a petition to adopt it, but the department moved to dismiss on the ground that the contract estopped the couple from seeking the adoption. The trial judge sustained this motion, but the supreme court reversed and remanded the case for hearing on the adoption petition. There was no doubt that by the contract terms the couple had clearly and knowingly promised not to attempt to adopt the child, and the supreme court conceded that the "application of equitable estoppel to the facts arising in this case might ordinarily be proper."[60] Nevertheless, the court noted several factors which justified a refusal to estop the petitioners. First, the waiver contract which should have been executed when the child was first placed in the home, was not brought forward for fifteen months. Further, the petitioners claimed that the department had, for more than a year prior to the filing of the adoption petition, led them to believe that they might be allowed to adopt the child. And finally, though petitioners had originally been told that the child would be left with them for not more than six months, they had actually been allowed to keep it for over four years, as a result of which the child had never known any other home and could be expected to have developed as great an affection for the couple as a child would to its natural parents. Obviously giving primary weight to the latter factor, the court declared: "To remove

58. *In re* Clements' Petition, *supra* note 56, at 878.

59. 362 S.W.2d 785 (Tenn. 1962).

60. *Id.* at 786.

this child solely under the cold print of a contract would be in reckless disregard of human emotions."[61] Thus, the paramount importance of serving the welfare of the child served to shield the petitioners from the estoppel which their own acts would otherwise have justified.

V. LEGISLATION

A. *Surrender of Child for Adoption*

Three sections in title 36 of the Code were amended during the 1963 session of the legislature. In section 36-114,[62] dealing with the surrender of a child for adoption, one word was changed to make it permissive, but no longer mandatory, that the person to whom the child is being surrendered be present in court at the time the surrender is executed by the parents.[63]

B. *Venue in Divorce of Military Personnel*

In the divorce chapter, section 36-804,[64] which deals with venue for divorce actions, was supplemented by the addition of a new sentence fixing the residence status of federal armed services personnel and their spouses. If such persons have been living in Tennessee for one year or more, they shall now be presumed to be a resident of this state, and this presumption shall be overcome only by "clear and convincing evidence of a domicile elsewhere."[65] This revision places military personnel stationed in Tennessee on the same basis, presumptively, at least, as other persons, who are required to reside in the state for one year in order to obtain a divorce in a Tennessee court.[66]

C. *Absolute Divorce After Limited Divorce*

The third amendment extended the power of the courts to grant absolute divorces. A paragraph was added to section 36-802[67] (which sets out the grounds for divorce from bed and board, and, in the discretion of the court, for absolute divorce) providing that when a final decree of divorce from bed and board or of separate maintenance has been in effect for two years and the parties have not become

61. *Id.* at 787.

62. TENN. CODE ANN. § 36-114 (1956).

63. TENN. CODE ANN. § 36-114 (Supp. 1964). This revision was accomplished by changing the word "shall" to the word "may," at its first use in paragraph two. This paragraph applies only when the child is being surrendered for adoption to someone other than a grandparent, an aunt or uncle, a stepparent, a licensed child placing agency, or the state department of public welfare.

64. TENN. CODE ANN. § 36-804 (1956).

65. TENN. CODE ANN. § 36-804 (Supp. 1964). Three short phrases are inserted in the first sentence of the section, but without any substantial change in the effect of the provision.

66. TENN. CODE ANN. § 36-803 (Supp. 1963).

67. TENN. CODE ANN. § 36-802 (1956).

reconciled, a court having divorce jurisdiction may grant an absolute divorce to either party making application for such decree.[68] The court is also authorized to make a final and complete adjudication of support and property rights of the parties.

This amendment should have the salutary effect of precluding further situations like that disclosed in *Perrin v. Perrin*.[69] There, the court had granted the wife a separate maintenance decree on the ground of abandonment, and had ordered the husband to pay her seventy-five dollars a month and to allow her to occupy the house they owned jointly. After this situation had continued for twenty-two years, the husband sought an absolute divorce, claiming that he had repeatedly attempted to effect a reconciliation but that the wife had unjustifiably refused, stating that she had no intention of ever living with him again. When the case reached the supreme court, the husband was held not to be entitled to a divorce because the wife's continued refusal to live with him "cannot be considered a wrong within the meaning of our divorce statutes, because her alleged desertion was a legal impossibility in that she was living apart from her husband pursuant to a valid court decree."[70] Under the 1963 addition to section 36-802, a wife who is well satisfied to be rid of her husband's person but still desirous of living on his money may be prevented from perpetuating the legal life of a sociologically dead marriage—and this should ordinarily serve society's interests, if the courts use their authority with good discretion. However, it can readily be foreseen that the courts will be faced with some very difficult problems in determining whether, and on what support terms, to grant an absolute divorce in cases in which the spouse who was the original guilty party is applying for the divorce after two years of decreed separation.

68. TENN. CODE ANN. § 36-802 (Supp. 1964). It is further specified that this provision does not preclude the divorce forum from granting an absolute divorce before the two-year period has elapsed.

69. 201 Tenn. 354, 299 S.W.2d 19 (1957).

70. *Id.* at 364, 299 S.W.2d at 23. Courts in other jurisdictions have reached the same unfortunate conclusion. Williams v. Williams, 33 Ariz. 367, 265 Pac. 87 (1928); Weld v. Weld, 27 Minn. 330, 7 N.W. 267 (1880); Boger v. Boger, 86 W. Va. 590, 104 S.E. 49 (1920); Annot., 61 A.L.R. 1268 (1929).

In the *Perrin* case, the court observed: "While it may be true that society is not interested in enforced celibacy, persons who are neither married nor unmarried, and that the wishes of neither party control the action of the court, it must also be understood that the court cannot by judicial fiat add an additional ground for divorce that is unknown to the statute . . . ." *Id.* at 366, 299 S.W.2d at 24.