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One Year Review of Domestic Relations

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ONE YEAR REVIEW OF DOMESTIC RELATIONS

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The cases discussed in this review were decided between January 1, 1960, and January 1, 1961. Although there were no cases of outstanding significance for the practitioner, there were several of interest because they presented unusual issues. Despite the large number of cases decided during the year, most of the domestic relations cases received adequate consideration by the Supreme Court. The only general criticism of the decisions on this subject is that the court's decisions involving children were again made with too little concern for the welfare of the children and too little respect for the views of other legal agencies which have greater expertise and more intimate familiarity with the facts than an appellate court.

I. ALIMONY, CHILD SUPPORT AND DIVISION OF PROPERTY

Several cases this past year have dealt with various aspects of alimony and property orders as incident to divorce. In one of these, *Reap* v. *Reap*[1] the Supreme Court approved an award of one hundred dollars per month as a minimum to the wife for support of the children, but further specified that during the husband's periods of employment he pay a percentage of his income—thirty percent for support of the children and fifteen percent for alimony. Although this form of order is somewhat unusual in Colorado, the court found it proper in view of the wide fluctuation in the husband's income. In the same case the court held that a defendant wife could be granted alimony, but that her conduct should be closely scrutinized for evidence of moral delinquency or complete disregard of marital vows. If she should be found to have been guilty of such conduct, she would not be entitled to alimony. No such evidence was presented in this case. In the course of its opinion the court disapproved of dictum in *Henderson* v. *Henderson*,[2] which might be construed to deny alimony in all cases to a wife against whom a decree is given, and reiterated its support of the holding in *Vigil* v. *Vigil*.[3]

The collection of accrued and unpaid alimony and child support payments ordered as part of a divorce decree was the subject of two cases. In *Hauck* v. *Hauck*[4] the wife filed a claim in the husband's estate for unpaid installments of child support. The court held that she was entitled to those payments which had accrued within twenty years prior to the date of her claim, the relevant statute of limitations being the one applicable to judgments.[5] The court also held that the defense of laches applies only to the remedy of contempt, and not to the remedy being asserted in this case. The second case, *Beardshear* v. *Beardshear*,[6] reiterated the court's position that accrued installments of alimony are final judgments, not modifiable,

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1 350 P.2d 1063 (Colo. 1960).

2 104 Colo. 325, 90 P.2d 968 (1939).

3 49 Colo. 156, 111 Pac. 833 (1910). This seems to be the correct construction of the statute on alimony. Colo. Sess. Laws 1958, ch. 37, § 6.

4 353 P.2d 79 (Colo. 1960).

5 Colo. Rev. Stat. § 77-1-2 (1953).

6 352 P.2d 969 (Colo. 1960).

and enforceable by a writ of execution without further court proceedings. Although it might be better procedure to obtain an order of court, failing to do so does not make the execution and the sale pursuant to it void.

An important question relating to property settlements in divorce decrees was settled by *Magarrell* v. *Magarrell*.[7] The parties executed a separation agreement which was approved and incorporated in the divorce decree, and which required the husband to transfer to the wife all the incidents of ownership in certain insurance policies on his life. He further agreed to keep the policies in force by payment of all premiums. Later the wife remarried and the husband filed a motion asking modification of the decree to relieve him of the duty to make further premium payments on the policies. This was denied by the Supreme Court on the ground that these payments were part of a property settlement which could not be modified. On this point the case is in accord with the law of other states[8] and with what was probably the law of Colorado.[9] Now the question remains whether alimony might also be immune to modification if it were part of an integrated agreement containing property provisions, as is the case in California.[10]

The *Magarrell* case also makes a distinction between alimony and property provisions, which was badly needed in Colorado due to the tendency of some cases to confuse the two.[11] Alimony is defined as those payments made "for food, clothing, habitation and other necessities for the support of the wife."[12] The insurance premiums, though paid periodically, were held not to be made for this purpose and therefore were not alimony. This definition of alimony by reference to its purposes is also in agreement with the law of other states,[13] though it is inconsistent with *International Trust Co.* v. *Liebhardt*,[14] cited by the court in the *Magarrell* case.

Two cases concerned modification of the support provisions of divorce decrees.[15] In both, the trial court's disposition was approved as not being an abuse of discretion. *Huber* v. *Huber*[16] also held that modification should not be granted unless it appears that the original order is no longer equitable. Presumably the court meant that it must have become inequitable by reason of a change in the circumstances of the parties. Finally, the same case held that the needs of the parties at the time of the hearing should be controlling, not the conditions in the past or the future. The implication that future conditions cannot be considered is inconsistent with another case decided this year, *Lanz* v. *Lanz*,[17] in which the court held it proper for the trial judge to consider a pay raise which the husband was

7 355 P.2d 946 (Colo. 1960).
8 Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15 (1945). Other cases are collected in Clark, *Separation Agreements*, 28 Rocky Mt. L. Rev. 320, 339 (1956).
9 Zlaten v. Zlaten, 117 Colo. 296, 186 P.2d 583 (1947).
10 Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873 (1954).
11 See, e.g., Granato v. Granato, 130 Colo. 439, 277 P.2d 236 (1954), where the court approved an award of property in lieu of alimony, and International Trust Co. v. Liebhardt, 111 Colo. 208, 139 P.2d 264 (1943).
12 355 P.2d at 947.
13 Walters v. Walters, 409 Ill. 298, 99 N.E.2d 342 (1951).
14 111 Colo. 208, 139 P.2d 264 (1943). In this case the payments were expressly made for the support of the wife, but the court, emphasizing form over substance, held they were not alimony.
15 Huber v. Huber, 353 P.2d 379 (Colo. 1960); Jensen v. Jensen, 351 P.2d 387 (Colo. 1960).
16 353 P.2d 379 (Colo. 1960).
17 351 P.2d 845 (Colo. 1960). Though decided in 1960, this case will not be further commented upon since it contains little else of general interest.

anticipating in arriving at an award of support in separate maintenance. As the cases now stand, it is impossible to say whether in awarding alimony or support the trial court may take into account the future circumstances of the parties.[18] There would seem to be no reason why future conditions should not be taken into account in making alimony or support orders where they can be predicted with high probability, and, in fact, they often must be.[19] Any flat rule which bars consideration of future circumstances is therefore highly undesirable.

Wives are provided with one more weapon in the arsenal of non-support remedies by *McQuade* v. *McQuade*,[20] which held that a wife could bring a suit in equity to force her husband to support herself and their child. This seems to be a sensible result and is supported by cases in other jurisdictions[21] and by an earlier case in Colorado.[22]

II. PROPERTY TRANSFERS BETWEEN PARENT AND CHILD

The only case in this area during the year raised questions more relevant to trust law than to domestic relations. *In First National Bank of Fort Collins v. Honstein*,[23] parents transferred ten thousand dollars to their son, with which, together with a smaller sum of his own, he built a house on land which he owned. The understanding was that the parents would live in the house rent free and that upon their deaths the son would keep the house. The father died after a time, and then the mother's health required her to be hospitalized. She sued for return of the ten thousand dollars, asserting either a resulting trust or a constructive trust. The court held that there was no duty to repay the money, apparently on the ground that transfers between parent and child are presumed to be gifts unless the contrary is clearly and unequivocally shown, a presumption which was not rebutted in this case. This reasoning is somewhat unsatisfactory but the outcome was correct. It would seem that this transfer was either upon an express trust[24] or gave rise to a resulting trust for the mother's benefit during her life.[25] By either theory she was entitled to the use of the house during her life, and it was conceded by both parties that when she became unable to live in the house she was entitled to the income from the ten thousand dollars. But by neither theory would she be entitled to the return of the principal of the ten thousand dollars. The only gift to the son was a gift of the principal of the ten thousand dollars after the expiration of the mother's life interest. Thus the court was right to refuse

18 On this point see also Watson v. Watson, 135 Colo. 296, 310 P.2d 554 (1957), which seems to exclude evidence of future circumstances.

19 See, e.g., Flanders v. Flanders, 241 Iowa 159, 40 N.W.2d 468 (1950), where the court took account of the future prospects of the parties.

20 354 P.2d 597 (Colo. 1960).

21 Cases are collected in Annot., 141 A.L.R. 399 (1942).

22 Tinglof v. Askerlund, 96 Colo.27, 39 P.2d 1039 (1935).

23 355 P.2d 535 (Colo. 1960).

24 Restatement (Second), Trusts § 52, comment c (1959).

25 Restatement (Second), Trusts §§ 440, 441 (1959). Illustration 2 to § 441 is closely analogous to the case under discussion.

relief to the plaintiff, but for reasons other than those given in the opinion.

III. CUSTODY

The frequently announced principle that natural parents have a right to the custody of their children unless "the most solid and substantial reasons" to the contrary exist was restated in *Turner* v. *Hunter*.[26] This case was a particularly extreme application of the rule because it resulted in a removal of the children from the home of their deceased father's sister and her husband with whom they had been living for many years pursuant to an Oklahoma custody decree. The children's mother had remarried, and by this decision she and the step-father were given the custody of all three children. Both couples were apparently qualified as parents and both were in a position to provide good homes for the children. The court, in affirming the trial judge's award of custody to the mother, did not discuss the effect of this change upon the children after so long a time nor did it discuss the desires of the children, though at the time of the opinion the oldest child was about nineteen and the youngest about thirteen. The court decided the case solely on the basis of the mother's "parental rights." There is little in the opinion to indicate what, if any, consideration was given to the children's welfare.

In another dispute over custody, between divorced parents, the court approved the trial court's refusal to modify the custody decree and held that there was no abuse of discretion.[27] In the course of the litigation an *ex parte* custody order had been entered without notice to the mother and the court held this order void as contrary to the due process clause. The court stated that "A parent cannot be deprived of the custody of his or her children without the notice required by due process of law."[28]

IV. DEPENDENCY

Over the past few years many Colorado cases have been concerned with the definition of dependency.[29] Notwithstanding a clear definition in the statute,[30] these cases have produced confusion to such an extent that the trial courts must often make the difficult choice between following the statute or following the case law. The

26 350 P.2d 202 (Colo. 1960).
27 Parker v. Parker, 350 P.2d 1067 (Colo. 1960).
28 *Id.* at 1069.
29 Diernfeld v. People, 137 Colo. 238, 323 P.2d 628 (1958); Kearney v. Blue, 134 Colo. 217, 301 P.2d 515 (1956); Carrera v. Kelley, 131 Colo. 421, 283 P.2d 162 (1955); Foxgruber v. Hansen, 128 Colo. 511, 265 P.2d 233 (1954); Everett v. Barry, 127 Colo. 34, 252 P.2d 826 (1953).
30 Colo. Rev. Stat. § 22-1-1 (1953). This section states: "For the purpose of this article, the words 'dependent child' or 'neglected child' shall mean any child under the age of eighteen years who is dependent upon the public for support; or who is destitute, homeless or abandoned; or who has not proper parental care or guardianship; or who, in the opinion of the court, is entitled to support or care by its parent or parents, where it appears that the parent or parents are failing or refusing to support or care for said child; or who habitually begs or receives alms, or who is found living in any house of ill fame, or with any vicious or disreputable persons, or whose home, by reason of neglect, immorality or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such child; or whose environment is such, or about whose custody a controversy may be such, as to warrant the state, in the interest of the child, in assuming or determining its guardianship, or in determining what may be for the best interest of said child. Nothing in this article shall be construed to require the Colorado state children's home to accept any child beyond the ages mentioned in article 4 of this chapter creating and concerning such home.
"The laws of this state concerning dependent or neglected children or persons who cause, encourage or contribute thereto, shall be construed to include all children under the age mentioned in this section from the time of their conception and during the months before birth."

existing confusion has not been relieved by the two cases dealing with this problem in 1960. The first of these is *Jones* v. *Koulos*,[31] exemplifying the trial court's dilemma. In this case the mother of a young child left the child with friends who cared for it for some time. The mother gave it no support or parental care, and at the time of the hearing on the dependency petition the mother's whereabouts was unknown. The petition was resisted by the couple who had been caring for the child. The juvenile court, saying that "the evidence is that the mother placed the child with these people and there is no showing that they are incompetent,"[32] and obviously attempting to comply with the rulings of the earlier cases on dependency, dismissed the petition. On appeal the Supreme Court reversed, holding that the child was dependent without making any reference to the quoted finding of the juvenile court.[33] At no point did the Supreme Court refer to the applicable statutory definition of dependency. The *Diernfeld*[34] and *Foxgruber*[35] cases were distinguished on the ground that in those cases the mother had not abandoned the child whereas in this case she had abandoned it.

The result in *Jones* v. *Koulos*[36] is in accord with the statute even though the statute is not relied upon; but it is quite inconsistent with the prior case law, including those cases which the court purports to distinguish. In both *Diernfeld* and *Foxgruber*, as in *Jones*, the child had been left with friends or relatives. In both of those cases the parent had neither cared for nor supported the child. The only real difference among the three cases seems to have been that in *Diernfeld* and *Foxgruber*[37] the person opposing the dependency petition was a parent, while in the *Jones* case the opposing party was not a parent. Thus the cases seem to mean that a parent can deposit his child with friends or relatives for an indefinite period, provide no support or parental care, and at any later time successfully resist a dependency proceeding. The effect upon the child's welfare does not seem to be relevant. On the other hand, if someone other than the parent wants to keep the child, the finding of dependency will be upheld. In short, the dependency statute is enforced according to its terms against those not parents, but it is not enforced against parents. This reflects the assumption that a child is to be treated like a chattel, the parent having a claim upon its analogous to title. If the parent asserts no claim, then the child becomes *bona vacantia* and the state may take control. Thus the parent may farm the child out with friends or relatives, or fail to support it, or neglect it in various other ways. Having done all this, if he then decides to assert his title he will prevail. Needless to say, there is no statutory warrant for this doctrine nor is it supported by any argument based upon the child's best interests.

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31 349 P.2d 704 (Colo. 1960).

32 Brief for Plaintiff in Error, p. 7, Jones v. Koulos, 349 P.2d 704 (Colo. 1960).

33 It is interesting to note that the Supreme Court opinion did quote from the statement made by the juvenile court but omitted the material quoted in the text at note 32.

34 Diernfeld v. People, 137 Colo. 238, 323 P.2d 628 (1958).

35 Foxgruber v. Hansen, 128 Colo. 511, 265 P.2d 233 (1954).

36 349 P.2d 704 (Colo. 1960).

37 Another case which goes even further to frustrate the dependency statute is Carrera v. Kelley, 131 Colo. 421, 283 P.2d 162 (1955), in which the Supreme Court held the child was not dependent, and therefore that his mother could have custody, in spite of undisputed evidence that the mother had made no provision for the child's support for over a year.

This analysis is borne out by *Wellbrink* v. *Walden*,[38] another dependency case which was decided on the same day as *Jones* v. *Koulos*,[39] and upon very similar facts. In this case the child's father, an itinerant construction worker, left the child with friends, the petitioners. At times the father reclaimed his son and contributed some money for his support, but he did not adequately support him and apparently had not furnished or offered to furnish any support for the boy for nearly three years preceding the filing of the dependency petition.[40] The Supreme Court's opinion indicates that the petitioners had given the boy a good home and wholesome surroundings. Nevertheless, the court reversed a finding of dependency by the trial court[41] and dismissed the petition. This meant that the father would resume custody of the boy. The reason chiefly advanced by the court was that the dependency proceeding was "resorted to as a means to secure an adjudication of a dispute"[42] over custody of the boy, and that under *Everett* v. *Barry*[43] this could not be done. This reasoning is defective on two counts: (1) The child was clearly dependent under the statute,[44] as the trial court found,

38 349 P.2d 697 (Colo. 1960).
39 349 P.2d 704 (Colo. 1960).
40 Brief for Defendants in Error, p. 4, Wellbrink v. Walden, 349 P.2d 697 (Colo. 1960).
41 The trial court made findings that the child was dependent and neglected and at no point does the opinion of the Supreme Court indicate in what respect these findings were erroneous or unsupported by evidence. It would seem that in cases of this kind the Supreme Court should be most reluctant to upset findings of fact when so much turns upon the opportunity to see and hear the witnesses and evaluate their testimony, an opportunity which the Supreme Court cannot have.
42 349 P.2d at 699.
43 127 Colo. 34, 252 P.2d 826 (1953).
44 Colo. Rev. Stat. § 22-1-1 (1953) defines a dependent child, inter alia, as one who has not proper parental care, or who is entitled to support by his parents where it appears that the parents are failing or refusing to support or care for the child.

so that this was not just a custody dispute. (2) Even if it be considered only a custody dispute, the statute very plainly states that a dependent child is one ". . . about whose custody a controversy may be such, as to warrant the state, in the interest of the child, . . . in determining what may be for the best interest of said child."[45] Therefore, on this point *Everett* v. *Barry* directly violates the statute, is clearly wrong and should have been overruled long ago.

One final word may be said about policy in these cases. Before 1959 the Supreme Court may have been reluctant to uphold a finding of dependency because of a fear that this would in all instances result in a final termination of parental rights. This is no longer true. As the statute now reads, a broad range of remedies short of terminating parental rights may be incorporated in the dependency decree.[46] For this additional reason, therefore, it is to be hoped that the court will decide future dependency cases with reference to the statute and the welfare of the children involved, rather than solely by recognizing "rights" of a natural parent.

One other case ostensibly involved adoption, but really amounted to an attempt to attack a dependency decree. This was *Olsen* v. *Davidson*,[47] in which children had been declared dependent and notice of the proceeding had been mailed to the father at his last address. He contended that he had never received notice, that the dependency decree was void, and that therefore an adoption decree which followed was invalid. The court held that the notice was sufficient,[48] the dependency decree terminated the father's parental rights, and finally that the father could not attack the adoption because of the two-year statute of limitations on such attacks.[49]

Finally, the case of *Devereaux* v. *Devereaux*[50] held that a county court judgment annulling the marriage of husband and wife on the ground of the wife's prior subsisting marriage did not amount to a conclusive adjudication as to the non-paternity of a child in a later contributory dependency proceeding brought by the wife against the former husband. In this case the wife sued to compel her former husband to support her child. Apparently relying on the doctrine of collateral estoppel,[51] the husband put in evidence the annulment decree which contained a statement that the child was not an issue of the marriage. The Supreme Court held that this was not a defense but its reasons were not entirely clear. At least two reasons might be given for this result: (1) The question of paternity was not actually litigated in the annulment proceedings, and collateral estoppel applies only to facts actually litigated.[52] (2) The finding in the annulment case was merely that the child was not an issue of the marriage, while the issue in dependency is one of paternity. Therefore, the prior finding, even if collateral estoppel does apply to it, is not relevant to the later suit.

45 Colo. Rev. Stat. § 22-1-1 (1953).
46 Colo. Sess. Laws 1959, ch. 68, § 1.
47 350 P.2d 338 (Colo. 1960).
48 Notice in dependency is governed by Colo. Sess. Laws 1958, ch. 30, § 1.
49 Colo. Rev. Stat. § 4-1-16 (1953).
50 354 P.2d 1015 (Colo. 1960).
51 Restatements, Judgments § 68 (1942).
52 Restatement, Judgments § 68, comment d (1942).

V. RELINQUISHMENT AND ADOPTION

The case of *Smith* v. *Welfare Department*[53] concerned an attack upon a relinquishment decree and the adoption which followed it. The facts are somewhat unusual in that the child was born to a married couple and was legitimate, but was nevertheless relinquished by them because it was conceived before their marriage. The baby's parents wished to hide the facts from their own parents. After they had been fully advised of the consequences in accordance with the statute,[54] both by a welfare worker and by the referee in the relinquishment proceeding, they persisted in their desire and a decree of relinquishment was entered. Later, after the baby had been placed for adoption and an interlocutory decree of adoption entered, the baby's maternal grandmother learned of its birth and offered to help the parents regain the child. The Supreme Court held the relinquishment decree immune from attack because it was based on jurisdiction, the statutory counselling had been given, and no fraud, duress or coercion appeared. Notice of the adoption proceeding was not required to be sent to the natural parents since their rights had been cut off by the relinquishment. The case is clearly right, though one may question the dictum disapproving of the "hasty procedure" by virtue of which the relinquishment decree was granted on the day the relinquishment petition was filed. If natural parents have been counselled calmly and thoroughly by an experienced social worker and understand and accept the consequences, no good and considerable harm can result from delay. It is usually highly desirable to place the child for adoption as soon as possible so that both child and adoptive parents can form the parent-child relationship at the earliest possible time.[55] The court's criticism of this procedure is thus not justified and again gives evidence of an exclusive attention to the "rights" of the natural parent without due concern for the welfare of the child.

VI. DELINQUENCY

One case this year raised a novel and interesting question in parent-child relations. In *Selby* v. *Jacobucci*,[56] parents filed a delinquency petition against their daughter and a petition for contributing to deliquency against the man with whom the daughter had spent the night without the parents' consent. The petitioner, an attorney, was retained by both the daughter and the man to represent them. The parents objected to petitioner's representing their daughter and the county court entered an order forbidding the petitioner to represent her. In an original proceeding for prohibition or mandamus brought by the attorney, the Supreme Court held that the trial court had exceeded its jurisdiction in entering the order. At least two criticisms may be made of this decision. One is that

53 355 P.2d 317 (Colo. 1960).
54 Colo. Rev. Stat. § 22-5-2 (1953).
55 Many authorities for this could be cited, but the following are illustrative. Child Welfare League of America, Standards for Adoption Service p. 20 (1959): "Infants should be placed in the adoptive home at as early an age as possible, preferably in the first weeks or at least by three months of age, except where there are special problems of the child or the mother or parents have not had sufficient time or help to become emotionally ready to relinquish the child." American Academy of Pediatrics, Adoption of Children at 10 (1959): "An early relinquishment is advantageous for the unmarried mother and for the child, but should be done only in accordance with the mother's emotional needs and readiness to give up her child." See also 1 Schapiro, A Study of Adoption Practice, at 45-46 (1956).
56 349 P.2d 567 (Colo. 1960).

the right to counsel of one's own choosing, upon which the Supreme Court based its decision, may be open to some qualification where a minor is involved. As one commentator on this case has put it, the court is "holding that a child has a right to resist her parents' efforts to prevent her from spending the night with a man,"[57] a rather far-reaching interference with the "rights" of natural parents. The second criticism is that the Supreme Court did not discuss the question of a possible conflict of interest which this case raises. It would be most interesting to have the court's opinion on whether an attorney could represent both defendants without violating the Canons of Professional Ethics[58] when there was a possibility that one defendant might be the leading witness for the prosecution against the other defendant.

57 2 Juvenile Court Judges' Journal No. 4, at 11 (1960).

58 Canon 6 provides in part: "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." Colorado Bar Association, The Public and Professional Responsibilities of Lawyers and Judges in Colorado at 7 (1957).