Annual Survey of Massachusetts Law

Volume 1965 Article 12

1-1-1965

Chapter 9: Domestic Relations and Persons

Banks McDowell

Arthur B. Tyler

CHAPTER 9

Domestic Relations and Persons

BANKS MC DOWELL

§9.1. Revocation or termination of decree of separate support. The Supreme Judicial Court has recently dealt with several minor problems arising from the revocation or the termination of decrees of separate support.

In *Wilson v. Wilson*,[1] the probate court had dismissed the husband's petition to revoke a decree of separate support on the ground that a decree based on cruel and abusive treatment could be revoked only by the mutual agreement of the parties. This was held to be in error. It is proper to permit the husband in such a case to introduce evidence to show that the decree should be revoked, but the Supreme Judicial Court said the burden of proof would be "heavy, and possibly insuperable." Although the opinion did not spell out what the husband would have to prove, it quoted with approval a dictum of Justice Rugg,[2] where it was said that the husband would have to establish not only his "good faith," but that the wife "would be free from reasonable apprehension for her bodily safety." The important elements in such a showing are still somewhat ambiguous. The Court seems to say that the crucial factor is that the wife as a reasonable person should no longer be afraid of her husband. However, a wife should not be forced against her will, by terminating support payments, to return to her husband if she is still in fear for her safety, even though a "hypothetical" reasonable wife would not have been afraid. In other words, the objective standard suggested by Rugg's formulation, "reasonable apprehension," should not be used, but rather a subjective standard. The weakness of the trial court's position which required the consent of the wife is that such consent could be withheld in bad faith. The important question should then be the "good faith" of the wife. The way that the husband could establish lack of good faith would be to show that she actually was no longer in apprehension for her safety, which may well be, as the Court suggests, an "insuperable" burden of proof.

Two cases before the Court involved basically the same fact situation. The wife brought a petition for separate support in Massachusetts. As a defense, the husband introduced evidence of a Nevada decree of divorce. It is well settled that a foreign divorce, if valid, terminates any obligation of support which has not accrued at the

BANKS MCDOWELL is Professor of Law at Boston University Law School.

§9.1. 1 1965 Mass. Adv. Sh. 595, 206 N.E.2d 155.
2 Slavinsky v. Slavinsky, 287 Mass. 28, 33, 190 N.E. 826, 828 (1934).

date of the divorce decree.[3] The reason given is that the decree for separate support is dependent upon an existing relationship of marriage which ceases to exist once the divorce is granted. In *Ingersoll v. Ingersoll*[4] the probate court had refused to admit evidence of the Nevada decree. In light of the above principle, this was clearly error. Since, however, the wife had not personally appeared in the Nevada proceedings and she alleged that the Nevada court was without jurisdiction, the trial court on remand had to determine whether the Nevada court actually had jurisdiction over the husband before it terminated his obligation of support.[5] In *Rossi v. Rossi*[6] it was held that there must be strict compliance with General Laws, Chapter 233, Section 69, to prove the validity of the Nevada divorce. A copy of the decree certified by the attorney for the husband in Nevada was not sufficient evidence because the cited statute requires that the decree be certified by a clerk or an officer of the court charged with the keeping of the records. Proof of a remarriage of the husband celebrated in Nevada after the alleged divorce would also be insufficient because it does not establish a valid divorce.

In the *Ingersoll* case, which was a petition for execution under a decree of separate support, the wife had previously filed a petition for contempt against her husband, but at the time of the hearing on execution there had been no hearing or findings on the petition for contempt. The mere filing of a petition for contempt was held to be no basis for depriving the respondent of a possible mitigating defense, although a finding that the husband was in contempt would probably have prevented him from raising this defense until he had purged himself of contempt.[7]

§9.2. Effect of prior foreign custody decree on local custody proceeding. The Supreme Judicial Court side-stepped an interesting constitutional problem in *Jones v. Jones*.[1] This was an appeal from a decree of the probate court awarding permanent custody of a minor child to her paternal grandmother. The parents of the child had been divorced in the Virgin Islands in what was clearly a migratory divorce. The mother established a domicile in the Virgin Islands and the father appeared personally as defendant. Pursuant to a separation agreement, the mother was awarded custody of the child in the divorce decree. She left it with the paternal grandmother in Massachusetts,

3 Chittick v. Chittick, 332 Mass. 554, 126 N.E.2d 496 (1955); Rosa v. Rosa, 296 Mass. 271, 5 N.E.2d 417 (1936).

4 1964 Mass. Adv. Sh. 1369, 202 N.E.2d 820.

5 The issue to be decided on remand is whether the husband acquired a valid domicile in Nevada. Barnard v. Barnard, 331 Mass. 455, 120 N.E.2d 187 (1954). If the wife (defendant) had personally appeared in Nevada and the Nevada court had found that the husband (plaintiff) was domiciled in Nevada, Massachusetts must give effect to the Nevada divorce decree even if the husband was in fact not domiciled in Nevada. Aufiero v. Aufiero, 332 Mass. 149, 123 N.E.2d 709 (1955).

6 1965 Mass. Adv. Sh. 588, 206 N.E.2d 53.

7 Cf. Henderson v. Henderson, 329 Mass. 257, 107 N.E.2d 773 (1952).

§9.2. 1 1965 Mass. Adv. Sh. 849, 207 N.E.2d 922, also noted in §10.5 *infra*.

where the child resided for two and a half years. This residence of the child was sufficiently permanent to permit the Massachusetts court to take jurisdiction under General Laws, Chapter 208, Section 29. As far as one can tell from the opinion, the probate court had made a broad consideration of all the facts as to the child's welfare, including many which had existed at the time of the divorce proceeding. Since the case was made on a report of the evidence, the Supreme Judicial Court made a narrower finding of fact as a basis for the custody award. They found sufficient changed circumstances, arising from the mother's way of life and her indifference to the child since the divorce, to permit them to affirm the change of custody without regard to facts in existence at the time of the divorce. Therefore, it was unnecessary to consider "what the result would have been if the decree were based on events occurring prior to the entry of the original decree."[2]

There is still an open question whether the full faith and credit clause requires the forum to give effect to a custody decree of a sister state if there were no changed circumstances after the original decree and the change of custody in the forum is based on facts existing at the time of that decree.[3] Mr. Justice Frankfurter has argued persuasively that a finding of changed circumstances is often evasionary; that the forum frequently does and should consider factors that occurred prior to the foreign decree; at the very least these factors are a part of the total context which should be taken into account in such a delicate balancing of interests; that there is virtue in the forum being open about the factors which influence its decision; and, therefore, custody decrees ought not to be subject to the full faith and credit clause.[4] The objection to this position is that it will encourage the abduction of children, forum shopping, and continual relitigation of custody between parents or other relatives who are unable to agree on the question of custody.[5] The problem of abduction and relitigation can be handled collaterally by such techniques as criminal penalties against abduction, giving great weight to a prior decree of custody,[6] and a suspicious scrutiny of the position of the abducting parent. The clean hands doctrine should not, however, be automatically applied because the central question is the welfare of the child and not the rights of the respective parents.

The debate over this constitutional issue, an important one in Domestic Relations, is likely to remain academic as long as attorneys frame their arguments and judges their decisions as did the Supreme

[2] If the custody decree from the sister state was modifiable because of changed circumstances and the modification in the forum is based on circumstances occurring after that decree, the modification is clearly not a violation of the full faith and credit clause. Ford v. Ford, 371 U.S. 187, 83 Sup. Ct. 273, 9 L. Ed. 2d 240 (1962).

[3] Kovacs v. Brewer, 356 U.S. 604, 78 Sup. Ct. 963, 2 L. Ed. 2d 1008 (1958).

[4] Dissent by Frankfurter in Kovacs v. Brewer, 356 U.S. at 609, 78 Sup. Ct. at 967, 2 L. Ed. 2d at 1012.

[5] Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 810-811 (1964).

[6] See Brown v. Stevens, 331 F.2d 803 (D.C. Cir. 1964), where the technique of giving great weight to the prior custody decree was applied.

Judicial Court in order to avoid decision of the question. As a practical matter, the hearing in the forum will always occur in point of time after the original decree, and there will almost inevitably be changes in circumstances, which the attorneys and judge can use to justify the change or modification of custody and thus avoid presenting the constitutional question.

§9.3. Separation of support amount into alimony and child support for tax purposes. In *Metcalf v. Commissioner of Internal Revenue*,[1] the First Circuit Court of Appeals had to decide whether payments of $125 made by the taxpayer to his wife, who had custody of their minor children, was to be construed as alimony and therefore deductible from his income or as child support and nondeductible. In contemplation of their divorce in 1951, the spouses had entered a separation agreement providing that the taxpayer was to pay his wife $150 weekly, which sum amount would be reduced $25 on the death, marriage, or majority of each of the five minor children, and $25 on the remarriage of the wife. In prior litigation between these parties, the First Circuit had construed this agreement as fixing by its terms a sum of child support at $125 per month and the balance as alimony,[2] but on similar facts, the Second Circuit reached a different result.[3] The Supreme Court agreed with the Second Circuit, holding that the allocation must be fixed by specific designation rather than by interpretation and, as the agreement did not so specifically designate a portion for child support, the entire amount would be treated as alimony.[4]

Subsequent to these decisions, the divorce decree was amended following the remarriage of the wife in 1954 and ordering the taxpayer to pay $125 for the support of the four named children for which she had custody at this time. The contention of the taxpayer in the present case was that the question of whether the payments are child support or alimony is governed by the agreement and, since the wife may in her discretion apply these payments for her own support or for the support of the children, the payments ought to be construed as alimony. The court said that, under Massachusetts law, the divorce decree and the separation agreement could exist independently. However, the decree did specifically fix the payment as child support and when there is a disparity between the decree and the agreement, it is the decree which governs the allocation for tax purposes.

The lessons for the attorney are clear. In drafting separation agreements and divorce decrees as to support payments, the amount should be allocated specifically into a portion for alimony and a portion for child support. The amount allocated to child support must be a fair sum for the children, taking into account all of the relevant factors for fixing such support. Otherwise, this portion may be raised by the

§9.3. 1 343 F.2d 66 (1st Cir. 1965).
2 Metcalf v. Commissioner, 271 F.2d 288 (1st Cir. 1959).
3 Lester v. Commissioner, 279 F.2d 354 (2d Cir. 1960).
4 Commissioner v. Lester, 366 U.S. 299, 81 Sup. Ct. 1343, 6 L. Ed. 2d 306 (1961).

court at the request of the parent having custody, thereby raising the total amount of support. After fixing a fair portion as child support, the balance should be specifically allocated to alimony. If at all possible, the subsequent decree should correspond with the allocation made in the separation agreement because in case of difference, it is the decree which controls for tax purposes.

§9.4. **Legislative changes: Insurance coverage and inheritance rights of adopted children.** Two changes of some importance have been made in the legal position of adopted children. By Chapter 112 of the Acts of 1965, the legislature amended Chapter 175 of the General Laws, Section 108, 2(a)(3) to read as follows:

> (3) It purports to insure only one person, except that a policy may insure, originally or by subsequent amendment, upon the application of an adult member of a family who shall be deemed the policyholder, any two or more eligible members of that family, including husband, wife, dependent children or any children under a specified age which shall not exceed nineteen years and any other person dependent upon the policyholder; provided, that where a policy provides for termination of a dependent child's coverage at a specified age, and where such a child is mentally or physically incapable of earning his own living on the termination date, the policy shall continue to insure such child while the policy is in force and so long as such incapacity continues, if due proof of such incapacity is received by the insurer within thirty-one days of such termination date. *The term "dependent children" as used in this provision shall include children of adopting parents during pendency of adoption procedures* under the provisions of chapter two hundred and ten. . . . [Emphasis supplied.]

The italicized language makes a statutory interpretation of accident and sickness policies which construes a child living with prospective adoptive parents during the pendency of adoption procedures as a "dependent child" under the terms of the policy. This very sound change treats a person who is a de facto member of the family, although not yet legally so, as a family member for purposes of insurance coverage.

By Acts of 1965, Chapter 252, an even more important change has been made in the laws of succession as these affect adopted children. Section 7 of General Laws, Chapter 210, was amended by inserting the following in place of the first sentence:

> A person adopted in accordance with this chapter shall take the same share of that property which the adopting parent could dispose of by will as he would have taken if born to such parent in lawful wedlock, *and he shall stand to the kindred of such adopting parent in the same position as if so born to him.* [Emphasis supplied.]

The italicized language represents the change in place of the phrase which read:

> . . . and he shall stand in regard to the legal descendants, but to no other of the kindred of such adopting parent, in the same position as if so born to him.

Under the prior statute, the adopted child could inherit from the adoptive parents and their lineal descendants, such as his adoptive brother or sister,[1] but could not inherit through the adoptive parents from ascending or collateral relatives, such as grandparents[2] or aunts and uncles. The amendment permits the adopted child to take by succession just as if he were the natural child of the parents. The objection to such a provision has been that it would permit parents to create heirs of other relatives by the process of adoption without their knowledge or consent. The answer to this is that the property owner does have some obligation to be informed of his possible heirs and he can by executing a will disinherit the adopted child. If he fails to keep informed or to make a will, he does not have a strong claim to protection against possible adoptive heirs.

Both these enactments increase the assimilation of the adoptive child as nearly as possible to the position of the natural child and are to be greatly welcomed. It is regrettable that the legislature while amending Section 7 did not also strike out the sentence which permits the adoptive child to inherit from his natural parents. This makes it necessary to maintain the distinction of record between adopted and natural children and actually places the adoptive child in a better position than natural children, since he is permitted to take by succession from two sets of parents. The assimilation of the child into the adoptive family ought to be complete by totally cutting off all ties with the natural family.

§9.5. Legislative changes: Libelee in divorce action may now remarry immediately after divorce becomes absolute. By Chapter 640 of the Acts of 1965, the legislature struck out Section 24 of Chapter 208 of the General Laws and in its place inserted the following: "Section 24. After a decree of divorce has become absolute, either party may marry again as if the other were dead."

Under the stricken section, the libelee in a divorce action was prohibited from remarrying for two years after the decree had become absolute as long as the other party to the divorce was still living.[1] Any attempted remarriage by the libelee during this period was void. The removal of this prohibition is probably wise for two reasons. The first is that we recognize today that fault is not completely one sided in many divorces,[2] that it is usually a difference of degree only

§9.4. [1] O'Connell v. Powers, 291 Mass. 153, 197 N.E. 162 (1935).
[2] Gammons v. Gammons, 212 Mass. 454, 99 N.E. 95 (1912).

§9.5. [1] Van Bibber's Case, 343 Mass. 443, 179 N.E.2d 253 (1962) (and cases cited therein).
[2] Technically the doctrine of recrimination, which is still applicable in Massachu-

between the two spouses, and that it may be a matter of agreement as to who will be the libellant and who the libelee. In such a situation, it is very inequitable and harsh to permit the libellant to remarry while the libelee must wait for two years. The second reason is that today it is widely accepted as a social custom that divorced parties are or ought to be free to remarry. To prohibit such remarriage after the divorce becomes absolute increases attempts at evasionary marriages or leads the libelee in many cases to live with another person without marriage. Unless there is some very strong social policy behind such a prohibition, people ought not to be driven to such practices.

§9.6. Constitutionality of anticontraceptive statute. Grave doubt has been placed on the constitutionality of Chapter 272 of the General Laws, Sections 20-21, under the United States Constitution. In *Griswold v. State of Connecticut*[1] the Supreme Court of the United States, on June 7, 1965, declared the Connecticut statute consisting of two provisions, one making the use of contraceptives illegal and the other punishing the aiding and abetting of such use, unconstitutional because it interfered with a constitutionally protected right of privacy in the marital relation. The Massachusetts statutory scheme varies somewhat from Connecticut because the use of contraceptives is not illegal in Massachusetts. It is the sale, loan, or gift of contraceptive devices which is prohibited. Under the Massachusetts statute, just as under the Connecticut act, the provision of contraceptives for married couples is clearly prohibited. In the *Griswold* case, the defendants, who were an executive of the Planned Parenthood League of Connecticut and a medical doctor, were prosecuted and convicted under the aiding and abetting section of the statute for prescribing and giving contraceptives to married couples. It was held that they had standing to raise the rights of their married patients and they were permitted to argue that the acts they were prosecuted for aiding and abetting were constitutionally protected and, therefore, legal. There is little likelihood that the Supreme Court would be willing to draw distinctions between the two statutes should the constitutionality of the Massachusetts statute come before it.

Because of serious doubts about the social wisdom of this legislation, House Bill 4162, which would permit the dissemination by physicians and registered pharmacists of contraceptives, was introduced in the present legislature but this was referred, by a close vote, to the next session on August 2, 1965. Since the present law is clearly unenforceable in practice and of very doubtful constitutionality, it is hoped that the statute will be amended at the next session.

---

setts, Reddington v. Reddington, 317 Mass. 760, 59 N.E.2d 775, 159 A.L.R. 1448 (1945) (and cases cited therein), does not recognize this, but assumes that only one party can be at fault. However, the doctrine of recrimination has been severely criticized and is clearly out of touch with social reality. See Chaffee, Some Problems of Equity 73-75, 81-84 (1950).

§9.6. [1] 381 U.S. —, 85 Sup. Ct. 1679, 14 L. Ed. 2d 510 (1965).