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DOMESTIC RELATIONS—1954 TENNESSEE SURVEY

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ADOPTION OF CHILDREN

An important case dealing with testamentary restraint upon adoptions was decided by the Tennessee Supreme Court during the survey period.[1] The case was one of first impression in this jurisdiction and appears to be one of the few decisions upon the subject in the United States.

In his will testator created a trust for his granddaughter, the child of his deceased son. He imposed a condition that if the child were adopted before her eighteenth birthday by someone outside testator's immediate family, and if her name were changed, then the trust should terminate and the corpus be distributed to other persons. After testator's death the condition was breached; the mother of the child remarried, the child was adopted by her stepfather, and her name was changed, before her eighteenth birthday.

The trustee brought suit in the nature of interpleader to determine the effect of this breach. The guardian of the child contended that the condition imposed on the trust was contrary to public policy as being an unlawful restraint upon adoption, and was merely an *in terrorem* provision.[2]

Both the chancellor and the Supreme Court upheld the condition and held that its violation forfeited the child's interests. Since the property belonged to testator, he could impose such conditions and restraints upon its devolution as he saw fit, within the limits of statutes and positive rules of law. The court indicated that a prohibition against adoption "so arbitrary and absolute" as to make the child a probable public charge might well violate public policy. The present restraint was partial only, however, and violated no general statutory provision or rule of policy. Consequently the breach of the condition forfeited the estate, whether the condition was a condition precedent or condition subsequent.[3]

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1. National Bank of Commerce v. Greenberg, 195 Tenn. 217, 258 S.W.2d 765 (1953).

2. The guardian also insisted that the violation occurred during the minority of the child, while it was incapable of consenting, so that its interests should not be prejudiced. The court gave the obvicus answer, however, that the testator had fixed the child's eighteenth birthday as the critical point; the breach would have occurred before that date if at all. Clearly the testator did not consider the child's consent material. The court stated that the guardian might be subject to criticism for not having the validity of the condition determined before permitting it to be breached.

3. The court did not discuss the contention that the restraint was a mere *in terrorem* provision. The *in terrorem* doctrine generally applies to restraints

The decision seems to be sound and is in accord with the general rules on the similar subject of restraints upon marriage.[4] Absolute prohibitions against marriage are usually deemed contrary to public policy,[5] but partial restraints have generally been upheld when the conditions imposed are reasonable in view of all of the circumstances.[6] If a restraint upon marriage, whether general or partial, is held invalid, however, it then becomes important to classify the condition as precedent or subsequent, since by somewhat arbitrary rules, if not by historical accident, different consequences flow from this determination.[7] When the restraint is upheld, it will be enforced, regardless of its classification as a condition precedent or subsequent.[8]

The only other decision dealing with adoptions during the survey period was one in which a welfare worker was held in contempt of court for unjustified interference with a pending adoption.[9] The only issue was whether the decree of the chancellor was supported by the preponderance of the evidence. The Court of Appeals had held that it was not, but the Supreme Court reversed. Only two witnesses had testified as to the conduct of the welfare worker, these being the worker herself, who denied any interference, and the natural mother of the child. The child had been surrendered by the mother before the chancellor without placing it with the Welfare Department. The mother alleged that the worker had called her and told her that this was a violation of the adoption law, and demanded that the mother regain custody of the child. The chancellor believed the mother's

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on marriage or to prohibitions against contesting wills. Provisions of this nature may be stricken when the court can find no reason for their insertion other than to intimidate a legatee. In cases involving restraints on marriage, however, where the gift is one of personalty and there is a gift over upon violation of the condition, the *in terrorem* doctrine is almost universally held to be inapplicable. Since this case involved a gift over, the doctrine would not apply to it. See generally HARPER, PROBLEMS OF THE FAMILY 188 (1952); PRITCHARD, LAW OF WILLS AND EXECUTORS § 158 (2d ed., Sizer, 1928); 35 AM. JUR., *Marriage* §§ 266-68 (1941).

4. See generally HARPER, PROBLEMS OF THE FAMILY 187-89 (1952); PRITCHARD, LAW OF WILLS AND EXECUTORS §§ 155-60 (2d ed., Sizer, 1928); 35 AM. JUR., *Marriage* §§ 247-82 (1941); Note, 122 A.L.R. 7 (1939).

5. HARPER, PROBLEMS OF THE FAMILY 187 (1952). Such restraints upon second marriages are usually upheld, however. Hinton v. Bowen, 186 Tenn. 463, 230 S.W.2d 965 (1950); Overton v. Lea, 108 Tenn. 505, 68 S.W. 250 (1902); Note, 163 A.L.R. 1152, 1160 (1946).

6. See note 4 *supra;* 35 AM. JUR., *Marriage* § 256 (1941). And both partial and general restraints may be upheld if they are drafted so as to constitute limitations upon the duration of an estate rather than as conditions to the vesting thereof. See Hinton v. Bowen, 186 Tenn. 463, 230 S.W.2d 965 (1950); PRITCHARD, LAW OF WILLS AND EXECUTORS § 159 (2d ed., Sizer, 1928); 35 AM. JUR., *Marriage* §§ 258, 271, 272 (1941).

7. Thus if the condition is precedent and the gift is real estate, the gift is void; if the gift is personalty, the condition is sometimes stricken and the gift upheld. If the condition is subsequent, then regardless of whether the gift is real or personal property, the gift is sustained and the condition is stricken. PRITCHARD, LAW OF WILLS AND EXECUTORS § 158 (2d ed., Sizer, 1928).

8. RESTATEMENT, PROPERTY §§ 437-38 (1944).

9. *In re* Adoption of Myers, 265 S.W.2d 12 (Tenn. 1954).

testimony rather than that of the welfare worker, and the Supreme Court held that, inasmuch as the chancellor acted as both judge and jury in the matter, his determination of the credibility of the witnesses settled the issue of the preponderance of proof.

As presently drawn, the Tennessee adoption statutes[10] require the harmonious cooperation of the courts and welfare or child-placing agencies. Both must perform essential functions in the delicate task of placing a child in a foster home. Some misunderstandings are almost inevitable while the adoption statutes are still new, but it is to be hoped that friction between the courts and the agencies will be minimal. Inasmuch as the subject of adoption is still a legal one, involving the judicial processes, however, the courts must of necessity use their inherent powers to curb unwarranted interference whenever found.

CUSTODY OF CHILDREN

In the case of *Weaver v. Weaver*,[11] the Court of Appeals dealt with a prolonged custody dispute between divorced parents. After the father was awarded a divorce in 1946, custody of the child was rotated between the parents at intervals of three months each. In 1948, however, as the child approached school age, both parents sought its dominant custody. A lengthy hearing was held, with the chancellor awarding custody to the father. The Court of Appeals reversed and gave custody to the mother. The controversy had been pending in the courts for three years, principally because the father had repeatedly sought extensions of time before the appeal was heard in the higher court. During this time the child had been with its mother. Stating that the welfare of the child, not the parents, is the primary concern of the courts in such matters,[12] the Court of Appeals felt that a young child should be with its mother unless she is clearly shown to be unfit.[13] The great mass of partisan testimony in the record failed to convince the Court of her unfitness.

The opinion is noteworthy in that the Court frankly pointed out "the unsuitability of adversary litigation as a vehicle for determining delicate family relationships."[14] Increasingly, in this and other jurisdictions, the need for special courts to deal with domestic relations cases is being recognized.[15] Such courts, with independent investigatory powers and staffed with trained counsellors, would seem to be

10. Tenn. Pub. Acts 1951, c. 202; TENN. CODE ANN. §§ 9572.15 *et seq.* (Williams Supp. 1953).
11. 261 S.W.2d 145 (Tenn. App. E.S. 1953).
12. See Powell v. Powell, 36 Tenn. App. 367, 255 S.W.2d 717 (M.S. 1952) discussed in the 1953 Survey, 6 VAND. L. REV. 981 (1953).
13. Newburger v. Newburger, 10 Tenn. App. 555 (W.S. 1930).
14. 261 S.W.2d at 147.
15. See HARPER, PROBLEMS OF THE FAMILY 771-75 (1952), discussing the recommendations made in this respect by the Federal Council of Churches of Christ, the American Bar Association and other interested groups.

far better equipped to determine such difficult problems as divorce, support, custody and adoption than can be done by adversary litigation in the regular trial courts. The fact that the Court of Appeals in the present case had a record of over three thousand pages of partisan testimony dealing with the fitness of these parents for custody and still had great difficulty in determining the true facts indicates something of the inadequacy of the present system. The frank acknowledgment by the court of the need for an innovation in the handling of domestic relations cases should act as a spur to creative and constructive legislation in this field.

In *Williams v. Williams*,[16] the mother of a child obtained a divorce in 1941 and was awarded custody. She also received an alimony award. She later remarried, but the father did not take any action to have the alimony terminated. In 1952 he filed a petition to change custody on the ground that the mother and her present husband were mistreating the child. The father was in arrears in the alimony payments, however, apparently because of illness and inability to pay. Since he was prima facie in contempt for failure to make the payments,[17] the trial court dismissed his petition without a hearing on the merits. The Supreme Court reversed, holding that the welfare of the child was at stake, and the father should have a hearing on the merits despite his arrearage in alimony. The result seems entirely sound, particularly so in view of the fact that the alimony might well have been terminated by proper petition upon the remarriage of the mother,[18] and even at present the arrearage might be cancelled upon proper showing of hardship and inability to pay.[19]

SUPPORT OF CHILDREN

In *Chappell v. Chappell*,[20] a contempt proceeding, a mother had obtained a divorce in 1943, and had been awarded custody of a child upon substituted service of process, the father being a non-resident at the time. The decree also awarded periodic payments for the support of the complainant and her child. From time to time over

16. 263 S.W.2d 531 (Tenn. 1953).
17. Clark v. Clark, 152 Tenn. 431, 278 S.W. 65 (1925).
18. Generally alimony payments do not terminate automatically upon remarriage of the wife unless the decree of divorce or the divorce statutes expressly so provide. COMPTON, CASES ON DOMESTIC RELATIONS 330-36 (1951); MADDEN, DOMESTIC RELATIONS 329 (1931); 17 AM. JUR., *Divorce and Separation* § 610 (1938). Almost universally, however, the husband may have them terminated or modified by petition to the divorce court.
19. In a number of states accrued alimony installments become final judgments, not subject to modification by the courts. COMPTON, CASES ON DOMESTIC RELATIONS 332 (1951); Note, 6 A.L.R. 2d 1278 (1949). In Tennessee, however, the courts may cancel or modify accrued installments since all matters of support and alimony remain within the jurisdiction of the trial court under TENN. CODE ANN. §§ 8446, 8454 (Williams 1934). Gossett v. Gossett, 34 Tenn. App. 654, 241 S.W.2d 934 (W.S. 1951).
20. 261 S.W.2d 824 (Tenn. App. W.S. 1952).

the next eight or nine years, the father made the payments required by this decree. He was twice arrested for contempt for non-payment under the decree; each time he paid the arrearage. At no time did he question the validity of the decree. In the present case he was again cited for contempt, and this time he challenged the support decree as having been rendered without personal service of process. Both the trial court and the Court of Appeals recognized that the decree initially was void for lack of jurisdiction, but both held that the father had acquiesced in the provisions of the decree and had voluntarily accepted them to such an extent that he was no longer in position to attack the validity thereof. Further, in the present proceedings, he had entered a general appearance and had filed answer to the merits, thereby curing the defect in the original decree.[21]

The contempt decree was reversed, however, on the purely technical ground that it did not recite on its face that the father was able to make the payments. While a number of Tennessee cases have held, in accord with the general rule, that inability to pay is a defense to contempt proceedings,[22] it is well established that this is an affirmative defense, to be proved by the defendant.[23] Accordingly it appears highly technical and unnecessarily strict to reverse a finding of contempt for mere lack of the recital that the defendant is able to pay.

Legitimacy of Children

In *Winfield v. Cargill*,[24] the Supreme Court held that the child of a bigamous and entirely void marriage was legitimate. The father was already married when he went through the ceremony with the mother of the child. He was later killed, and the issue in this case was whether the child of the second marriage, born posthumously, could share in workmen's compensation benefits. In holding that the child was legitimate and entitled to a share, the Supreme Court followed much the same reasoning as that of the Court of Appeals in a case discussed in the 1953 *Survey*.[25]

Divorce and Alimony

The case of *Schneider v. Schneider*[26] involved an attack upon a 1945 amendment[27] to the Shelby County Divorce Proctor statute.[28]

21. 3 Am. Jur., *Appearances* § 37 (1936).
22. Going v. Going, 148 Tenn. 522, 256 S.W. 390, 31 A.L.R. 633 (1923); Bradshaw v. Bradshaw, 23 Tenn. App. 359, 133 S.W.2d 617 (M.S. 1939); 17 Am. Jur., *Divorce and Separation* § 671 (1938).
23. 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.S. 1951).
24. 264 S.W.2d 584 (Tenn. 1954).
25. Taliaferro v. Rogers, 35 Tenn. App. 521, 248 S.W. 2d 835 (W.S. 1951), 6 Vand. L. Rev. 983 (1953), 22 Tenn. L. Rev. 1066 (1953).
26. 260 S.W.2d 290 (Tenn. App. W.S. 1952).
27. Tenn. Pub. Acts 1945, c. 109.
28. Tenn. Pub. Acts 1915, c. 121.

The amendment authorized the proctor to appeal from the decree of a trial court in any divorce case when he felt the general welfare required this action. The original statute creating the office of divorce proctor was upheld many years ago as not contravening the Tennessee constitutional provisions against class legislation.[29] The Court of Appeals accordingly held that this amendment likewise did not violate those provisions but affected the county in its governmental capacity only.

In his appeal in this case the proctor challenged the power of a trial court to grant an absolute divorce to a pregnant woman. His contention was that this would cause the child to be born out of wedlock, and that therefore the only course open to the trial court was to give a limited divorce, to be made absolute after the birth of the child. While the point is one of first impression in Tennessee, the contention of the proctor that the child, conceived in wedlock, could be rendered illegitimate by the subsequent divorce of its parents, seems unsound. At common law a child conceived or born during the lawful wedlock of its parents was legitimate;[30] if this were not true, a posthumous child could not be legitimate, since the marriage of its parents would have been terminated before its birth. Further, the Tennessee legitimacy statute[31] would appear without question to apply to this type of case; the statute, which is always liberally construed to protect the legitimacy of children,[32] provides that the dissolution or annulment of marriage shall not affect the legitimacy of children.

The Court of Appeals held that the contention of the proctor was unsound, however, without discussion of the effect of the divorce upon the status of the child. The statutory ground of divorce in this case was cruelty. The Code expressly authorizes either an absolute or a limited divorce upon this ground,[33] and it makes no exception with respect to pregnant women; accordingly the court held that it could not carve out such an exception.

In *Doty v. Doty*[34] a circuit court had held that a written property settlement and support agreement, incorporated into a divorce decree, could not be modified upon subsequent petitions alleging a change in circumstances. The Court of Appeals reversed. Under the agreement, in addition to settling property rights, the husband agreed to make periodic payments for the support of his wife and child. The court of appeals held that the support provisions of the settlement were so merged into the divorce decree that they lost their contractual nature

29. Wilson v. Wilson, 134 Tenn. 697, 185 S.W. 718 (1916).
30. MADDEN, DOMESTIC RELATIONS 336 (1931).
31. TENN. CODE ANN. § 8453 (Williams 1934).
32. Taliaferro v. Rogers, 35 Tenn. App. 521, 248 S.W.2d 835 (W.S. 1951). See note 25 *supra*.
33. TENN. CODE ANN. § 8427 (Williams 1934).
34. 260 S.W.2d 411 (Tenn. App. W.S. 1952).

and could be modified by later court action.[35] It recognized that a pure property settlement, unrelated to support and maintenance, may not be subject to modification.[36] In the present case, however, there were separable provisions dealing with support of the wife, and by statute such matters remain within the jurisdiction of the courts.[37] Further, the court pointed out that support for a child was involved as well as alimony to the wife; therefore the trial court did not lose power to modify the settlement, nor could it deprive itself of that power even if it should desire to do so.[38]

The distinction between venue and jurisdiction of the subject matter was emphasized by the Supreme Court in *Kelley v. Kelley*.[39] In that case both parties to a divorce action lived in Hamblen County when the bill was filed. The wife brought her action in Knox County, however, and apparently service was had on the husband in Hamblen.[40] A divorce was granted to her in Knox County. The husband brought the present action to set aside the divorce on the ground that neither party had ever been a resident of Knox County. The Code permits a divorce action, in the case of a resident defendant, to be filed in the county "where the parties resided at the time of their separation, or in which the defendant resides or is found."[41] The court held that this provision relates to venue only, not to jurisdiction of the subject matter, and unless the issue of venue is raised by a preliminary pleading, it is waived.[42] While the Knox County court might well, in its discretion, have dismissed the action,[43] it was not compelled to do so. Since it had general jurisdiction over the subject matter of divorce, the court's decree could not be collaterally attached for improper venue.

MISCELLANEOUS

In Morrison v. State[44] the Supreme Court dealt with the criminal responsibility of a married woman. The defendant was convicted of unlawful possession of intoxicating liquor.[45] It was proved that the arresting officers had found the liquor in her wardrobe, and that she

35. See Osborne v. Osborne, 29 Tenn. App. 463, 197 S.W.2d 234 (E.S. 1946).
36. Notes, 58 A.L.R. 639 (1929), 109 A.L.R. 1068 (1937), 166 A.L.R. 675 (1947).
37. TENN. CODE ANN. § 8446 (Williams 1934).
38. TENN. CODE ANN. § 8454 (Williams 1934) expressly retains child support decrees before the trial court.
39. 263 S.W.2d 505 (Tenn. 1953).
40. If service was obtained in Knox County, there could be no question as to that county's being the proper county for suit, inasmuch as the venue statute, TENN. CODE ANN. § 8429 (Williams 1934), fixes the county in which the defendant is found as proper venue. Williams v. Williams, 193 Tenn. 133, 244 S.W.2d 995 (1951).
41. TENN. CODE ANN. § 8429 (Williams 1934).
42. Brown v. Brown, 155 Tenn. 530, 296 S.W. 356 (1926); McFerrin v. McFerrin, 28 Tenn. App. 552, 191 S.W.2d 946 (W.S. 1945).
43. Walton v. Walton, 96 Tenn. 25, 33 S.W. 561 (1896).
44. 263 S.W.2d 504 (Tenn. 1953).
45. TENN. CODE ANN. § 11216 (Williams 1934).

had stated that she had been expecting a raid. The defendant did not at any time deny ownership of the liquor. On appeal, however, she insisted that since the liquor was found in the home where she was living with her husband, the presumption arose that the husband, not the wife, owned it, he being the head of the household.

Prior to the enactment of the emancipation statutes, there was a presumption in practically all cases that a crime committed by a married woman in the presence of her husband was the result of coercion by him.[46] While coercion is still a defense, in many states there is no longer a presumption that it existed.[47]

In the instant case, the Supreme Court held, in accord with a number of previous decisions,[48] that a presumption of ownership by the husband does still exist in Tennessee, but it is a rebuttable presumption, disappearing in the face of positive testimony. The court held that it had been rebutted in the instant case, or that at least the circumstances related above made a jury issue as to ownership of the liquor.

46. COMPTON, CASES ON DOMESTIC RELATIONS 422-26 (1951); MADDEN, DOMESTIC RELATIONS § 68 (1931). The presumption did not apply to cases of treason and usually was not applied in murder cases, nor in criminal matters where women were more frequently the offenders than men, such as the keeping of bawdyhouses.

47. Morton v. State, 141 Tenn. 357, 209 S.W. 644, 4 A.L.R. 264 (1919); Notes, 4 A.L.R. 266 (1919), 71 A.L.R. 1116 (1931).

48. Waller v. State, 178 Tenn. 509, 160 S.W.2d 404 (1941); Johnson v. State, 152 Tenn. 184, 274 S.W. 12 (1925); Crocker v. State, 148 Tenn. 106, 251 S.W. 914 (1922).