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One Year Review of Domestic Relations

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ONE YEAR REVIEW OF DOMESTIC RELATIONS

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INTRODUCTION

As is commonly true in Colorado, the cases dealing with domestic relations during the year 1958 were few in number and generally of no more than local interest. The chief development was accomplished by the Forty-First General Assembly in enacting a new statute on divorce and separate maintenance.[1] Detailed discussion of this statute is outside the scope of this article, but it will be mentioned in connection with the cases to which it is relevant.

DIVORCE AND SEPARATE MAINTENANCE

In last year's review the writer risked the opinion that the Colorado Supreme Court, in *Carroll v. Carroll*,[2] had adopted a liberal definition of cruelty. This statement was made without sufficient attention to the supreme court's penchant for reversing itself sub silentio. This year, in *Reed v. Reed*,[3] the court held that evidence substantially similar to that

[1] Colo. Laws 1st Reg. Sess. 1958, c. 37, 38.
[2] 135 Colo. 379, 311 P.2d 709 (1957), discussed in Clark, One Year Review of Domestic Relations, 35 DICTA 36 (1958).
[3] 329 P.2d 633 (Colo. 1958).

in the *Carroll* case did not amount to cruelty. The evidence outlined by the court was that the defendant, the wife, had criticized the plaintiff's parents and his job, and that they had quarreled over their sex relationship. There was evidence of two acts of physical violence. In short, the activities revealed in the *Reed* case were very much like those in the *Carroll* case, with the apparent difference that the plaintiff in the *Reed* case did not testify that his wife's conduct affected his well-being, health or peace of mind. Although the *Reed* opinion is anything but enlightening on the point, it was this failure that seems to have persuaded the court that cruelty had not been proved. The *Carroll* case had specifically stated that inferences may be allowed, but it now appears that the court has repented of its more liberal view, although its failure to cite *Carroll* leaves some doubts.

The chief authority for the *Reed* opinion is a quotation from Corpus Juris Secundum[4] which in part follows the language of *Evans v. Evans*,[5] the leading ecclesiastical case defining cruelty for eighteenth century English practice. Aside from the question whether present conditions in Colorado are such that an eighteenth century ecclesiastical authority should govern our divorce law, this choice of authority can only increase the hypocrisy which is already so distasteful a feature of divorce practice.[6] Divorce plaintiffs who are well advised must now go through the empty ritual of testifying that their peace of mind, health or well-being were affected by the defendant's cruelty.

One other case this year suggested in a dictum that entering a bigamous marriage would not necessarily amount to cruelty, at least if the defendant had acted in good faith.[7] The negative inference might then exist that entering into a bigamous marriage in bad faith is cruelty. This is of little importance in any event, since entering into a bigamous marriage would necessarily involve adultery, another ground for divorce.[8]

The year also produced a group of cases involving the financial side of divorce. In addition to reiterating the established rule that allowances of alimony are within the discretion of the trial court, not to be upset in the absence of arbitrary or unreasonable action,[9] the supreme court had to pass on the effect of an alimony decree where installments were not paid. In *Jenner v. Jenner*[10] it was held that each installment becomes a judgment debt as it matures, and that the trial court may at any time enter a total judgment for the unpaid arrears without further notice to the husband. If the court's reasoning is correct, it would seem to follow that the wife could get execution at any time for the unpaid amount, without going through the formality of getting a judgment entered for the total. The *Jenner* case also held that although the wife's

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[4] 27 C.J.S. *Divorce* § 28 (1941) to the effect that "mere rudeness of language, neglect, indifference, petulance of manner, austerity of temper, or an occasional sally of passion or act of ill treatment which does not injure the health of the complaining party does not constitute cruelty . . . ."

[5] 1 Hagg. Con. 35, 38, 161 Eng. Rep. 466, 467 (1790): "Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty."

[6] Any practitioner who has listened to divorce cases being tried must concede that the list of things which Corpus Juris Secundum says do not amount to cruelty are exactly the things for which divorces are granted every day in trial courts of Colorado and other states. To announce in appellate opinions that this sort of thing is not cruelty cannot help but increase the disrespect in which many laymen hold courts, lawyers and the law itself. It is no wonder that many successful and respected leaders of the bar look upon divorce practice as beneath them.

[7] Schleiger v. Schleiger, 324 P.2d 370 (Colo. 1958).

[8] Colo. Laws 1st Reg. Sess. 1958, c. 37, § 2.

[9] Fitchett v. Fitchett, 320 P.2d 339 (Colo. 1958); Schleiger v. Schleiger, 324 P.2d 370 (Colo. 1958). But see Vines v. Vines, 326 P.2d 662 (Colo. 1958) (supreme court reduced an award of alimony from $833.33 per month to $700 per month).

[10] 330 P.2d 544 (Colo. 1958).

laches might give the husband a defense to a contempt proceeding, it does not prevent her from enforcing the judgment for the arrears.

In *Rodgers v. Rodgers*,[11] a case commented on last year,[12] the supreme court held that awards of alimony and a property division could be made after the divorce decree had become final, where both parties had agreed in advance of decree that this should be done, and had intended at all times to submit the property questions to the court. This case raised but did not decide the question whether the property and alimony questions might be foreclosed from later consideration if the parties had not explicitly agreed that they should be decided after the divorce was final. This question seems now to be answered by the new divorce statute, which authorizes alimony to be awarded "at all times after the filing of a complaint, whether before or after the issuance of a divorce decree,"[13] and authorizes property to be divided "at the time of the issuance of a divorce decree, or at some reasonable time thereafter."[14] "Decree" here means a final decree, since the new statute abolishes the interlocutory decree.[15]

The court this year also described the circumstances under which a wife may be awarded part of her husband's property. Where she is asking a divorce, and can show that she contributed either funds or services beyond the usual duties of a homemaker, she is entitled to an equitable award.[16] Presumably this would hold true also under the new divorce statute. Such awards resemble alimony more than property, and give evidence that the court is influenced by the same considerations which led to the adoption of community property laws in other states.

Where the wife is asking not a divorce, but separate maintenance, the court has adopted other criteria. *Vines v. Vines*[17] held that the wife in separate maintenance is only entitled to a share of her husband's property where that is essential to assure her of support. In that case the trial court had given the wife half of her husband's property in addition to a substantial monthly sum for support. The supreme court said that the wife who seeks separate maintenance is entitled to maintenance and no more, so that as long as she is adequately supported, title to her husband's property cannot be ordered transferred to her. The court construed the separate maintenance statute, which authorized a division of property "in a proper case,"[18] to mean that such a proper case would not exist unless the division were necessary to secure support for the wife.

The problem immediately arises whether this view of separate maintenance is to prevail under the new statute. That statute allows the court to divide the property of the parties "as the circumstances of the case may warrant," "in such proportions as may be fair and equitable."[19] This is very little more specific than the statute under which *Vines v. Vines* was decided.

The new statute does remove one ground of the *Vines* case, however, by providing that if a property division is ordered, neither party may

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[11] 323 P.2d 892 (Colo. 1958).
[12] See Clark, One Year Review of Domestic Relations, 35 DICTA 36, 37 (1958).
[13] Colo. Laws 1st Reg. Sess. 1958, c. 37, § 6, amending Colo. Rev. Stat. § 46-1-5 (1953).
[14] *Ibid.*
[15] Colo. Laws 1st Reg. Sess. 1958, c. 37, § 8.
[16] Britt v. Britt, 328 P.2d 947 (Colo. 1958).
[17] 326 P.2d 662 (Colo. 1958).
[18] Colo. Rev. Stat. § 46-2-4 (1953).
[19] Colo. Laws 1st Reg. Sess. 1958, c. 38, § 2.

thereafter share in the estate of the other except by a will subsequently executed. This provision makes it clear that property rights can be decided, with finality, and that the wife has no chance of later receiving a further benefit when her husband dies, unless he expressly provides for her in his will. This makes separate maintenance bear a closer resemblance to divorce, and supports the conclusion that the new separate maintenance statute should be so construed as to allow a property division under the same circumstances in which it would be allowed in a divorce case.

The doubts and problems which arise over the nature and effect of separate maintenance underline the equivocal nature of the action and its undesirable social consequences, the worst of which is that it leaves the parties neither married nor single. This evil is not redeemed by the slight possibility that the parties might be reconciled and resume marital life.

One further problem arose during the year, the procedural question of the extent of review of a divorce case where no transcript of the evidence is made in the trial court. The supreme court said[20] that under these circumstances the findings of the trial court will be presumed to be supported by the evidence. The supreme court's willingness substantially to forego review of a divorce case where, under Rule 80 (a),[21] no transcript is made contrasts with its requirement in adoption cases that a reporter must be present and a transcript made.[22] The solution would seem to be a revision of Rule 80 (a) to require a transcript in all courts of record.

CUSTODY, ADOPTION AND DEPENDENCY

The supreme court has always been more willing to re-examine the decisions of trial courts on matters relating to children than to review factual determinations in other types of cases. This year was no exception. The case which goes the farthest in this direction is *Crites v. Crites*,[23] where the supreme court overturned an award of custody in a divorce case on the ground that it was "conceived in aggravation and not based on any evidence," even though no reporter had been present in the lower court, no transcript was made, and therefore it was impossible to tell whether there was evidence to support the decree or not. On the remand no requirement was made that the evidence should be reported. This of course is inconsistent with the *Schlieger* case[24] holding that in the absence of a transcript the trial court's decision will be presumed to be supported by the evidence.

A still different approach was taken in *Clerkin v. Geisendorfer*,[25] an adoption case in which abandonment by the child's father was in issue. The trial court granted the adoption and the supreme court reversed, remanding the case with instructions that a reporter be present at the trial and a transcript of the evidence made. This rule was made to apply to all contested adoption cases. If the court is correct in its reasoning that a transcript is required because of the state's interest in the child's welfare, then a transcript should also be required in all chil-

[20] Schlieger v. Schleiger, 324 P.2d 370 (Colo. 1958).
[21] Colo. R. Civ. P. 80 (a): "Unless the parties stipulate to the contrary, a master or district court shall, and any other court in its discretion may, direct that evidence be taken stenographically and appoint a reporter for that purpose."
[22] See Clerkin v. Geisendorfer, 323 P.2d 633 (Colo. 1958), discussed in text at note 25, *infra*.
[23] 322 P.2d 1045 (Colo. 1958).
[24] Schlieger v. Schleiger, 324 P.2d 370 (Colo. 1958).
[25] 323 P.2d 633 (Colo. 1958).

dren's cases, whether adoption, dependency, divorce or relinquishment, since the state's interest is equally great in all such actions. As indicated above,[26] the proper solution is a complete revision of Rule 80 (a), and not a piecemeal revision via decisions in individual cases.

Another case involving children dealt with a conflict of jurisdiction between the district court and the Denver Juvenile Court. In *Johnson v. Black*[27] the mother of a child had custody under a Colorado divorce decree. She left the child with her parents, the child's maternal grandparents, for about four years, and at the time of the suit was living in California. The grandparents filed a petition for adoption in the Denver Juvenile Court,[28] whereupon the mother filed a petition for habeas corpus in the Denver District Court,[29] asking that she be given custody of the child. The grandparents then asked an original writ of prohibition from the supreme court, to prevent the district court from hearing the habeas corpus action. The supreme court refused the writ, holding that the district court had jurisdiction in habeas corpus to determine whether the child was wrongfully restrained of his liberty, and that there was no conflict between the decision as to custody by the district court and the decision of the juvenile court on the adoption petition. The supreme court did not discuss the question of just how the juvenile court could enforce its adoption decree if the child's mother should be given custody in the habeas corpus action and she should then take the child to California.

Allowing the district court to go ahead with the habeas corpus proceeding thus enabled the mother to frustrate any decree of adoption which the juvenile court might give. The proper disposition of the controversy would have been to order the district court to stay the habeas corpus case pending the outcome of the adoption proceeding. If the adoption were granted, then the mother would not be entitled to custody. If the adoption were denied, then the district court could grant habeas corpus and see that the mother obtained custody of her child. The supreme court seems unable to look at children's cases other than as mechanical applications of the rules of jurisdiction. It never seems to occur to the court that at times a jurisdiction which clearly exists should not be exercised. This is certainly a case where the district court should have been made to stay its hand. Of course the other explanation for the case is the supreme court's long-standing hostility to decrees of the juvenile courts.

The same hostility can be seen in what was perhaps the most warmly discussed domestic relations case of the year, *Diernfeld v. People*.[30] This was a dependency case filed by the Colorado Springs probation officer in the El Paso County Court. The child was illegitimate and had been left by its mother with its maternal grandmother. The mother was serving her second term in the Colorado penitentiary and therefore was not supporting the child. So far as appears, the child was well cared for by its grandmother. The supreme court reversed a finding of dependency. The basic difference between trial court and supreme court was on the question whether a parent in Colorado may transfer the guardianship of his child to whom he pleases, without court approval. The supreme

[26] See text following note 22, *supra*.
[27] 322 P.2d 99 (Colo. 1958).
[28] Under Colo. Rev. Stat. §§ 4-1-2 and 37-9-2 (1953).
[29] The applicable statute is Colo. Rev. Stat. § 65-1-2 (1953).
[30] 323 P.2d 628 (Colo. 1958).

court held that he may, saying, "Clearly it is *not* the law that before a child can be placed by a parent in temporary custody of a relative permission must be first obtained from the court."[31] The trial court had ruled that the sole question in a dependency action was whether the parents were properly caring for the child, and that it did not matter that some other person was performing the parent's duties so long as the parent was not performing them. Regardless of what one may think about the wisdom of allowing a parent to transfer his child to others as he might transfer a chattel, the supreme court's decision does not take account of the applicable statute. The definition which the legislature has adopted applies the term "dependent child" to any child under eighteen:

> "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. . . ."[32]

From the literal reading of the statute it therefore seems obvious that the trial court's position was the correct one. A solution of this particular litigation which might be satisfactory would place temporary custody of the child in some agency,[33] perhaps leaving it with the grandmother, providing there was some chance that the child's mother might be able to care for it upon discharge from prison. If the chance that the mother would be able to care for it were slight or non-existent, then some permanent arrangement for care of the child should be made, and if the child were adoptable as the trial court thought, then adoption would appear the best solution. As a result of the supreme court's decision, however, the child's status remains in doubt at least until the mother's release, and perhaps after that if the mother provides no better care than she has in the past. Another dependency action appears probable before this unfortunate child's status can be settled.

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[31] 323 P.2d 628, 631 (Colo. 1958).

[32] Colo. Rev. Stat. § 22-1-1 (1953), defining a "dependent child." The supreme court has refused to apply this definition in a long line of cases. See, e.g., Carrera v. Kelley, 131 Colo. 421, 283 P.2d 162 (1955).

[33] The dependency statute does not now specifically authorize a temporary order for protective custody, but Colo. Rev. Stat. § 22-1-6 (1953) might well authorize such an order if liberally construed.