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Domestic Relations: Special Equity in Property as Prerequisite to Property Settlement

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a long term of imprisonment that later conduct proves to be unnecessary.

At present the situation is confused. Two district courts have followed the instant decision, one without referring to it,¹⁸ and the other using it as authority.¹⁹ District courts in the Eighth Circuit are without power to grant probation because of the ruling in the instant case; those in the Ninth Circuit have this power under the rule in *Kirk v. United States*;²⁰ those in other circuits are not bound and may assume the power or refuse to do so. The Supreme Court has not ruled on the matter.

If the Supreme Court decides that it is proper to retain power in the judiciary to grant probation in the situation presented here, it can do so logically and without disturbing any earlier decisions by the simple expedient of holding that the term *consecutive sentences* means just what it implies and does not mean a single sentence. Whatever its decision, the Supreme Court should establish uniformity throughout the circuits as soon as the problem is presented.

EUGENE L. ROBERTS

DOMESTIC RELATIONS: SPECIAL EQUITY IN PROPERTY AS PREREQUISITE TO PROPERTY SETTLEMENT

Goode v. Goode, 76 So.2d 794 (Fla. 1954)

Husband filed suit for divorce and wife filed counter-claim for divorce and alimony. The trial court granted divorce to the wife and, in lieu of alimony, costs, and attorney's fees, awarded her the husband's interest in personal and real property owned by the parties as tenants in common. On appeal, HELD, under the pleadings and evidence it was improper to award the husband's interest, thereby virtually stripping him of all his property. Decree reversed for further proceedings with reference to alimony, Justices Terrell and Roberts dissenting.

Florida by statute vests chancery courts with exclusive jurisdiction over matters of divorce¹ and, as an incident thereto, with the power

¹⁸United States v. Soeder, 120 F. Supp. 594 (N.D. Ill. 1954).

¹⁹United States v. Bennett, 123 F. Supp. 841 (D. Md. 1954).

²⁰185 F.2d 185 (9th Cir. 1950).

¹FLA. STAT. §65.01 (1953).

to allow alimony in proper cases.² The award of alimony is based on the common law obligation of the husband to support the wife.³ Generally, there are four conditions that must be met before an order for permanent alimony will be granted: a legally valid marriage; the legal continuance of that marriage; a separation between the spouses, not on a voluntary basis but by judicial decree; and the legal innocence of the petitioning wife.⁴ In order to obtain a decree providing for permanent alimony, the petitioner must present evidence sufficient to enable the court to form an intelligent basis for such an order.⁵ Among the factors considered by the courts in deciding the propriety of awarding alimony and the amount thereof are the conduct of both parties; the property and income of each; their ages, health, and past and present habits; length of marriage; and whether there are children dependent on either.⁶ Basically the amount of alimony depends upon the financial ability of the husband and the necessities of the wife.⁷

In the absence of express statutory authority, courts have refused to award alimony in a gross sum in lieu of periodic payments;⁸ alimony by definition is an allowance judicially allotted to a wife during a period of separation.⁹ Florida has specifically provided by statute that in awarding permanent alimony the court may order either periodic payments or payment in a lump sum.¹⁰ Maintenance, suit money, alimony, and the form thereof are controlled in Florida by the circumstances of the case and the judicial discretion of the chancellor, except in cases involving an adulterous wife.¹¹ Whether alimony is awarded in the form of periodic payments or a gross sum might result in important income tax consequences to both parties.¹² A gross sum

²FLA. STAT. §65.08 (1953).

³Floyd v. Floyd, 91 Fla. 910, 108 So. 896 (1926).

⁴See Foreword, 6 LAW & CONTEMP. PROB. 183 (1939).

⁵Phelan v. Phelan, 12 Fla. 449 (1868).

⁶E.g., Gilbert v. Gilbert, 305 Ill. 216, 137 N.E. 99 (1922).

⁷Knox v. Knox, 159 Fla. 123, 31 So.2d 159 (1947).

⁸E.g., Roberts v. Roberts, 160 Md. 513, 154 Atl. 95 (1931); Parmly v. Parmly, 125 N.J. Eq. 545, 5 A.2d 789 (1939). See 1 U. FLA. L. REV. 79 (1948) for a discussion of the Florida situation prior to the 1947 amendment of FLA. STAT. c. 65.

⁹Sanchez v. Sanchez, 21 Fla. 346 (1885).

¹⁰FLA. STAT. §65.08 (1953).

¹¹Longino v. Longino, 67 So.2d 203 (Fla. 1953).

¹²INT. REV. CODE §71. Alimony and separate maintenance awards payable in periodic payments are includible in the gross income of the wife and deductible from the gross income of the husband. If a gross (lump sum) award is made the proceeds are not deductible by the husband or includible by the wife unless the obligation is discharged over a period of ten or more years and then only to

award, even though made payable in installments, becomes a vested right in the wife¹³ and could be the basis for a claim against the former husband's estate upon his death.

Property rights existing between the husband and wife are proper subjects for disposition in divorce proceedings.¹⁴ When a wife has brought property to the marriage or has contributed money or labor to the acquisition of property during the marriage, she acquires a peculiar equity in it that may be enforced in a divorce proceeding.¹⁵ A divorce award to the wife is not classified as alimony if the contribution of labor and money by the wife during coverture has resulted in an accumulation.¹⁶ Such an award is a property settlement. Use of the term *alimony* in a separation agreement or a divorce decree is not conclusive as to the legal status of the financial arrangement made in the agreement or decree, since it is the substance and not the form that controls.¹⁷

In the instant case it is difficult to determine whether the Court is referring to a gross sum award of alimony as authorized by Section 65.08 of Florida Statutes 1953 or to a property settlement between the parties. A property settlement is based upon a wife's special equities in the property, while alimony is based upon the husband's duty to support the wife. Regardless of whether alimony is awarded in periodic payments or a gross sum, it is separate and distinct from a property settlement. In certain cases both an award of alimony and a property settlement may be proper. On the facts of this case an alimony award rather than a property settlement would have been proper, because the wife had not acquired any special equities in the property of the husband and the husband was still obligated to support the wife.

G. L. KENNEDY, JR.

the extent the amount of payment in any year does not exceed 10% of the principal sum.

¹³Yandell v. Yandell, 39 So.2d 554 (Fla. 1949).

¹⁴Tenny v. Tenny, 147 Fla. 672, 3 So.2d 375 (1941); Meloche v. Meloche, 101 Fla. 659, 140 So. 319, *reaff'd*, 133 So. 339 (1931).

¹⁵Strauss v. Strauss, 148 Fla. 23, 3 So.2d 727 (1941); Windham v. Windham, 144 Fla. 563, 198 So. 202 (1940).

¹⁶Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932).

¹⁷Underwood v. Underwood, 64 So.2d 281 (Fla. 1953).