Vanderbilt Law Review

Volume 12
Issue 4 *Issue 4 - October 1959*

Article 14

10-1959

Domestic Relations--1959 Tennessee Survey

William J. Harbison
Vanderbilt School of Law

DOMESTIC RELATIONS—1959 TENNESSEE SURVEY

WILLIAM J. HARBISON*

* * *

I. ADOPTION OF CHILDREN

In the case of *In re Matthews*,[1] the supreme court once more was called upon to construe the adoption statutes and to determine the relationship between the juvenile court and a court in which adoption proceedings are pending. In this same case, the court had earlier held that jurisdiction of juvenile courts to declare children abandoned is not exclusive and that in adoption proceedings a chancery court may determine whether there has been an abandonment of the child proposed to be adopted.[2] The supreme court had remanded the case to the chancery court. In that court, the Department of Public Welfare resisted the proposed adoption and asserted that in still earlier proceedings the subject child had been declared to be a dependent by the juvenile court, its custody had been given to the department and the cause retained in juvenile court for further orders. The department therefore contended that the chancery court could not proceed with the proposed adoption proceedings. The chancellor agreed and dismissed the petition for adoption. For the second time the supreme court reversed the cause and remanded it to the chancellor, holding that nothing in the juvenile court statutes prevents a circuit or chancery court from entertaining an adoption proceeding merely because the child is within the jurisdiction of the lower court as a dependent.

This holding would seem to have been implicit in the earlier opinion of the court. Jurisdiction over adoption of children is vested ex-

* Lecturer in Law, Vanderbilt University; former Editor-in-Chief, Vanderbilt Law Review; member, Trabue, Sturdivant & Harbison, Nashville, Tennessee.

1. 319 S.W.2d 69 (Tenn. 1958).

2. *In re* Matthews, 310 S.W.2d 185 (Tenn. 1957), discussed in Harbison, *Domestic Relations—1958 Tennessee Survey*, 11 VAND. L. REV. 1259, 1260 (1958).

clusively in the circuit and chancery courts and is entirely beyond the jurisdiction of a juvenile court.[3] Although juvenile courts do have power to declare children abandoned and to place them with an agency for adoption,[4] the mere fact that the juvenile court has done so does not prevent the circuit or chancery court from proceeding with an adoption. Likewise the fact that juvenile court retains a child in its custody as a dependent should not mean that the child is indefinitely "frozen" within the exclusive jurisdiction of that court, so as to prevent interested persons from petitioning one of the higher courts for its adoption.[5]

The state adoption statutes were extensively amended by the 1959 General Assembly.[6] Formerly any person over twenty-one years of age could file a petition to adopt a child. New provisions require that the petitioners be citizens of the United States and that they shall have lived, maintained a home and physically resided in the state, or on a federal enclave within the state, for a period of one year prior to filing the petition for adoption. It is not required, however, that the petitioners actually make Tennessee their "legal residence."[7] Other amendments to the statutes provide that when a petition for adoption is filed, the child becomes "a ward of the court" and that the court "shall have jurisdiction of all matters pertaining to the child."[8] The latter provision should help eliminate jurisdictional technicalities such as those which were raised in the *Matthews* case.[9]

Other provisions of the new legislation make more specific the conditions under which a natural parent may consent to the adoption of a child by a relative[10] and clarify the powers of the adoption court with respect to declaring children abandoned by their natural parents.[11]

Perhaps the most important changes in the statutes are those respecting the surrender of children by their natural parents directly to prospective adoptive parents.[12] The new provisions require that the persons to whom the child is being surrendered must be physically present at chambers of the court when the surrender occurs. Identity of the persons to whom the child is being surrendered must be proved

3. TENN. CODE ANN. § 36-102(3) (1956).
4. TENN. CODE ANN. § 37-260 (Supp. 1959).
5. The persons who may apply for adoption are specified in TENN. CODE ANN. § 36-105 (Supp. 1959). See note 7 *infra*.
6. TENN. CODE ANN. §§ 36-105, 106, 108, 110, 114, 117, 118, 123, 124, 125 (Supp. 1959).
7. TENN. CODE ANN. § 36-105 (Supp. 1959).
8. TENN. CODE ANN. § 36-106 (Supp. 1959).
9. 319 S.W.2d 69 (Tenn. 1958).
10. TENN. CODE ANN. § 36-108 (Supp. 1959).
11. TENN. CODE ANN. § 36-110 (Supp. 1959).
12. TENN. CODE ANN. § 36-114 (Supp. 1959).

to the court, and specific forms for execution by all of the parties are prescribed.

The time within which revocation of a surrender by the natural parents may be made was shortened from six months to ninety days in cases where surrenders are made directly to prospective adopting parents.[13] New provisions were added specifying the form for revocation of surrender and providing for investigation and a hearing by the court as to the proper disposition of the custody of a child where a surrender has been revoked.[14] Other amendments extended the time for investigation of proposed adoptions from thirty to sixty days,[15] and provisions were added empowering the court to award custody of children according to their best interests when adoption proceedings are dismissed.[16]

II. Custody and Support of Children

The case of *Lokey v. Griffin*[17] may be an important decision in defining the powers of the juvenile and circuit courts over the custody of children declared to be dependent. The children of divorced parents had been declared dependent by a municipal juvenile court, and their custody had been divided between their parents. Upon appeal to the circuit court, the decree of the lower court had been affirmed. In a further appeal to the court of appeals, however, that court had held that the circuit court is required, in reviewing a juvenile court order, to make a new and independent disposition of child custody.[18] The case had accordingly been remanded to the circuit court for this purpose. Upon the remand, the circuit court had awarded the children to their father, and had remanded the case to the juvenile court for enforcement of the decree. In the present case, the court of appeals held that this procedure was proper and that the juvenile court would continue to have jurisdiction over the children until they reached their majority. Its further orders were held to be subject to review de novo in the circuit court upon appeal, and of course the question of the proper custody and welfare of the children remains subject to modification at any time upon a showing of sufficient change in circumstances.[19]

The decision seems to be correct, and it is of importance in that it represents the first reported construction of many of the provisions of the juvenile court statutes enacted in 1955.[20]

13. Tenn. Code Ann. § 36-117 (Supp. 1959).
14. *Ibid.*
15. Tenn. Code Ann. § 36-118 (Supp. 1959).
16. Tenn. Code Ann. § 36-123 (Supp. 1959).
17. 322 S.W.2d 239 (Tenn. App. W.S. 1958).
18. Tenn. Code Ann. § 37-273 (Supp. 1959).
19. Tenn. Code Ann. § 37-263 (Supp. 1959).
20. Tenn. Code Ann. §§ 37-242 to -274 (Supp. 1959).

Another significant decision in the complex area of interstate divorce and custody decrees is the case of *Burden v. Burden*.[21] Here the parties had lived in Ohio with their children for two or three years prior to their separation. After separating from her husband, the wife returned to her former home in Tennessee, bringing the minor children of the parties with her. Shortly after she left Ohio, her husband filed suit for divorce in that state. The wife entered an appearance through counsel and contested the action. Various attempts at reconciliation failed. The divorce action in Ohio was set for trial without adequate notice to the wife, so that she did not appear at the hearing. The Ohio court awarded a divorce to the husband and entered a custody decree in his favor. The wife then instituted the present suit in Tennessee, attacking the Ohio custody decree because of lack of jurisdiction in that state and because of lack of notice to her, allegedly constituting fraud upon her. The chancellor sustained her suit, awarded custody to her, and ordered the husband to support the children.

The court of appeals affirmed the decree. The court found that the wife had established a new domicile in Tennessee, separate from that of her husband. This finding was based upon evidence that she had withdrawn from her husband justifiably and with his consent. The court found that the question of her right to withdraw had not been adjudged in the Ohio proceeding, so that the wife was not precluded by the rule of res adjudicata.

Having found that the wife had established a new domicile, the court held that the minor children had acquired domicile with her, and that the Ohio court lacked jurisdiction to enter a custody decree over them.[22] The fact that the mother had submitted to the jurisdiction of the Ohio court was deemed unimportant as far as the custody aspect of the case was concerned. The court also found that the husband had practiced a "constructive fraud" upon the wife by having the Ohio suit set for trial without notice to her and at a time when she had been led to believe the suit had been dismissed.

Having found that the trial court had jurisdiction to enter a custody award, the court of appeals also affirmed the support decree. The court held that since the father was before the lower court, it would be circuitous to require a new action by the mother to obtain support for the children.[23]

---

21. 313 S.W.2d 566 (Tenn. App. E.S. 1957).

22. Ritchison v. Ritchison, 28 Tenn. App. 432, 191 S.W.2d 188 (1945); Annot., 4 A.L.R.2d 7, 26 (1949).

23. The defendant insisted that the court lacked power to enter a support decree, relying upon the Tennessee decisions that a child may not bring a direct action against its father for future support. Baker v. Baker, 169 Tenn. 589, 89 S.W.2d 763 (1935); Fuller v. Fuller, 169 Tenn. 586, 89 S.W.2d 762

The right of a father to offset earnings of his children against support payments was the subject of the case of *Churchill v. Churchill.*[24] The husband had legally adopted two sons of his wife by her former marriage. When the husband and wife were divorced, an agreement was made between them under which the wife was given exclusive custody of the children, and the husband agreed to make regular payments for their support. The present suit was instituted when he became delinquent as to these payments.

In defense of the claim for arrearage, the husband asserted that the two sons had been working regularly and that he was entitled to credit their total earnings against the support payments. The chancellor disallowed his claim. The court of appeals, however, held that although the father had waived any claim for past earnings by not claiming them, he would be allowed credit in the future for the earnings of the children. The supreme court reversed the court of appeals and held that the parent has no right to the earnings of his minor child unless he has actual custody. Since custody had been surrendered in this case to the mother, the father was held to have no right in the earnings of the sons, past or future. The common law right of the parent to earnings was held to be conditioned upon actual custody and upon the rendering of parental supervision and support to the child.[25]

III. Emancipation of Children

The case of *Glover v. Glover*[26] presented the unusual fact situation of an automobile collision between a vehicle of parents and a vehicle in which their minor son was riding as a passenger. The son filed suit against his parents for personal injuries which he sustained in the accident. The lower court held that the suit could not be maintained because of the rule of family immunity in tort.[27]

The court of appeals reversed and remanded the case for a new trial upon the issue of emancipation of the minor from parental

---

(1932). This rule has now become a minority rule. See Harbison, *Domestic Relations,* 6 Vand. L. Rev. 974, 982 (1953). In the present case the court expressed disapproval of the *Baker* and *Fuller* decisions but correctly pointed out that in any event they were inapplicable because the present suit was brought expressly for a determination of custody. The support order was incident to this proceeding. It was not made in a direct or separate action against the father by a child.

24. 313 S.W.2d 436 (Tenn. 1958).

25. Kenner v. Kenner, 139 Tenn. 700, 202 S.W. 723 (1917), L.R.A. 1918E 587 (1917).

26. 319 S.W.2d 238 (Tenn. App. M.S. 1958).

27. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903). See Sanford, *Personal Torts Within the Family,* 9 Vand. L. Rev. 823, 832 (1956).

control. The rule of immunity in tort between parent and child does not apply when an emancipation has taken place.[28] In this case the child was nineteen years of age and was in military service at the time of the accident. Before entering service, he had worked on his father's farm on a sharecrop basis. He had paid no amount for his support at home and had been allowed to retain his crop earnings. After entering service, he had retained his entire military salary, making no allotment in favor of his parents.

Under these facts the court of appeals held that the case should have been submitted to the jury upon the issue of emancipation. Emancipation is primarily a matter of intention, to be gathered from all of the facts and circumstances of a given situation.[29] It may be either complete or partial, and it may be either temporary or permanent.[30] It frequently is found, by implication and sometimes as a matter of law, from the fact that the child has been permitted to enlist in military service.[31] Accordingly, the court of appeals correctly held that the trial court erred in applying the immunity rule without affording the jury an opportunity to consider the question of emancipation.

IV. DIVORCE

In the case of *Murrell v. Murrell*[32] a wife had filed against her husband for separate maintenance, but in the petition had set forth specific acts of cruelty and had charged cruel and inhuman treatment in the language of the divorce code.[33] At the hearing of the case, she had amended her bill to seek an absolute divorce. The trial judge granted a divorce *a mensa et thoro* for a period of six months with leave granted either party later to apply to make the divorce absolute. In later proceedings between the parties, the wife had made such application and an absolute divorce had been awarded to her.

The husband had not appealed from any of the decrees in the previous suit. He had sought a modification of certain child custody provisions of the divorce decree after its entry. Later, however, he filed the present suit as a separate cause, seeking to set aside the divorce decree because of lack of jurisdiction of the divorce court and for alleged fraud. The circuit judge dismissed the suit.

The court of appeals affirmed. The court recognized that normally

28. Annot., 122 A.L.R. 1352, 1356 (1939); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823, 836 (1956).

29. Fiedler v. Potter, 180 Tenn. 176, 172 S.W.2d 1007 (1943).

30. Wallace v. Cox, 136 Tenn. 68, 188 S.W. 611 (1916), L.R.A. 1917B 690 (1916).

31. 39 AM. JUR. *Parent and Child* § 64 (1942); Annot., 165 A.L.R. 723, 750 (1946); Annot., 137 A.L.R. 1467, 1490 (1942); Annot., 12 A.L.R. 827 (1921).

32. 323 S.W.2d 15 (Tenn. App. W.S. 1958).

33. TENN. CODE ANN. § 36-802 (1956).

a divorce decree cannot be granted in a petition for separate maintenance only, where no grounds for a divorce are stated.[34] In the present case, however, the original petition for separate maintenance was amended to seek a divorce, and grounds therefor were set out with sufficient clarity in the petition.[35] Accordingly, the trial judge had authority to grant a divorce to the wife, and it was within his discretion to grant first the limited divorce and later to grant an absolute divorce.

As to the allegations of fraud, there had been no transcript of testimony preserved so that the appellate court could not review this phase of the case. In any event, however, it was pointed out that a suit to set aside a judgment for fraud must be brought exclusively in the chancery court.[36] The present case was filed in circuit court which the appellate court held would not have power to set aside the previous decree by collateral attack upon the basis of fraud.[37]

The 1959 General Assembly enacted an important provision concerning the power of divorce courts over jointly owned property.[38] The new provisions permit a court in either divorce or separate maintenance actions to "adjust and adjudicate" the respective rights and interests of the parties in all jointly owned property "as may be just and reasonable" under the facts of the case. The court is empowered to divest and revest title, and in proper cases to order sale of the property and division of the proceeds.

Although there had previously been somewhat similar statutes in existence, their terms had not been entirely clear.[39] The new legislation should eliminate any problems as to the jurisdiction of the

34. Stephenson v. Stephenson, 201 Tenn. 253, 298 S.W.2d 717 (1957), discussed in Harbison, *Domestic Relations—1957 Tennessee Survey,* 10 VAND. L. REV. 1082, 1090 (1957).

35. The Tennessee statutes require that acts of cruelty be set out specifically in the petition for divorce; a general allegation of statutory grounds is not sufficient. TENN. CODE ANN. § 36-805 (1956); Beard v. Beard, 3 Tenn. App. 392 (1926).

36. GIBSON, SUITS IN CHANCERY §§ 29, 981 (5th ed. Crownover 1956).

37. The opinion is not clear in dealing with this point. Under TENN. CODE ANN. § 16-511 (1956), the circuit court is given full power to try *any* cause of an equitable nature unless objection to the jurisdiction is made by the defendant. There had been such objection made in the instant case, and it would seem therefore that the dismissal was proper upon this basis. Certain language of the opinion, however, indicates that the circuit court could never entertain a suit to set aside a decree for fraud even if its jurisdiction were not challenged by the defendant. See 323 S.W.2d at 23. This seems clearly incorrect and is more confusing because in an earlier portion of the opinion the court held that the circuit court could, under this statute, entertain a separate maintenance suit—purely an equitable action—where no objection to jurisdiction was made.

38. TENN. CODE ANN. § 36-825 (Supp. 1959).

39. TENN. CODE ANN. § 36-825 (1956). The former statutes applied only when relief was given to the husband in the suit, and the courts had shown some reluctance to utilize them. See Harbison, *Domestic Relations—1956 Tennessee Survey,* 9 VAND. L. REV. 990, 997 (1956).

courts to dispose of jointly owned property as the equities of the case require.

V. MARRIAGE

The General Assembly amended the marriage licensing statutes in an effort to clarify certain provisions relating to the three-day waiting period between the filing of an application and the issuance of the license.[40] The new provisions require the application to remain on file for "three (3) whole days" before license is issued, and require registered mail notice to the parents or next of kin of the female except when they join in the application and state that she is over eighteen years of age.

40. TENN. CODE ANN. §§ 36-406 (Supp. 1959).