Denver Law Review

Volume 37 | Issue 1 Article 6

January 1960

One Year Review of Domestic Relations

Homer Clark

One Year Review of Domestic Relations

ONE YEAR REVIEW OF DOMESTIC RELATIONS

BY HOMER CLARK

Professor of Law, University of Colorado School of Law

The cases discussed in this review were decided between January 1, 1959 and January 1, 1960 and include only those of importance. As can be seen by an inspection of the cases, this was not an unusual year for this branch of the law. There were not many cases, and none which announced new doctrine or startling departures from accepted principles.

DIVORCE: PROCEDURE

One case[1] construed the statute [2] which formerly provided that the court shall enter its decree dismissing the action within forty-eight hours after the close of the trial, if it decides that the divorce is to be denied. The contention was made in this case by the former wife that when the court granted the divorce after the expiration of more than forty-eight hours, this violated the statute and caused the decree to be void for lack of jurisdiction. The Supreme Court rejected this contention on two grounds, one that the "close of the trial" did not occur until the court resolved the issues by its decision, and two, that in any event the statute is directory and not mandatory, so that its violation would not affect the validity of the divorce. The case is of diminishing importance because this provision of the statute has been eliminated by amendment.[3]

DIVORCE: PROPERTY, ALIMONY AND SUPPORT

The Supreme Court adhered again, in three cases, to its earlier rule[4] that the level of alimony and support payments,[5] and the manner in which property is divided between spouses[6] is largely within the discretion of the trial court. If the trial court's orders are supported by substantial competent evidence, they will not be disturbed. It is surprising that so many appeals are taken in the face of this well established principle.

The question of just when a property division should be determined in a divorce action, one which has troubled the Supreme Court in the past, arose again in 1959. In *McCoy v. McCoy*[7] the court held that there was no jurisdiction to hear and determine property rights after the interlocutory decree, but before the decree became final. The reasoning was that the statute authorized such a division "when a divorce has been granted,"[8] and the divorce has not been granted until the decree is final. It is to be hoped that the new statute which abolishes the interlocutory de-

1 Kemper v. Kemper, 344 P.2d 449 (Colo. 1959).
2 Colo. Sess. Laws 1933, ch. 71, § 1, at 440.
3 Colo. Sess. Laws 1958, ch. 37 § 8, at 224.
4 The leading Colorado case is *Nunemacher v. Nunemacher*, 132 Colo. 300, 287 P.2d 662 (1955).
5 Brigham v. Brigham, 346 P.2d 302 (Colo. 1959).
6 Green v. Green, 342 P.2d 659 (Colo. 1959); Drake v. Drake, 138 Colo. 388, 333 P.2d 1038 (1959).
7 336 P.2d 302 (Colo. 1959).
8 Colo. Sess. Laws 1917, ch. 65, § 7, at 182.

cree,[9] and is more specific about the timing of the property division,[10] will end all doubt on this matter.

Two other procedural aspects of alimony also arose in 1959. In *Doll v. Doll*[11] it was held that orders pertaining to alimony and support money being *in personam* do not survive the death of the husband. The case contains no discussion of the matter, which is not at all as clear as seems to have been assumed, although there is some earlier opinion in support of this view.[12] The other case[13] contains a dictum that accrued and unpaid installments of support money cannot be forgiven, or in other words, that alimony or support payments, once they accrue, cannot be modified. This holding might be of some importance if it were attempted to enforce such payments in other states, since if the Colorado Court cannot modify them, then courts of other states are required to enforce them under the full faith and credit clause.[14]

Three cases this year dealt with aspects of alimony and property as affected by a separation agreement. The simplest of these held that a valid separation agreement, not induced by fraud, in which the wife relinquished all claim to the husband's property prevented her from contesting his will.[15] *Cawley v. Cawley*,[16] the

9 Colo. Sess. Laws 1958, ch. 37, §§ 7,8, at 224.
10 Colo. Sess. Laws 1958, ch. 37, § 6, at 223.
11 345 P.2d 723 (Colo. 1959).
12 See International Trust Co. v. Liebhardt, 111 Colo. 208, 139 P.2d 264 (1943), and cases collected in Annot., 39 A.L.R.2d 1406 (1955).
13 Gier v. Gier, 339 P.2d 677 (Colo. 1959).
14 U.S. Const. art. IV, § 1; Sistare v. Sistare, 218 U.S. 1 (1909).
15 Thomas v. Eaton, 138 Colo. 512, 335 P.2d 270 (1959).
16 340 P.2d 122 (Colo. 1959).

second of these cases, held that the trial court had no jurisdiction to adjudicate a division of property four and one-half months after the divorce decree became final, when the decree was silent as to property, even though the parties had a separation agreement which divided their property. This case also was decided under the pre-1958 divorce statute, but in all likelihood the result would be the same under the new statute, since the new statute requires that the property division occur "at some reasonable time thereafter as may be set by the court at the time of the issuance of said divorce decree."[17] In a specially concurring opinion in the *Cawley* case Mr. Justice Frantz stated that in his view the petition for a division of property had not come within a reasonable time. A dictum in the *Cawley* case stated that there might be relief on the agreement even though the petition in the divorce action was denied.

The third case on separate agreements, *Murphy v. Murphy*,[18] was an action by a wife against her husband to set aside a separation agreement by which she had released all claims to the husband's property in return for his conveyance to her of cash and property. She alleged that she had not been adequately advised or represented, that she had been mentally ill at the time, and that false representations had been made to her to induce her to give the release. The separation agreement had been attached to a divorce decree obtained (uncontested) by the husband and incorporated therein by reference. As a defense the husband argued that the agreement could not be attacked because its validity had been adjudicated in the divorce action. The Supreme Court refused to accept this argument and held that the agreement did not become part of the decree because not set out verbatim in the decree, and therefore it was open to attack for fraud. So far as this holding goes it is correct, since earlier cases had established in Colorado that incorporation by reference is not sufficient to make the agreement part of the decree.[19] The wife consequently was in the same position as any person seeking to attack a contract for fraud. The objection to the opinion in the *Murphy* case is its inarticulated assumption that if the agreement had been incorporated and so "merged" in the decree it would have been immune to attack for fraud. This assumption is not supported by the authorities.[20] Attack on a decree for fraud is not "collateral" as the Supreme Court seemed to think, but is and has for a long time been considered a direct attack.[21] The kinds of fraud for which a decree can be attacked may very well include the type of which the wife was complaining in this case, since it prevented her from litigating the property division, and therefore was "extrinsic," in the old-fashioned sense.[22] Furthermore, under the new divorce statute it is clear that a separation agreement may be incorporated in a

17 Colo. Sess. Laws 1958, ch. 37 § 6, at 223.
18 138 Colo. 516, 335 P.2d 280 (1959), thoroughly analyzed in 32 Rocky Mt. L. Rev. 97 (1959).
19 McWilliams v. McWilliams, 110 Colo. 173, 132 P.2d 96 (1942).
20 Authorities on this are collected in Clark, *Separation Agreements*, 28 Rocky Mt. L. Rev. 320, 346 (1956).
21 1 Freeman, Judgments § 308 (5th ed. 1925).
22 Restatement, Judgments § 118, comment b (1942). See Jorgenson v. Jorgenson, 32 Cal. 2d 13, 193 P.2d 728 (1948).

divorce decree by reference.[23] The *Murphy* case does not consider this. Presumably the court was assuming that the new statute did not apply. And finally, the former statute provided that no action to attack a divorce decree could be brought after the expiration of a year, except for lack of jurisdiction or for a fraud perpetrated on the court,[24] giving express legislative sanction for upsetting divorce decrees on the ground of fraud. The court in the *Murphy* case does not cite this statute which has now been repealed and replaced by an even clearer provision.[25] But for all these reasons, any inference from the *Murphy* opinion that a separation agreement which is merged in the divorce decree is immune to attack for the kind of fraud asserted in that case is quite unwarranted.

At the very end of the year the court decided *Allingham v. Allingham*,[26] holding that a California judgment for arrears of alimony would be enforced in Colorado. The defendant husband's chief contention was that the order of the California court allowing execution for the arrears, on which suit was brought in Colorado, was obtained without notice to him and was therefore unenforcable under *Griffin v. Griffin*.[27] In an eminently clear and well-reasoned opinion, Mr. Justice Doyle disposed of this contention by showing that the *Griffin* case was distinguishable. In the *Griffin* case enforcement of a New York judgment for arrears of alimony was asked, and the Supreme Court of the United States held that since by New York law alimony was modifiable even as to accrued installments (i.e., retroactively modifiable), due process required an opportunity to the husband to be heard before a judgment could be entered for the arrears. Mr. Justice Doyle cited several California authorities to prove that California decrees are not retroactively modifiable.[28] Therefore the husband could not have raised any defenses in California, and for that reason no notice to him was necessary. The court also discussed and dealt with questions of incorporation of a separation agreement by reference, an oral agreement of modification, and a claim for attorney's fees.

PARENT AND CHILD

The matter of child custody came before the Supreme Court on several occasions during 1959, and the court reiterated the established rule that the trial court's determination of custody will be upheld when supported by substantial competent evidence, this being a question within the trial court's sound discretion.[29] The unusual thing about this year's cases is that three of them involved a dispute between a natural parent and a grandparent over the custody of the child, and in all three an award of custody to the grandparent was upheld.[30] This represents a sharp reversal of attitude on the part of the Court, although of course one must always admit

23 Colo. Sess. Laws 1958, ch. 37, § 6, at 223.
24 Colo. Sess. Laws 1933, ch. 71, § 6, at 442.
25 Colo. Sess. Laws 1958, ch. 37, §§ 6, 9. The pertinent parts of section 6 read: "The court shall retain jurisdiction of the action . . . for the purpose of hearing any matters . . . which it was unable to determine at earlier hearings . . . because of fraud, misrepresentation, or concealment."
26 12 Colo. Bar Assn. Adv. Sh. 226 (1959).
27 227 U.S. 220 (1946).
28 12 Colo. Bar Assn. Adv. Sh. 226, at 228-29 (1959).
29 Harris v. Harris, 345 P.2d 1061 (Colo. 1959).
30 Coulter v. Coulter, 347 P.2d 492 (Colo. 1959); Devlin v. Huffman, 339 P.2d 1008 (Colo. 1959); Walcott v. Walcott, 336 P.2d 298 (Colo. 1959).

that no two custody cases involve identical facts, and therefore stare decisis plays a limited role in such litigation. Nevertheless, in the past in a line of cases reviewing decisions of juvenile and county courts the Supreme Court had seemingly taken the position that a natural parent would almost never be deprived of custody, even after conduct which would seem to amount to abandonment or neglect of the child.[31] If the cases decided in 1959 do show a greater willingness to give custody to persons other than natural parents after neglect by such parents, and a greater willingness to approve custody arrangements made by trial courts, this is a most encouraging development. Matters of custody are certainly difficult for appellate courts to determine on the basis of a paper record, without the opportunity to see the child and the contesting parties, and therefore, a very broad latitude should be given to the trial courts.

A question of procedure in the modification of custody decrees was settled in *Pearson v. Pearson*.[32] In that case the husband sought a modification, but the wife had disappeared and could not be served with notice of the hearing. Service was made on her former attorneys in the divorce action, and the court held this was sufficient under the Rules of Civil Procedure,[33] citing a similar California case.[34] The Supreme Court then went on to hold that the trial court should not have awarded custody to the husband solely because the wife had failed to respect the visitation provisions of the former decree, where the husband had no facilities for taking care of the children, and had not even sought full custody.

Four cases of contributory dependency this year concerned paternity and its proof. Three of these involved merely the admission of evidence, its weight, and the form of instructions and therefore require no discussion here.[35] One case, *Vasquez v. Esquibel*,[36] was of importance, however. It held that Lord Mansfield's rule,[37] to the effect that a spouse cannot testify to non-access in order to prove a child illegitimate, is no longer to be followed in Colorado. This holding was foreshadowed earlier by the case of *Nulman v. Cooper*.[38] The court found Lord Mansfield's rule outmoded and archaic and therefore rejected it.

HUSBAND AND WIFE

The rule of the *Vines*[39] case was reaffirmed by *Morgan v. Morgan*[40] this year, which held that in a separate maintenance action the wife can get support, but not a share of her husband's property. The court in that case also held that a trust set up by the husband could not be cancelled where the trustee was not a party to the action, and that attorney fees could not be given to the wife for

31 Diernfeld v. People, 137 Colo. 238, 323 P.2d 628 (1958); Carrera v. Kelley, 131 Colo. 421, 283 P.2d 162 (1955); Foxgruber v. Hansen, 128 Colo. 511, 265 P.2d 233 (1954).
32 12 Colo. Bar Assn. Adv. Sh. 221 (1959).
33 Colo. R. Civ. P. 5 (b) (1).
34 Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251 (1943).
35 Medina v. Gonzales, 347 P.2d 138 (Colo. 1959); Briano v. Rubio, 347 P.2d 497 (Colo. 1959); Angelopoulos v. Wise, 336 P.2d 739 (Colo. 1959).
36 346 P.2d 293 (Colo. 1959).
37 The history and background of the rule are discussed in Williams, *The Legal Unity of Husband and Wife*, 10 Mod. L. Rev. 1 (1947).
38 120 Colo. 98, 207 P.2d 814 (1949).
39 Vines v. Vines, 137 Colo. 449, 326 P.2d 662 (1958).
40 340 P.2d 1060 (Colo. 1959).

the payment of counsel who had represented her in a divorce action brought by the husband in Nevada. Counsel fees in the Nevada suit were said to be a matter for the Nevada court to determine.

The principle that a property owner in Colorado may convey his property without the consent or knowledge of his spouse was adhered to in *Will v. Mills.*[41] The court said that the mere fact that such a conveyance deprives the surviving spouse of the chance to inherit does not make the conveyance invalid or fraudulent.

Finally the troublesome factual question whether a man was acting as agent for his wife in making an assignment of a mining lease was determined in the affirmative in *Broomhall v. Edgemont Mining Co.*,[42] on the familiar principle that the agency of one spouse for the other may be established by somewhat less convincing evidence than would be required if the parties were not married to each other.

41 344 P.2d 1083 (Colo. 1959).
42 340 P.2d 869 (Colo. 1959).