Denver Law Review

Volume 41 | Issue 2 Article 5

January 1964

One Year Review of Domestic Relations

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ONE YEAR REVIEW OF DOMESTIC RELATIONS

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I. ALIMONY AND SUPPORT PAYMENTS

In *McMichael v. McMichael*,[1] the wife obtained a divorce and permanent alimony of 10,000 dollars in monthly installments of 125 dollars, as well as attorney's fees. The husband paid the attorney's fees without objection but appealed to the supreme court by writ of error seeking reversal of the order for the payment of permanent alimony. He contended that the trial court had abused its discretion in ordering the payment of alimony, and that the payment was not really alimony but rather a property settlement. His argument was based on the fact that no provision was made for its termination on the death or remarriage of the wife, or his own death. The supreme court rejected the husband's contention that the award was a property settlement rather than alimony, stating that the conditions which might require a modification or termination of payments could be dealt with when they occurred. The court then held the award of alimony was proper and stated: "We have repeatedly held that the amount of alimony to be awarded is a matter within the sound discretion of the trial court and will not be disturbed if there is credible evidence to support it."[2]

The financial history of the marriage showed that at the time of the marriage the wife had assets of between 80,000 and 150,000 dollars and that the husband had no assets. However, at the time of the divorce neither the wife nor the husband had any appreciable assets. On these facts the court found ample credible evidence to support the lower court's judgment.

Liggett v. Liggett[3] is another case in which the discretion of the trial court was questioned. In this case the wife, from whom the husband had been granted a divorce because of her excessive use of alcohol and drugs, brought a writ of error contending that she was entitled to a property settlement which had been denied her, and that the 7,500 dollars alimony awarded her was not reasonable. The supreme court held that the trial court did not abuse its discretion; according to the evidence, the wife had failed to perform her duties as a wife and partner in the marriage relationship and had not contributed to the business or financial resources of the parties. There was no evidence that the award of alimony was unreasonable, and the supreme court declined to interfere with the trial court's decision in this case.

The trial court's discretion in awarding separate maintenance rather than alimony in *Hayutin v. Hayutin*[4] was upheld by the supreme court on the same reasoning as applied in alimony cases. Quoting from a Colorado decision,[5] the court said:

> It is fundamental that the question of the amount of alimony awarded rests in the sound discretion of the trial

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1 380 P.2d 233 (Colo. 1963).
2 *Id.* at 234.
3 380 P.2d 673 (Colo. 1963).
4 381 P.2d 272 (Colo. 1963).
5 McPheeters v. McPheeters, 132 Colo. 312, 287 P.2d 959 (1955).

> judge if supported by competent evidence. *Kleiger v. Kleiger*, 127 Colo. 86, 254 P.2d 426. The award when made will not be disturbed or modified by this court in the absence of a showing of abuse of discretion on the part of the trial judge. A careful consideration of the record here presented fails to show an abuse of discretion.[6]

The *Hayutin* case had an interesting twist in that the husband, after less than three months of marriage, instituted annulment proceedings in Nevada where the marriage had taken place. The wife subsequently brought an action in Colorado for separate maintenance. Since a final determination had not been reached by the Nevada court, the trial court ordered the husband to refrain from proceeding with the Nevada action. The supreme court, in sustaining the order of the trial court, stated that the general rule is ". . . well established that courts of equity will and should in proper cases enjoin a party to a divorce or separate maintenance action from proceeding in an annulment suit in a foreign jurisdiction."[7]

Alexander v. District Court[8] was a divorce action in which the husband was granted the decree and the wife awarded alimony. Subsequently, the trial court without notice to the wife or her attorney vacated the award of alimony; and the wife, in an original mandamus proceeding, sought to have the award reinstated. The respondent judge stated that he had vacated the alimony award after reconsideration of the case because he felt that the award was not supported by the evidence. The supreme court reinstated the award holding that the trial court, which had jurisdiction over the parties originally, was without jurisdiction or authority to vacate an award of alimony after its entry without notice to the parties even though the court concluded that it had committed error in the original awarding of alimony.

II. ALTERATION OF SUPPORT PAYMENTS

Three 1963 Colorado cases considered the propriety of altering support payments after a divorce had been granted and the conditions upon which the support payments were based had changed. The first case, *Griffith v. Griffith*,[9] was a proceeding on a motion to vacate a judgment for unpaid monthly child support payments. The husband had been granted the divorce, there had been a property settlement, and the husband had been ordered to pay 75 dollars monthly for support of a child whose custody was awarded to the mother. The mother subsequently secreted herself and the child, remarried, and had her second husband tell the first that they did not want his money. Being unable to make further support payments, the father let them lapse and the mother brought suit when he became 5,400 dollars in arrearage. Upon a hearing, the mother agreed to a reduction to 2,500 dollars, but the trial court awarded her only 1,000 dollars, and she brought a writ of error claiming that the trial court was without power to cancel the payments which were due. The supreme court agreed that

6 381 P.2d at 275.
7 *Id.* at 273.
8 387 P.2d 726 (Colo. 1963).
9 381 P.2d 455 (Colo. 1963).

under the general rule an order reducing the amount of support money operates only *in futuro*,[10] but held that when the mother's admissions and actions showed that equity required a reduction of past-due payments, the mother could not object because the reduction given by the trial court was not to her liking. The trial court had found that a lesser sum than asked for by the mother would adequately provide for the child.

The case of *Garrow v. Garrow*[11] involved a review of an order of the district court modifying the terms of child support and visitation rights. The district court had ordered an increase in child support payments from 100 to 190 dollars per month, such increase being based on the fact that the divorced husband's income had increased from 350 dollars per month at the time of the divorce to 500 dollars per month at the time of the hearing. The ex-husband brought a writ of error claiming that the trial court had abused its discretion in increasing the support payments, granting the attorney's fees, and ordering that he take the children to church at the discretion of their mother. The court, in affirming the decision of the lower court, quoted from the case of *Brown v. Brown*[12] which clearly and explicitly states the applicable Colorado law governing the present case:

> It always has been recognized in this jurisdiction that if the financial ability of the husband and father improves, and the needs of the minor children increase, the jurisdiction of the court to make additional orders for the care and maintenance of the minor children may be invoked at any time in the proper proceeding.[13]

Looking to the facts of the case, the court found that there was sufficient evidence to justify the order of the trial court.

In *Drazich v. Drazich*,[14] the father petitioned for a reduction of support payments because his daughter had finished high school and had obtained a job. The petition was not acted upon, and the father reduced the payments on his own initiative. Upon suit by the mother for past payments owed by the father, the trial court awarded them to her. The father sought relief by writ of error on the theory that the trial court had erred in entering judgment for the arrearage in support money in the face of his showing that his daughter was emancipated when his petition was filed. He urged the supreme court to direct the trial court to issue a *nuc pro tunc* order to do what he contended should have been done earlier—namely, order that he should no longer be required to make support payments for his emancipated daughter who was no longer living at home. The supreme court, however, upheld the judgment of the lower court and ordered that the past payments that were due be paid. Citing a number of Colorado cases, the court stated that in support matters, each installment maturing under a decree which has not been modified becomes a judgment debt similar to any other judgment for money,[15] and the trial court was without

10 Engleman v. Engleman, 145 Colo. 299, 358 P.2d 864 (1961).
11 382 P.2d 809 (Colo. 1963).
12 131 Colo. 467, 283 P.2d 951 (1955).
13 382 P.2d at 811.
14 385 P.2d 259 (Colo. 1963).
15 Taylor v. Taylor, 147 Colo. 140, 326 P.2d 1027 (1961); Burke v. Burke, 127 Colo. 257, 255 P.2d 740 (1953).

power to enter an order which would, in effect, amount to a cancellation of delinquent support payments.[16] "A modifying order or decree relates only to future payments and can be effective only from the time of its entry."[17]

III. REMOVAL OF CHILDREN FROM THE STATE

Two 1963 Colorado cases dealt with problems that arise when the parent having custody of the children desires to remove them from the state. *Nelson v. Grissom*[18] illustrates an important factor to be taken into consideration in the removal of custodial children from the state. The mother, who had the custody of the two children, had remarried and requested that she be allowed to take the children with her to California where her present husband was employed. The father contested the request and attempted to introduce into evidence hospital records relating to the second husband's emotional instability. The trial court refused to receive this evidence and the father brought a writ of error, claiming that is was in the best interests of the children that the facts contained in the hospital records be known to the trial court. The supreme court ruled that the hospital records were not privileged insofar as this question was concerned and should have been admitted into evidence. The issue before the trial court being whether or not it was in the best interests of the minor children to permit their removal, evidence of the emotional stability or instability of the stepfather was material to the issue though he was not a party to the litigation.

The second case, *Tanttila v. Tanttila*,[19] dealt more thoroughly with the problem of removal and was one of the court's more interesting decisions. The mother of the three minor children asked for and was granted permission by the lower court to remove the children to her home in Minnesota. The father brought a writ of error to review the decision of the trial court. He contended that removal was not in the best interests of the children, that it would unreasonably deprive him of his visitation rights, and that it was purely for the convenience of the mother.

16 Ferkovich v. Ferkovich, 130 Colo. 228, 274 P.2d 602 (1954).
17 385 P.2d at 260.
18 382 P.2d 991 (Colo. 1963).
19 382 P.2d 798 (Colo. 1963).

The judgment was reversed and the order authorizing the removal vacated. Citing a Colorado decision,[20] the supreme court reiterated its holding therein that it is contrary to Colorado law to permit the removal of children from the jurisdiction unless their best interests would be served; but if it is determined that removal would be in the children's best interests, it should be allowed. The court, quoting from a Colorado case,[21] listed the factors that are to be considered in determining what is in the best interests of the children:

> In determining what is for the best welfare of a child of tender years, the courts must consider not only food, clothing, shelter, care, education, and environment, but also bear in mind that every such child is entitled to the love, nurture, advice, and training of both father and mother, and to deny to the child an opportunity to know, associate with, love, and be loved by either parent, may be a more serious ill than to refuse it in some part those things which money can buy.[22]

Examining the facts in the light of the above language, the majority of the court felt that it was in the best interests of the children to remain in Colorado. The evidence failed to show that the children would be in a better environment if the removal were allowed. If more support were required for the children so that they could stay in Colorado, the father was willing and able to provide it. The court agreed with the father's contention that the removal was solely for the mother's personal convenience.

IV. Adoption

The supreme court considered only one adoption case in 1963. In *Pelt v. Tunks*,[23] the defendants adopted an infant born to the plaintiff, an unwed mother. More than seven months after the final decree of adoption had been entered, the plaintiff filed a petition for revocation of the decree. No hearings were held, and a minute order was entered which set aside the adoption decree and gave the defendants 10 days within which to answer. On that same day the court entered findings of fact and conclusions of law setting aside the adoption, dispensing with a motion for a new trial, and giving the defendants 10 days within which to file their appeal. In other words, on the day the defendants were given 10 days to answer the petition, an order was entered making the action of the court final. The defendants requested that the judgment be reversed and the cause remanded to the county court with directions to set the matter for hearing on the merits; this request was granted by the court.

V. Common Law Marriage

An interesting situation was presented to the court in *Ward v. Terriere*.[24] The plaintiff, claiming rights as a widow, brought suit

20 McGonigle v. McGonigle, 112 Colo. 569, 151 P.2d 977 (1944).
21 Searle v. Searle, 115 Colo. 266, 172 P.2d 837 (1946).
22 382 P.2d at 799.
23 385 P.2d 261 (Colo. 1963).
24 386 P.2d 352 (Colo. 1963).

against the estate of her deceased former husband. She alleged that although she had been granted a divorce, three and one-half years later she had moved that the divorce decree be set aside. In the alternative, she contended that even if the divorce decree was valid, she and the deceased had become husband and wife by entering into a common law marriage subsequent to the divorce. The trial court ruled against her on both contentions.

On the first of the plaintiff's contentions, the supreme court ruled that the trial court was bound by the final decree of divorce and was correct in its holding that the divorce could not be dismissed. The interlocutory decree granting the divorce, by force of law,[25] became final six months from its date of entry. The plaintiff's motion to set aside the decree was not made within the six months limitation and thus, from the record, the supreme court found that the county court had no jurisdiction to dismiss such a case which had proceeded to final judgment.

On the second contention as to the common law remarriage, the supreme court found the issue to have been correctly resolved by the trial court that had weighed the testimony which, although conflicting, was heavily against the plaintiff. The trial court had found that although there was evidence of cohabitation and posing as husband and wife between the parties, by and large, the plaintiff had not conducted herself as though she had been bound in marriage, but had only tried to convey the impression of a marriage relationship between herself and the deceased when it was to her convenience or best interest.

VI. PATERNITY AND DEPENDENCY

In 1963 the Supreme Court of Colorado heard one paternity and two dependency cases. In the paternity case, *Beck v. Beck*,[26] the juvenile court considered the question of whether the husband had access to his wife during the possible period of conception of her child which, she alleged, was his. At the conclusion of the trial a verdict in her favor was directed. The husband then filed a motion for a judgment *non obstante veredicto* attaching thereto a blood test taken after the trial by agreement of the parties before trial. The blood test showed that it was impossible for the husband to have been the father of the child. The trial court granted the husband's motion and a writ of error was brought by the wife who contended that blood tests were incompetent to overcome the presumption of legitimacy. The court cited the Colorado statute[27] which permits the court to order that blood tests be taken in paternity proceedings and held that the statute entitles the reputed father to have the tests made and the results introduced into evidence when definite exclusion is established, provided a proper foundation has been laid. When such evidence is introduced, it is competent to overcome the presumption of legitimacy. The court felt that to hold otherwise would be acting contrary to an established scientific fact.

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25 Colo. Sess. Laws 1929, ch. 91, § 3.
26 384 P.2d 731 (Colo. 1963).
27 Colo. Rev. Stat. § 52-1-27 (Perm. Supp. 1960).

In *Martinez v. Lopez*,[28] the mother brought an action in the juvenile court under C.R.S. '53 § 22-7-1 charging the defendant with contributing to the child's dependency. The defendant, Martinez, denied paternity and also denied that the child was dependent as contemplated by the statute under which the proceedings were instituted. In a jury trial he was found to be the father of the child and contributing to her dependency. However, no judgment was entered on the verdict that he was contributing to the dependency of the child. Following the denial of a motion for a new trial, the defendant brought a writ of error. The supreme court reversed the judgment and remanded the cause with directions to dismiss the proceedings, stating that the statute under which the action was brought provided expressly that the juvenile court could handle dependency proceedings, but not paternity suits. Citing the case of *Everett v. Barry*,[29] the court stressed that the juvenile court is a statutory court with no jurisdiction beyond that expressly given by statute. Thus, the court reasoned, a paternity matter could not be properly determined under a statute providing for dependency proceedings. As far as the dependency matter was concerned, in light of the complete lack of evidence showing either that the child was dependent or the defendant was contributing toward her dependency, the juvenile court should have directed a verdict for the defendant. The court said, "To permit one to expand the statutory proceedings on 'contributing to dependency' beyond the construction guidelines in 22-7-7 would effect judicial repeal of the provisions on 'paternity proceedings' and would forever remove the limitations therein contained."[30]

As far as the actual question of paternity was concerned, the paternity statute, C.R.S. '53 § 22-6-1, provides that an action must be brought before the child is 12 months old and can be brought by the mother only. The first of these conditions was not complied with as the child was 4 years old at the time of the proceedings. The plaintiff was, therefore, precluded from bringing a paternity action under the paternity statute, and the decision of the court prohibited her from accomplishing a decree of paternity under the guise of a dependency suit.

In *Nissen v. People*,[31] the mother claimed that the defendant, the alleged father, was contributing to the dependency of the child. In the lower court a judgment from which the father brought a writ of error was entered against him. The supreme court reversed, holding that the plaintiff failed to prove that the daughter was a dependent or negligent child, and without the showing that the child was dependent there was nothing the defendant could be contributing to.

The court cited *Martinez v. Lopez*[32] discussed above and stated that it was controlling in the disposition of the present case. In both cases evidence was introduced which established that the mother was earning sufficient funds to support the child; and, therefore, the child was not dependent as alleged.

28 386 P.2d 595 (Colo. 1963).
29 127 Colo. 34, 252 P.2d 826 (1953).
30 386 P.2d at 598.
31 387 P.2d 897 (Colo. 1963).
32 *Supra* note 28.