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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.

The past year[1] was not an active one in Colorado for domestic relations law. The only cases of striking interest to the practitioner in this field concern the law of delinquency and adoption.

A broader view of the year's developments in the national law of marriage and the family can be obtained from a recent excellent article which should be of value to Colorado lawyers and judges.[2]

MARRIAGE

The only case involving marriage reiterated the Supreme Court's position that the capacity of persons to marry, at least so far as age is concerned, is governed by the law of the place where the marriage is contracted. In *Spencer v. People*[3] the court held that a marriage contracted in Utah between persons domiciled in Colorado was valid even though the girl was only fifteen years old, where the Utah statute fixed the age of consent to marry at fourteen for the female. The court relied on the Colorado statute which provides that marriages contracted outside the state are valid if valid by the law of the place where contracted.[4]

DIVORCE, ALIMONY AND PROPERTY SETTLEMENTS

Questions of divorce procedure and defenses were dealt with in *Collins v. Collins*.[5] The plaintiff-wife brought a first divorce action in 1951, based on cruelty, and in April, 1953 her complaint was dismissed after a jury verdict found that both spouses had been guilty of cruelty. In May of 1953 the wife brought another divorce action based on general allegations of cruelty and at the trial gave evidence of cruelty occurring after the filing of the first suit but before that suit was tried. The Supreme Court directed dismissal of the suit. The opinion leaves doubt about the court's reasoning,

[1] In compliance with the editor's request, the author has included only cases decided during the period from November 1, 1955 to December 31, 1956.
[2] See Johnston, Family Law, 32 N.Y.U.L. Rev. 335 (1951).
[3] 133 Colo. 196, 292 P.2d 971 (1956).
[4] Colo. Rev. Stat. Ann. § 90-1-5 (1953). See also Payne v. Payne, 121 Colo. 212, 214 P.2 495 (1950). Marriages of persons under sixteen are void by Colorado law. Colo. Rev. Stat. Ann. § 90-1-4 (1953).
[5] 132 Colo. 495, 289 P.2d 900 (1955).

but apparently the judgment rests on two grounds: (a) The prior action was a conclusive adjudication of the wife's own fault, so that she was barred by recrimination. (b) The wife could not in this action rely on acts of cruelty occurring before the trial of the prior action. The first of these grounds is certainly valid. The second is also proper as a means of discouraging repeated, harrassing suits but it seems inconsistent with the language in *Harms v. Harms.*[6] The *Harms* case held that it was reversible error to admit testimony of acts of cruelty occurring after filing of the suit but before trial. The court in *Collins* stated:

> "The evidence in the first divorce action was not necessarily limited to matters occurring prior to the date of the filing of the complaint, but evidence of other facts, whether before or after suit, which serve to give character to the acts of cruelty alleged and proven, is admissible. This is true whether or not plaintiff filed an amended complaint to embrace matters occurring after the suit was commenced as she had a right to do under our rules."[7]

This might overrule *sub silentio* the court's statement in *Harms* that "we do determine that defendant herein was bound by, and should have been confined to, his bill of particulars filed herein on motion and order during the process of arriving at issue in the case."[8] Perhaps the rule of the *Harms* case only applies where a bill of particulars has been filed and not where the parties rely solely on the complaint to outline the issues.

The relationship between divorce and bankruptcy was involved in one case, *Todd v. Todd.*[9] The Supreme Court held that where the husband became a bankrupt before a final division of property in the divorce action, the district court in the divorce case had jurisdiction to determine the interests of the spouses, and of the husband's trustee in bankruptcy, to property standing in the joint names of husband and wife.

A rather difficult question of the division of property on divorce was raised by *Lee v. Lee.*[10] During a large part of the parties' marital life the husband loaned nearly all of his earnings to his mother who used the money to pay off a loan on a valuable piece of real estate. During this time the wife contributed her own funds for the support of the family. The husband's mother died before the divorce action was brought leaving the real estate to the husband. The Supreme Court, stating that there would have been no inheritance had it not been for the wife's contributions to the family, directed that the inheritance should be taken into account in making an allowance of propery to the wife. The case reaches what appears to be an equitable result, but it never examines closely the

[6] 120 Colo. 212, 209 P.2d 552 (1949).
[7] 132 Colo. at 499, 289 P.2d at 90.
[8] 120 Colo. at 217, 209 P.2d at 554.
[9] 133 Colo. 1, 291 P.2d 386 (1956). On the general question of bankruptcy and family law, see Joslin, Bankruptcy from a Family Law Perspective, 9 Vand. L. Rev. 789 (1956).
[10] 133 Colo. 128, 293 P.2d 293 (1956).

purposes of awards of money in divorce. If the purpose of this award was merely to divide the property of the parties, then clearly the wife should not share in an inheritance received by the husband. If the purpose was to reward the wife for years of faithful support of the family, then she should share in any property owned by the husband, no matter how acquired. This latter purpose is one usually held relevant to alimony, not to a property division.[11] Although the exact label placed on the award did not matter in the *Lee* case, it sometimes is extremely important. Therefore, it is submitted that the courts ought to be more articulate about just what kind of an award they are making to the wife in a case like this one. Superficially, this case would seem to be overruled by the proposed new divorce law for Colorado,[12] but if the award to the wife is to be considered alimony, rather than a share of property, the new statute would not apply to it. This makes it all the more important for the courts to be clear about what they are doing when they begin to award the husband's property to the wife in divorce cases.

In *Stephenson v. Stephenson*,[13] the Supreme Court reversed an award of property to a wife in divorce on the ground that the husband did not own as much property as the trial court found belonged to him and on the ground that the award as made below completely impoverished him. The Supreme Court held that since the lower court's decree was made solely on the basis of documents, it was entitled to none of the usual presumptions in favor of correctness.

One other case[14] approved dismissal of a contempt citation against a delinquent husband on the ground that the wife had let arrears of alimony accumulate for several years without taking any action. During this time the husband had been available for service of process and his whereabouts known to the wife. The Supreme Court, after stating that the contempt remedy is to be used cautiously, found that the dismissal was within the trial court's discretion. Presumably if the trial court had reached the opposite conclusion, its decision would have been affirmed also.

[11] See, e.g., Poppe v. Poppe, 114 Ind. App. 348, 52 N.E.2d 506 (1944).
[12] H. B. 70, § 5, amending Colo. Rev. Stat. Ann. § 46-1-5 (2)(a) (1933). At present writing this bill has passed both Houses of the Legislature but has not been signed by the Governor.
[13] 299 P.2d 1095 (Colo. 1956).
[14] Conway v. Conway, 299 P.2d 509 (Colo. 1956).

HUSBAND AND WIFE

The single case[15] in this category upheld a conveyance by a dying man in trust to support research in lung cancer, rejecting his wife's contention that the transfer was made in fraud of her rights. The court stated the rule to be that a husband may convey his property during his life to anyone he pleases, even though the conveyance deprives his wife of her inheritance, provided that the conveyance is bona fide and not merely colorable. The court found that the bona fide nature of this conveyance was not affected by the husband's subjecting the property to the payment of all debts which he might contract during his lifetime.

PARENT AND CHILD

Two cases during the past year dealt with property transfers between related persons. One of these, *Shores v. Shores*,[16] held that the presumption of a gift which arises when a father takes title to land in the name of a daughter was rebutted. The court relied on the facts that the daughter was an adult and was thus not the beneficiary of any obligation of the father, that the father had retained possession of the land, and that the parties had treated similar transactions as if the father had retained ownership. On these facts the presumption would seem to have been fully rebutted. The other case mentioned[17] appeared to hold that there is no fiduciary relationship between grandmother and granddaughter which might create a presumption of undue influence or fraud in a transfer of land from one to the other. The court affirmed the trial judge's decision that the deeds could not be cancelled either for alleged incompetence of the grandmother or for fraud or undue influence.

The family car doctrine was applied in a case of relatively slight interest, *Ferguson v. Hurford*.[18] The defendant, mother of the driver of the car, was shown to have taken title in her name, registered the car in her name and taken out insurance in her name. The court held her the owner in spite of the fact that her son paid for the car and paid the expenses of its operation. As owner, she was liable under the family car doctrine.

Two other unimportant cases, mentioned only for the sake of completeness, are *Hayes v. Hayes*,[19] approving a decree which divided custody and allowed the mother to remove her child from the state, and *Angelopoulos v. Wise*,[20] which held that the evidence of paternity in an action for contributory dependency was not clearly sufficient to support the jury's finding that defendant was the father of the child.

Two cases involving dependency and adoption were decided by the Supreme Court and are of considerable importance for lawyers and judges. he first of these is *Fackerell v. District Court*.[21] It arose as a petition to the Supreme Court for a writ of prohibition

[15] Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956).
[16] 303 P.2d 689 (Colo. 1956).
[17] Hines v. Oliver, 133 Colo. 40, 291 P.2d 693 (1955).
[18] 132 Colo. 507, 290 P.2d 229 (1955).
[19] 303 P.2d 238 (Colo. 1956).
[20] 133 Colo. 133, 293 P.2d 294 (1956).
[21] 133 Colo. 370, 295 P.2d 682 (1956).

against the further hearing of a habeas corpus case by the district court for Adams county. Petitioner had obtained an adoption decree in the Moffat county court in 1952, based upon a consent by the child's mother. The child had been in the petitioner's custody for about a year before the adoption decree was granted, but the opinion does not state how the petitioner acquired custody. In 1955 the child's mother filed a petition for habeas corpus in the Adams county district court alleging that the adoption decree had been obtained by fraud and seeking custody of her child. It was this habeas corpus suit which petitioner sought to prevent by his petition for the writ of prohibition. The Supreme Court refused the writ of prohibition on the ground that the Moffat county court had had no jurisdicion to grant the adoption decree. Apparently the reason for the lack of jurisdiction was the absence of a prior relinquishment decree.

It is not clear what the effect of the *Fackerell* decision will be. The relinquishment statute does provide that no person may receive a child for purposes of adoption unless the child has been relinquished under the statute.[22] Yet the adoption statute continues to provide, quite inconsistently, that a child may be adopted upon the filing of the required consents.[23] The Supreme Court never discusses this conflict in the statute. The *Fackerell* case thus seems

[22] Colo. Rev. Stat. Ann. § 22-5-3 (1953).
[23] Colo. Rev. Stat. Ann. § 4-1-9 (1953).

to mean at least that no adoption by consent of the natural parent can be decreed unless preceded by a relinquishment decree.

The adoption statute also provides that a decree of adoption may be granted without consents where the non-consenting parent has abandoned the child.[24] It seems clear that the relinquishment statute was never intended to apply where the child had been abandoned. The court in the *Fackerell* case stated that no question of abandonment was involved, but it also seemed to make the absolute rule that a decree of adoption without a preceding relinquishment is void on its face. On this point two earlier Colorado cases are to the contrary,[25] neither of them being cited by the court.

Furthermore, the court never cites or refers to the adoption statute which prohibits attack on adoption decrees for any reason, jurisdictional or otherwise, more than two years after the decree.[26] It appeared that the attack in this case came nearly three years after the adoption decree.[27]

Finally, the case contains a dictum that a parent cannot relinquish a child to an individual,[28] a point which has been raised in the past in Colorado, and on which an attorney-general's opinion has been given to the contrary.[29] The applicable statute allows the court in relinquishment to award custody of the child "to whomsoever the court shall see fit."[30] One can only sum up the effect of this case by stating that it creates doubt and confusion about the present state of adoption laws.

The second important decision referred to is *Kearney v. Blue.*[31] In this case a mother filed a dependency petition in the Denver juvenile court asking for an order directing the father of her children to support them. The Supreme Court seemed to hold that the juvenile court had no jurisdiction over actions by a mother against a father for support of the children. The opinion concludes with the novel suggestion that the proper remedy is a divorce proceeding, thus creating the impression that a wife must divorce her husband in order to force him to support their children.

The *Kearney* case is the latest in a line of cases limiting the juvenile court's jurisdiction over dependency.[32]

The applicable statute defines a dependent child as one "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

[24] Colo. Rev. Stat. Ann. § 4-16-6 (2)(b) (1953).

[25] Fulton v. Martensen, 129 Colo. 125, 267 P.2d 658 (1954); Moreau v. Buchholz, 124 Colo. 302, 236 P.2d 540 (1951).

[26] Colo. Rev. Stat. Ann. § 4-1-16 (1953): "No attempt to invalidate a final decree of adoption by reason of any jurisdictional or procedural defect shall be received by the court, or by any court of this state, unless regularly filed with such court within two years following the entry of the final decree."

[27] The court states that the adoption decree was granted on October 23, 1952, and the petition for habeas corpus filed on July 9, 1955. 133 Colo. at 371, 295 P.2d at 683.

[28] 133 Colo. at 374, 295 P.2d at 684.

[29] Op. Att'y Gen. Colo. No. 2221-52 (January 31, 1952).

[30] Colo. Rev. Stat. Ann. § 22-5-6 (1953).

[31] 301 P.2d 515 (Colo. 1956).

[32] Other such cases are Foxaruber v. Hansen, 128 Colo. 511, 265 P.2d 233 (1954); Everett v. Barry, 127 Colo. 34, 252 P.2d 826 (1953); Arnett v. Northern, 118 Colo. 307, 194 P.2d 909 (1948); Snyder v. Schmoyer, 106 Colo. 290, 104 P.2d 612 (1940).

failing or refusing to support or care for said child . . . ."[33] The statutes then give jurisdiction over dependent children to the Juvenile Court.[34] And the provision governing decrees in dependency cases authorizes the juvenile court to "make such disposition of the child by adoption, guardianship, or otherwise, as seems best for its moral and physical welfare."[35] It has generally been thought that this allowed the juvenile court in a proper case to leave the child with its parents, including in the order a provision for support. In a later section the juvenile court is given express authority to leave the child in its own home subject to conditions imposed by the court.[36] Thus, the result of the *Kearney* case runs counter to the statutory scheme. It places an unnecessary limitation on the remedies of a wife and mother for support of her children at a time when most authorities agree that non-support is one of the most serious problems of modern American family law.

DELINQUENCY

Only one recent case[37] need be mentioned here, and that one is interesting only for a dictum which it contains to the effect that "a single violation of any of the acts defining deliquency is not enough upon which delinquency can be determined. It is the repetition of such acts and the frequency thereof that creates a state of delinquency or incorrigibility."[38] This dictum confuses delinquency with incorrigibility. The two are not the same. The delinquency statute very plainly says that a single violation of law may amount to delinquency.[39] It is true, as an earlier case held,[40] that a series of offenses must be proved before a child can be held incorrigible, but these offenses need not be violations of a criminal statute. It is unfortunate that this dictum may be used to embarrass juvenile and county judges in the already difficult task of handling children who come within the delinquency statute. These judges need all the assistance and support possible for the performance of their statutory duties.

[33] Colo. Rev. Stat. Ann. § 22-1-1 (1953).
[34] Colo. Rev. Stat. Ann. § 37-9-2 (1) (1953).
[35] Colo. Rev. Stat. Ann. § 22-1-6 (1953).
[36] Colo. Rev. Stat. Ann. § 22-1-9 (1953).
[37] Spencer v. People, 133 Colo. 196, 292 P.2d 971 (1956).
[38] 133 Colo. at 199, 292 P.2d at 972.
[39] Colo. Rev. Stat. Ann. § 22-8-1 (2) (1953).
[40] Kahm v. People, 83 Colo. 300, 264 Pac. 718 (1928).