Denver Law Review

Volume 35 | Issue 1 Article 6

May 2021

One Year Review of Domestic Relations

Homer H. Clark Jr.

ONE YEAR REVIEW OF DOMESTIC RELATIONS

BY HOMER H. CLARK, JR.
Professor of Law, University of Colorado School of Law

INTRODUCTION

The year 1957 saw relatively few reported cases in Colorado dealing with domestic relations.[1] Most of these were of little importance as precedents. The most significant legal event in this field was the passage of a comprehensive set of amendments to the statutes dealing with divorce[2] and annulment.[3] The divorce bill was vetoed by Governor McNichols but the annulment bill became law.[4] It is to be hoped that the divorce bill will be reintroduced, passed and approved by the governor, since it makes many badly needed reforms. Both bills were drawn by Colorado Bar Association committees, who should receive great credit for the skillful execution of a difficult job. A detailed examination of the new annulment statute is outside the scope of this paper, but some reference will be made to its provisions in the appropriate section below.[5]

DIVORCE AND SEPARATE MAINTENANCE

Two important cases arose in this area of domestic relations. In one, *Carroll v. Carroll*,[6] the supreme court gave Colorado lawyers some much-needed light on what constitutes mental cruelty in this state. The husband was plaintiff and alleged in his bill of particulars that his wife had refused to attend social functions, church or to entertain in their home, had disagreed and argued with the plaintiff, had failed to keep house properly, and had been guilty of other conduct causing the plaintiff humiliation and distress. The trial court denied the divorce on the ground that the plaintiff had failed to establish cruelty. The supreme court reversed, saying that the proof did show cruelty, rather than mere incompatibility. Although the kinds of conduct which may constitute cruelty vary so widely that no two cases are just alike, this opinion does contain some general language which is worth quoting because it suggests that the Colorado Supreme Court is willing to grant divorces for conduct which does not meet the standards of cruelty which some more strict courts might require:

> "So far as peace of mind, happiness and good health is concerned, mental cruelty may be the most devastating type of cruelty. As was said in an earlier case, it is a refined cruelty which is sharper than the knife and more brutal than the fist. Married persons should be responsible to their spouses for the natural consequences of their words and actions, and if the conduct of defendant in this case was such as to cause disturbances with plaintiff's ability to carry on his chosen profession, and in addition thereto, bring about an impairment of health and rob him of his peace of mind, then it is something more than mere incompatibility. In some instances, it might be difficult to pin-

---

[1] Only cases decided during the calendar year 1957 will be discussed in this article.
[2] House Bill No. 70, First Regular Session, Forty-first General Assembly (1957).
[3] House Bill No. 77, First Regular Session, Forty-first General Assembly (1957).
[4] Colo. Laws 1st Reg. Sess. 1957, c. 129, §§ 1-10, amending Colo. Rev. Stat. Ann. §§ 46-3-1 through 46-3-9 (1953).
[5] See note 34, infra.
[6] 311 P.2d 709 (Colo. 1957).

point mental cruelty and inferences may be allowed. Scrutiny of defendant's testimony discloses a clear inference that she felt herself superior in many ways to plaintiff, and that her environment was below her mental caliber. She admitted that she understood that plaintiff's nature was unusually sociable and responsive, and this leads to the inference that he is of a sensitive nature, and this should be a strong factor in determining whether there has been cruelty within the meaning of our divorce statute. This does not create a dual standard, that is, one standard for the cultured and refined, and another for the unrefined. While the state and society is always an interested party in the maintenance of the marriage contract, it is not so exacting as to insist that the marriage relation in all events should continue, or that a home be maintained under circumstances that are more detrimental to society than a divorce."[7]

In the writer's opinion, this decision takes a commendable step toward bringing the official definition of cruelty into line with what the trial courts are actually doing in many parts of the state. In the process, it does come near to assimilating mental cruelty to incompatibility.

The second important case is *Rodgers v. Rodgers*,[8] which held that permanent alimony and a division of property, granted some months after the divorce decree became final, were outside the trial court's jurisdiction. The supreme court stated that such relief must be given at, or perhaps before, the time of the final decree. At the present writing, a petition for rehearing in this case has been granted,[9] so that any comment would be premature. Whatever the result, the decision will be most significant for the administration of Colorado's divorce law.

One other divorce case[10] held that the husband was domiciled in Colorado, upon facts showing some contacts with other states. The same case held that in awarding alimony the trial court should consider the husband's existing income, not what he might expect to earn in the future.

The single separate maintenance case decided during the year[11] held that the wife's action should not have been dismissed when she failed, for lack of funds, to appear in Colorado for the taking of her deposition. She was living in Chicago, and the court properly said that the information sought by the deposition could be obtained in other ways which would not impose the expense and hardship of a special trip from Chicago to Denver.

HUSBAND AND WIFE

The two cases on this subject were of little importance. One decision reiterated the Colorado rule that a conveyance is not presumed to be in fraud of a spouse, in the absence of evidence to that effect.[12] Conversely, it was held in the other case that a wife could set aside a conveyance where it was in fraud of her rights.[13]

[7] Id. at 711.
[8] 9 Colo. Bar Ass'n Adv. Sh. 493 (1957).
[9] 10 Colo. Bar Ass'n Adv. Sh. 19 (1957).
[10] Watson v. Watson, 310 P.2d 554 (Colo. 1957).
[11] Manning v. Manning, 10 Colo. Bar Ass'n Adv. Sh. 70 (Colo. 1957).
[12] Bushner v. Bushner, 134 Colo. 509, 307 P.2d 204 (1957).
[13] Zingone v. Zingone, 314 P.2d 304 (Colo. 1957).

PARENT AND CHILD

The troublesome problem of the effect of a foreign custody decree arose once in 1957. In *Evans v. Evans*[14] the spouses had been divorced in Wyoming, custody being given to the wife, who lived in Wyoming, for nine months of the year and to the husband for the other three months. The child's father remarried four years later and moved to Denver. In 1956 he had the child under the Wyoming decree and refused to return her to the mother at the end of the summer. The mother filed a petition for habeas corpus in the Denver district court, the father counterclaimed asking that custody be granted to him, and the court denied the writ, giving custody to the father. The apparent ground for the decision was the child's desire to remain with her father. The supreme court reversed, and directed that custody be given to the mother. It is not entirely clear what reason the court relied upon in reaching this result. The supreme court first objected to the trial court's failure to make findings as to the child's domicile, as to any change of circumstances since the Wyoming decree, or as to the mother's unfitness. The court also referred to the fact that the father was in violation of the Wyoming decree. It found that the child was domiciled in Wyoming at the time the petition was filed.

If the decision stands for the proposition that there is no jurisdiction to decide custody where the child is domiciled outside the state, even though one parent is domiciled in Colorado and though both parents are personally before the Colorado court, it may be very doubtful. No Colorado statute governs on this point, and the common law authorities are in some conflict. The Restatement of Conflict of Laws seems to take the position that only the courts of the child's domicile have jurisdiction.[15] The California case of *Sampsell v. Superior Court*[16] holds that more than one state may have jurisdiction, and that the state of the child's temporary residence may grant a custody decree. The United States Supreme Court has held that a custody decree is entitled to full faith and credit only if the parents have been personally served in the jurisdiction granting the decree, regardless of the child's domicile.[17] On this point, therefore, the *Evans* opinion is unsatisfactory, since it fails to consider the various authorities and choose unequivocally between them.

There are two other well established grounds for the decision, however: (1) There was no finding that conditions had so changed since the Wyoming decree as to justify a change in custody,[18] and (2) The father, who was asking for the change, was violating the Wyoming decree in keeping the child beyond the three-month period. The Colorado Supreme Court in other cases has properly refused to grant a change in custody in such circumstances in order to discourage divorced spouses from shopping around for a favorable forum, such activities being

---

[14] 314 P.2d 291 (Colo. 1957).

[15] Restatement, Conflict of Laws § 146 (1934): "Upon the legal separation of the parents, by divorce or otherwise, custody of their child can be given to either parent by a court of the state of domicile of the child." And see Id. § 117 (1934). But see Id. § 148 (1934): "In any state into which the child comes, upon proof that the custodian of the child is unfit to have control of the child, the child may be taken from him and given while in the state to another person."

[16] 32 Cal. 2d 763, 197 P.2d 739 (1948).

[17] May v. Anderson, 345 U.S. 528 (1953), 26 Rocky Mt. L. Rev. 205 (1954).

[18] Restatement, Conflict of Laws § 147, comment a (1934).

extremely detrimental to the child's welfare.[19] If either of these two grounds were the basis for the *Evans* case, there could be no question of its correctness.

Quintrall v. Goldsmith[20] settled a hard question of adoption law, holding that a child who had been adopted twice could not inherit from his first adoptive parents, in spite of a provision in the first adoption decree that the adoptive parents could not disinherit him. The supreme court found the provision valid because the adoption occurred before the passage of the statute allowing the disinheriting of adopted children,[21] but the court said that the second adoption decree divested the first adoptive parents of all legal rights and obligations. The court recognized that there is authority to the contrary,[22] but chose not to follow it on the ground that it would create great difficulties in the drafting of wills and distribution of property on death. The decision seems to be in accord with the rationale of adoption, although it reads into the first adoption decree a provision not found there,[23] and gives

[19] Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950). For general discussion of these problems, see Stansbury, Custody and Maintenance Law Across State Lines, 10 Law & Contemp. Prob. 819, 831 (1944); Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 345 (1953).

[20] 134 Colo. 410, 306 P.2d 246 (1957).

[21] Colo. Rev. Stat. Ann. § 152-2-4 (1953), the critical portion of which was enacted in 1941. Colo. Laws 1st Reg. Sess. 1941, c. 235, § 16.

[22] E.g., In re Egley's Estate, 16 Wash. 2d 681, 134 P.2d 943 (1943).

[23] The court states that the first adoption decree should be read to mean that the adoptive parents must not disinherit the child "as long as the Wiltses (the adoptive parents) stood in loco parentis." 134 Colo. at 416, 306 P.2d at 248.

the second decree the effect of cutting off rights accrued under the first, without any language in the second decree explicitly so stating. The willingness of the court to read provisions into decrees in this case, where the result is to *prevent* an inheritance by an adopted child should be contrasted with the court's reluctance to give effect to the express words of the adoption statute where the result would be to *protect* an adopted child's rights of inheritance.[24] In this state as in others, the courts have been far too slow to place the adopted child on an equal footing with natural children where rights of inheritance are involved.

Two dependency cases of 1957 should be noted briefly. In the first, *Ortega v. Portales*,[25] the mother of an illegitimate child filed a dependency petition, alleging the father had failed to support the child, who was born some eight years before. The juvenile court, where the petition was filed, held that the action was barred by the general three-year statute of limitations.[26] The supreme court reversed, holding that the gravamen of the action was the failure to support, that there was a continuing breach of duty, and the action was thus not barred by the statute. Unfortunately, the supreme court failed to state whether the juvenile court could order support retroactive to the child's birth, or only over the preceding three years. This case also apparently means that non-support is a proper ground for a dependency action, and that the court is repudiating sub silentio its own remarks in *Kearney v. Blue*[27] and other recent cases,[28] to the effect that a child who is not being supported by its parents is not "dependent" as the statute defines that term.

The other dependency case, *Geisler v. People*,[29] held that it is a jurisdictional requirement, for dependency and contributory dependency actions,[30] that the child involved, as well as the petitioner, reside in the county where the petition is filed.

Two other cases must be briefly mentioned. One, *Tucker v. People*,[31] dealt with jurisdiction of county court in criminal non-support cases. Rehearing has been granted in the action,[32] so that comment would be premature. The other case merely affirmed a trial court's refusal to modify a custody decree, finding no abuse of discretion,[33] and is of slight significance as a precedent.

MARRIAGE AND ANNULMENT

As has been indicated, the year saw an entirely new annulment statute in Colorado,[34] dealing not only with the procedure in such cases, but also with the substantive law of marriage. A comprehensive and

---

[24] See, e.g., Russell v. Jordan, 58 Colo. 445, 147 Pac. 693 (1915), which the court cites as holding that the adopted child can inherit from, but not through, his adoptive parents. There is room for argument that this rule has been changed by the 1941 amendments to the intestacy law, now found in Colo. Rev. Stat. Ann. § 152-2-4 (1953), but this citation of Russell seems to indicate that the supreme court thinks the Russell rule is still law in Colorado. For full discussion of this problem see Note. 26 Rocky Mt. L. Rev. 65, 68 (1953).

[25] 134 Colo. 537, 307 P.2d 193 (1957).

[26] Colo. Rev. Stat. Ann. § 87-1-9 (1953), covering "all other actions of every kind for which no other period of limitation is provided by law."

[27] 134 Colo. 217, 301 P.2d 515 (1956).

[28] See Carrera v. Kelley, 131 Colo. 421, 283 P.2d 162 (1955); and Foxgruber v. Hansen, 128 Colo. 511, 265 P.2d 233 (1954).

[29] 308 P.2d 1000 (Colo. 1957).

[30] The court held that actions under both the dependency statute, Colo. Rev. Stat. Ann. § 22-1-3 (1953), and the contributory dependency statute, Colo. Rev. Stat. Ann. § 22-7-2 (1953) are to be governed by the same rules, with respect to residence of the child. The court seems to use the term "residence" as synonymous with "domicile" in this case.

[31] 9 Colo. Bar Ass'n Adv. Sh. 527 (1957).

[32] 10 Colo. Bar Ass'n Adv. Sh. 19 (1957).

[33] Strakosch v. Benwell, 310 P.2d 720 (Colo. 1957).

[34] Colo. Laws 1st Reg. Sess. 1957, c. 129. See note 5, supra.

exhaustive definition of void and voidable marriages was enacted.[35] The statute making miscegenation a crime and making miscegenous marriages void was repealed.[36] Other important changes in Colorado law were made.[37] The statute raises several complex questions which cannot be discussed in this limited space.

The only case on marriage during the year was *Archina v. People*,[38] a murder prosecution. In the trial court, the defendant's wife was allowed to testify against him, and the question was raised on appeal whether she was to be considered his wife for purposes of the statute giving him the privilege of excluding her evidence.[39] The supreme court held she was not, apparently limiting its definition of "wife" to apply solely to this precise question.[40] The parties had been married by a civil

---

[35] Colo. Laws 1st Reg. Sess. 1957, c. 129 §§ 1 and 3, which will eventually be found in Colo. Rev. Stat. Ann. §§ 46-3-1 and 46-3-3 (1953).

[36] Although the legislature did not expressly repeal Colo. Rev. Stat. Ann. § 90-1-2 1953 making marriages between negroes and whites void, this section was repealed by implication, since Colo. Laws 1st Reg. Sess. 1957, c. 129, § 3 provides that "A marriage is void only if one or more of the following conditions existed at the time of the marriage," and the listed conditions do not include miscegenation.

[37] E.g., Valdez v. Shaw, 100 Colo. 101, 66 P.2d 325 (1937) was overruled, so that a child of a void or voidable marriage is now legitimate, whether or not his parents get an annulment. See Colo. Laws 1st Reg. Sess. 1957, c. 129, § 5. And Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953), requiring personal service in annulment suits, has been overruled by Colo. Laws 1st Reg. Sess. 1957, c. 129, § 8. The new statute labels annulment an action in rem.

[38] 307 P.2d 1083 (Colo. 1957).

[39] The statute provides that a wife shall not be examined for or against her husband without his consent. Colo. Rev. Stat. Ann. § 153-1-7 (1953).

[40] The court said, in concluding its discussion of the point: "Our decision here is limited to an application of the statute to the facts as disclosed by this record." 307 P.2d at 1094. Presumably this means that the court was not making a general judgment about the validity of the marriage.

ceremony in Italy, there being some doubt as to just where in that country it was performed. But a marriage ceremony seems to have been performed, and probably made the parties man and wife by Italian law.[41] At least one reason for the marriage was to enable the husband to get into the United States. The marriage was never consummated and a later religious ceremony which had been contemplated never occurred. In reaching its result, the court relied on two federal cases in which marriages of this sort, contracted in order to enable one of the parties to enter the United States, had been held to violate the immigration laws. One of these cases held that no marriage had occurred,[42] but the other refused to pass on that issue, holding merely that a marriage of this kind amounted to a conspiracy to enter the United States by fraud.[43]

The *Archina* case assumes, without discussion, that marriage is "divisible," that is, that a man and woman may be married for some purposes and not others. The case must mean that although the relationship could not be annuled,[44] the parties could not be considered man and wife for purposes of requiring one to give evidence against the other. The reason for reaching this result, though not articulated plainly, seems to have been that a statute designed to protect confidential communications between spouses (and thus insure marital harmony) [45] has no application where the relationship so lacks affection and harmony that there is nothing to protect.[46] Such a holding has the virtue of construing the statute by reference to its purpose, but is open to the objection that it imparts uncertainty to a status where certainty is desirable. There are so many other sources of uncertainty, however, that

---

[41] At one point the court says there is doubt whether the parties ever entered a valid civil marriage, but later it is conceded that they did. 307 P.2d at 1091, 1092. The opinion could be a good deal clearer on this point. The court does not discuss the conflict of laws question.

[42] United States v. Rubinstein, 151 F.2d 915 (2d Cir. 1945).

[43] United States v. Lutwak, 344 U.S. 604 (1953). This case does not support the result reached in Archina.

[44] Although there are few cases with facts like this one, there are several where the "marriage" was entered into for an ulterior motive, such as to give a child a name, to enable one of the parties to get or keep a job, or for other reasons. The great majority of these cases hold the marriages valid. They are collected in a note, Sham Marriages, 20 Univ. of Chi. L. Rev. 710 (1953). It is too bad that the Archina opinion did not at least mention these decisions. A recent English case held a marriage valid where contracted solely for the purpose of enabling one of the spouses to emigrate to England. Kraft v. Silver, [1955] 1 Weekly L. R. 728, noted in 69 Harv. L. Rev. 768 (1956). In this case, the question arose in connection with the wife's suit for divorce. The fact that the parties did not intend to perform the usual marital duties does not invalidate the marriage in most cases. A leading case so holding is Estate of Duncan, 87 Colo. 149, 285 Pac. 757 (1930).

[45] That this is the policy underlying the marital privilege, see McCormick, Evidence 168, 169, 179, 180 (1954).

[46] "It is inconceivable that the legislature, in adopting the above statute, intended to preserve inviolate such strange relationships as that existing between Rose and the defendant. That relationship was a cold, inanimate, lifeless relationship which had its beginning and end in a preliminary civil contract, in the minds of the parties amounting to nothing more than an agreement to marry at some time in the future. This defendant cannot use this statute, designed and intended to protect and preserve an institution and status that from time immemorial has been the very foundation of civilization and survival of the human race, as a shield to escape the consequences of his unlawful acts." 307 P.2d at 1092. The peculiar thing about this policy argument is that in many American jurisdictions, the privilege survives divorce, where the relationship has become even more "cold, inanimate, lifeless" than it was in Archina. And presumably it would exist, notwithstanding a separation, where no divorce had occurred. See McCormick, Evidence 178 (1954). Perhaps the Archina opinion stands for the principle that the privilege ends whenever the marriage is or has become an empty relationship, in which the parties are not living affectionately together as husband and wife normally do.

perhaps it is illusory to think that people are entitled to have the law governing their marital relationships stated plainly, in a manner intelligible to laymen.[47] The new annulment statute is an attempt to provide an exhaustive list of the defects which impair the validity of marriages, thus providing a measure of certainty. Perhaps this statute, which does not refer to any such defect as existed in the *Archina* case, would be held to overrule that decision.[48] It certainly does seem to say, in effect, that all marriages are valid except those labeled void or voidable by reason of the named defects. It is hard to escape the conclusion that it was intended to establish a binding definition for all purposes.

[47] See, e.g., Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957), in which a marriage had ended for purposes of remarriage, but still existed as far as the husband's duty to support his wife was concerned.

[48] Colo. Laws 1st Reg. Sess. 1957, c. 129 §§ 1 and 3.