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ONE YEAR REVIEW OF DOMESTIC RELATIONS

By HOMER H. CLARK, JR.*

The 1962 judicial decisions on domestic relations in Colorado announced no radical departures from prior law. Similarly, the 1962 session of the general assembly produced no legislation of note in the field of domestic relations. A few of the court cases dealt with interesting or unusual factual situations which have been noted in this one year review.

DIVORCE, ALIMONY AND PROPERTY SETTLEMENTS

Two cases concern the merits of divorce actions. The first, *Heckel v. Heckel*,[1] merely affirmed the trial court's findings on disputed issues of fact as they related to cruelty. The second case, *Harvey v. Harvey*,[2] likewise affirmed the finding of cruelty, leaving to the trial court the question whether there were mitigating circumstances. The case also held that the wife was not barred by res judicata when she brought a second action for divorce, having lost her first action, so long as she relied in the second action on acts of cruelty which had occurred after the first action was dismissed. This application of res judicata to divorce actions is well established.[3]

In *Simpson v. Simpson*,[4] the supreme court laid down some useful principles for the application of preliminary restraining orders in divorce actions. The trial court had restrained certain third party defendants from turning over property or funds to the husband and, in addition, had ordered one of the third party defendants to pay into the registry of the court the amount of $25,000, apparently as a kind of security against alimony which might be awarded in the future. The supreme court reversed this action, stating that although under Rules 111 and 65 of the Rules of Civil Procedure restraining orders may be entered in divorce actions without notice to the defendant and without the requirement of a bond, this should be done only under extraordinary circumstances or where an actual emergency exists. The court went on to find that no such extraordinary circumstances or emergency had been shown in this case and that, therefore, the restraining order was improperly entered. In addition, the court expressly disapproved the practice of bringing in banks and business associates of the husband as parties to divorce actions.

Two cases this year concern the award of attorney's fees in divorce actions. The first of these, *Morrison v. Peck*,[5] held that an attorney for the wife may file a motion in the divorce action for the award of attorney's fees against either the wife or the husband, relying on the general language of the alimony statute. This seems to be a rather doubtful procedure[6] since the attorney for the wife is not a party to the divorce action and normally courts do not enter

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1 373 P.2d 303 (Colo. 1962).
2 373 P.2d 304 (Colo. 1962).
3 Geers v. Geers, 95 N.H. 316, 63 A.2d 244 (1949).
4 376 P.2d 55 (Colo. 1962).
5 376 P.2d 58 (Colo. 1962).
6 Cf. Weil v. Superior Court, 97 Cal. App. 2d 373, 217 P.2d 975 (1950).

judgments in law suits in favor of persons who are not parties. It puts the attorney in a very peculiar position with respect to a conflict of interests. In the divorce action he represents the wife at the very time he is asserting a claim against her for his fee. In the *Morrison* case itself there was no conflict of interest because the particular attorney seeking a fee had withdrawn from the case at an earlier stage. Furthermore, the purpose of the statutory authorization of an award of attorney's fees is not for the protection of the attorney but rather to insure that the wife is provided with legal services as well as with other necessaries of life. The other case on attorneys' fees in divorce actions held that they are not debts dischargeable in bankruptcy.[7] This is in line with the decisions in other states.[8]

Several cases this year dealt with the question of modification of alimony and child support payments. *Pritchard v. Pritchard*[9] held that when the wife moved that the husband be held in contempt for non-payment of child support, the trial court, without formal action by the husband and over the wife's objection, committed reversible error in reducing the amount due. The supreme court said such action requires a motion by the husband and proof by him that the relevant circumstances have changed. *Haase v. Haase*[10] held that where there are successive petitions for modification of alimony, the later petition must be based on changes in circumstance which have occurred after the denial of the first petition. This is of course correct since the other rule would allow a repeated relitigation of matters already determined by the earlier petition for modification.

The question of modification of a divorce decree so as to include an alimony award after the decree had been entered and had become final was dealt with again in *Burson v. Burson*.[11] In this case the wife sued for divorce and custody of the children, her complaint containing no prayer for alimony. Nine months after the divorce decree had been entered she filed a motion in the action asking for alimony. The court dismissed the motion, giving two reasons for this disposition. The first reason was that the statute governing the award of alimony contains "no machinery for putting in motion that which the statute purports to empower the trial court to do. . . ."[12] It is not at all clear what is meant by this language. The statute seems to be as clear as a statute can be since it provides that "At all times after the filing of a complaint, whether before or after the issuance of a divorce decree, the court may make such orders, if any, as the circumstances of the case may warrant for: . . . alimony."[13] The obvious purpose of this statute is to make it possible for alimony to be included in divorce decrees at any time, whether before or after the decree is entered, without any reservation of jurisdiction. The supreme court may disapprove of the policy of such a statute but this would not seem to justify reading it out of the statute books. The second reason for refusal of alimony in the *Burson*

7 Allison v. Allison, 372 P.2d 946 (Colo. 1962).
8 *E.g., In re* Brennen, 39 F. Supp. 1022 (E.D.N.Y. 1941).
9 367 P.2d 755 (Colo. 1962).
10 376 P.2d 698 (Colo. 1962).
11 369 P.2d 979 (Colo. 1962).
12 *Id.* at 980.
13 Colo. Rev. Stat. § 46-1-5(1)(d) (Supp. 1960).

case was that the wife had not asked for alimony in her complaint and under Rule 54(c) of the Rules of Civil Procedure a default judgment cannot be entered different in kind or amount from that demanded in the complaint. This rule is properly applied to divorce actions, since a husband may be willing to have the suit go against him by default where he sees no claim for alimony in the complaint, whereas he might wish to defend on the merits if alimony were claimed. This reason does not apply in the *Burson* case, however, since it would have been quite easy to give the husband notice of the claim for alimony when the motion was made and allow him at that time to come in and present whatever defenses to the alimony claim he might have available. In that way the objection based on Rule 54(c) could be overcome.

Two cases during 1962 concerned the extent and modification of payments due under separation agreements. *In re Kettering's Estate*[14] held that the payments did not survive the death of the husband even though the agreement, which was incorporated in the divorce decree, provided that the payments would continue "so long as the wife may live and remain unmarried."[15] The court construed the agreement as a whole and found that other provisions including one by which the husband agreed to leave the sum of $10,000 by will either to a trust set up to guarantee the payments, or directly to the wife, indicated that this was to be the exclusive provision for the wife after the husbands death and negated the inference created by other parts of the agreement that the payments would continue beyond his death. This would seem to be a satisfactory reading of the agreement, although arguments could be made the other way and were made by the dissenting opinion in this case. The case should serve as a warning to the attorneys drafting such agreements to provide specifically in the agreement either for continuance or for termination of the payments upon the husband's death.

The second case referred to is *Irwin v. Irwin.*[16] In this case the divorce was granted to the husband, the decree including provisions for a division of certain real and personal property and an order for alimony and child support. A little more than a year after the decree the parties entered into an agreement changing the disposition of the property and increasing the payments of alimony. By this

14 376 P.2d 983 (Colo. 1962).
15 *Id.* at 985.
16 372 P.2d 440 (Colo. 1962).

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agreement the payments of child support were continued in accordance with the earlier decree. The agreement was approved by a judge of the district court. About two years after the agreement the husband filed a motion to terminate alimony, to reduce the amount of the support money payable to the children and also to reduce certain payments on the real estate of the parties and on insurance policies. The husband alleged at this time a change in the circumstances of the parties. After a hearing the trial court relieved the husband of support payments for one of the children, changed the provision with respect to alimony and gave to the husband certain policies of insurance which under the agreement were to be maintained for the benefit of the wife and children. On appeal the supreme court held that the trial court had erred in entering such an order, apparently on the ground that the rights of the parties had been established by the 1959 contract and that the constitutional prohibition upon impairment of the obligations of contracts prevented any subsequent modifiation. No cases or other authorities are cited in the opinion and it is therefore difficult to be certain just what the basis for this result was. A proper analysis of this case would turn on whether the agreement of the parties became a part of the divorce decree. If it did, then it would seem modifiable upon a showing of changed circumstances just as any other divorce decree is, whether based on agreement originally or not. The authorities in Colorado make this principle clear enough at least with respect to alimony and child support.[17] Those parts of the decree or the agreement which relate to property are normally not modifiable.[18] The opinion of the supreme court indicates that the agreement of the parties was approved by the court and under the statute now in force this may be sufficient to make it part of the decree, since the statute says that a written agreement or stipulation of the parties "when incorporated in an order or decree or when filed in the action and referred to and approved and adopted in any order or decree, shall become a part of such order or decree."[19] If the agreement was not part of the decree because not incorporated or adopted in accordance with the statute, the authorities in other jurisdictions say that this does not prevent the court from modifying the original decree with respect to its alimony and child support provisions.[20] Such agreements, when made after the entry of alimony and property decrees, are usually held not binding on the parties or the court unless they are presented to the court and made a part of the existing decree.

The division of property in divorce actions must be made either at the time the divorce decree is entered or, if afterwards, only upon reservation of jurisdiction in the divorce decree. This rule, found in the statutes,[21] is reiterated this year by *Triebelhorn v. Turzanski*.[22] In two other cases the familiar principle that the property

17 *E.g.* Harris v. Harris, 113 Colo. 41, 154 P.2d 617 (1944); Hall v. Hall, 105 Colo. 227, 97 P.2d 415 (1939).

18 McDonald v. McDonald, 374 P.2d 690 (Colo. 1962); Zlaten v. Zlaten, 117 Colo. 296, 186 P.2d 583 (1947).

19 Colo. Rev. Stat. § 46-1-5(6) (Supp. 1960).

20 Hoops v. Hoops, 292 N.Y. 428, 55 N.E.2d 488 (1944). Other cases are collected in Annot., 166 A.L.R. 370 (1947), and in Desvernine, *Ground for Modification of Alimony Awards*, 6 Law & Contemp. Prob. 236, 247 (1939).

21 Colo. Rev. Stat. § 46-1-5(2) (Supp. 1960).

22 370 P.2d 757 (Colo. 1962).

division is a matter within the sound discretion of the trial court, not to be reversed except upon proof of abuse of this discretion, was restated.[23] A third case, *Bell v. Bell*,[24] although adhering to this rule, found that there was an abuse of discretion in an order which required the husband to pay off large incumbrances on certain property and deliver the property to the wife, without any findings as to the value of the property of the parties and without other findings which would support such a requirement. Finally, the case of *McDonald v. McDonald*[25] held that property divisions in divorce decrees are final and not open to modification, a familiar principle adhered to in jurisdictions other than Colorado.[26]

A waiver of widow's allowance in an ante-nuptial agreement was upheld as effective in *Maher v. Knauss*,[27] illustrating the type of specific language in the agreement which is essential to get this result.

Parent and Child

Four cases in 1962 concerned problems of custody of children arising out of divorce actions. Only one of these cases involved an original grant of custody and this case merely held that since the trial court had failed to make findings on the character and fitness of the parties as custodians the award of custody of a small child to the husband would be reversed.[28] The second case, *Grosso v. Grosso*,[29] modified an existing custody decree in such a way as to cancel the visitation rights of the husband on the ground that the parties had been using the child to hurt each other and that this was jeopardizing the child's welfare. The third case, *Holland v. Holland*,[30] upheld the trial court's finding that the child's best interests did not justify authorizing the mother to take the child to Spain. This decision was in part apparently based on the ground that the mother had taken the child to Spain after the trial court's decision was rendered but before the appeal was decided. The supreme court said that although a change of custody should not be granted as a means of punishing one of the parties for violating the custody order, disregard of an order is a factor which the court may weigh

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23 Harvey v. Harvey, 373 P.2d 304 (Colo. 1962); Cohan v. Cohan, 372 P.2d 149 (Colo. 1962).
24 371 P.2d 773 (Colo. 1962).
25 374 P.2d 690 (Colo. 1962).
26 Many cases are collected in Annot., 48 A.L.R.2d 270, 302 (1956).
27 370 P.2d 1017 (Colo. 1962).
28 Songster v. Songster, 374 P.2d 197 (Colo. 1962).
29 368 P.2d 561 (Colo. 1962).
30 373 P.2d 523 (Colo. 1962).

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in awarding custody. The trial court's decision that custody should shift to the husband under these circumstances was therefore approved.

The most interesting of the custody cases is *Root v. Allen*.[31] In this case the parents of the child had been divorced and had both remarried. Sometime after her second marriage the child's mother, who had custody of the child, died. The father then filed a petition for habeas corpus seeking to obtain custody of the child from the stepfather. After a thorough consideration of the requirements of the child's welfare and best interests the supreme court refused habeas corpus, holding that the child should remain in the custody of the stepfather. A major factor in this decision was the long period during which the child had been in the household of the stepfather and the warm and stable relationships she had formed there. The case is particularly interesting in illustrating that the claims of a natural parent will not always be superior to those of one not related to the child by blood.

An interesting case on adoption, *Batton v. Massar*,[32] calls attention to a conflict between the adoption and the relinquishment statutes. In this case the mother of the child consented to its adoption by its paternal grandparents. No relinquishment proceeding was had. Shortly after the adoption decree became final the child's mother filed a motion to vacate the decree on the ground that it was entered without jurisdiction, not being in exact compliance with that section of the statutes requiring a relinquishment proceeding when the natural parent of the child to be adopted is a minor,[33] as was the case here. The supreme court held that the adoption decree should not be vacated, stating that the only part of the statute to be given meaning is that part which reads "The minority of a natural parent shall not be a bar to such parents' consent to adoption. . . ."[34] The further language of that section, which reads, "provided, a court of competent jurisdiction has decreed the relinquishment of said child and affirmed subsequent adoption,"[35] was held by the supreme court to be meaningless and surplus. The writer has commented at length on this case in another place, there arguing that a prior relinquishment proceeding is required by the

31 377 P.2d 117 (Colo. 1962).
32 369 P.2d 434 (Colo. 1962).
33 Colo. Rev. Stat. § 4-1-6(3) (1953).
34 *Ibid.*
35 *Ibid.*

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statutes where the consent to adoption is that of a person under the age of twenty-one.[36]

The familiar rule that a child born to a married woman in wedlock is presumed legitimate was re-emphasized in *Lanford v. Lanford.*[37] The court in that case stated that this is one of the strongest presumptions known to the law and that it may be overcome only by proof of impotence or non-access by the husband at the time when the child could have been conceived. The court went on to say that the normal period of gestation is from 266 to 270 days, but that the cases had recognized that much shorter periods are possible. The trial court's charge to the jury was held erroneous in this case on the ground that the jury should have been required to determine whether the husband had access to his wife at any time during the period of possible conception of his child. The court also held that it was error to require the wife to testify on cross-examination as to intercourse with a man other than her husband in the absence of evidence by the husband overcoming the presumption of legitimacy.

Two further cases dealt with relatively minor points in juvenile court proceedings. *Martinez v. People*[38] held that a citation issued to parents of a child charged with juvenile delinquency was invalid under the applicable statute[39] when it contained no notice of the date and time of hearing and no endorsement of service on the return. In addition this case held that a decree in a delinquency proceeding ordering the imprisonment of a juvenile in the county jail is not authorized by the delinquency statute.[40] In the other case, *Robles v. People,*[41] it was held that a motion to vacate the decree finding the defendant the father of a child and ordering him to support the child was not a final judgment and therefore could not be reviewed by the supreme court on a writ of error.

36 Clark, *Batton v. Massar: The Finality of Colorado Adoptions,* 35 Colo. Rev. No. 3 (1963).
37 377 P.2d 115 (Colo. 1962).
38 372 P.2d 947 (Colo. 1962).
39 Colo. Rev. Stat. § 22-8-3 (Supp. 1960).
40 Colo. Rev. Stat. § 22-8-11 (Supp. 1960).
41 373 P.2d 701 (Colo. 1962).

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