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DIVISION OF PROPERTY IN SEPARATE MAINTENANCE

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Sec. 28, Chap. 56, Colo. Stat. Ann., provides *inter alia* as follows:

> . . . the court . . . may make reasonable orders for temporary support, suit money or counsel fees . . . and may, upon the entry of the decree of separate maintenance, make such permanent orders, or may, in the proper case, determine the property rights of the parties or decree a division of property upon such terms and conditions as the court shall deem just.

Should the "or" in each instance in the above quoted section be read in the disjunctive, i.e., either support payments or a division of property, or should it be read in the conjunctive so as to allow both which is permitted in divorce decrees [1] by such a construction? [2] There is no Colorado decision directly in point answering this question.

It is the writer's contention that to give the wife both support money and a division of property under a separate maintenance decree would be contrary to the underlying concept of separate maintenance, and would be treating it as a divorce to the extent that the property rights of the parties are affected thereby.

Under the common law, if the husband failed or refused to support his wife, she could buy necessaries upon his credit, if she were able to find a tradesman who was willing to sell to her on such precarious terms. All agreements for a separation were void as against public policy because they were in derogation of the marriage relationship.[3] It is apparent that the common law remedy afforded to the wife was grossly inadequate.

When the ecclesiastical courts first devised the equitable remedy of alimony, the husband was called upon to support the wife, but only when she had no means of support.[4]

The prevailing modern view is summarized in one of the present day encyclopedias as follows:[5]

> The purpose of a suit for separate maintenance is to enforce specifically the general duty of the husband to support the wife by obtaining an order or decree directing certain definite payments to be made at regular intervals for this purpose.

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[1] Colo. Stat. Ann., Sec. 8, Chap. 56 (1935).

[2] Shapiro v. Shapiro, 115 Colo. 505, 117 P. 2d 363 (1946).

[3] Madden, *Domestic Relations*, Sec. 99.

[4] O'Neil v. O'Neil, 18 N. J. Misc. 82, 11 A. 2d 128 (1939).

[5] 42 Corpus Juris Secundum, Sec. 614.

In *Coe v. Coe*, a Massachusetts case, the court said, "Allowance to the wife is made in recognition of the legal right of the wife to be supported by her husband solely for the purpose of providing for her support, and not for the purpose of a division of their property or the husband's property." [6]

In granting a division of the property in addition to the regular payments, the court would be ignoring the fact that "although a legal separation has been decreed, the marital relationship still exists. It (decree) anticipates that a future reconciliation may be brought about." [7] If the husband should die with such a decree in effect, the wife still retains her legal status as the spouse, for separate maintenance does not change the course of inheritance. Thus the wife would benefit twice from a division of the husband's property if the court had allowed such a division at the time of the separate maintenance decree.

The benefits of the separate maintenance decree should not be so large as to render separation attractive to the wife.[8] The decree differs from alimony in that ordinarily it is only temporary relief for the present needs of the wife.[9] The purpose is not to enrich the wife, but to provide suitable support and maintenance for her, taking into consideration the manner in which she was accustomed to live with her husband and the husband's ability to provide support.[10]

PROVISIONS IN OTHER STATES

It might be instructive at this point to consider a highlighted survey of other jurisdictions, to determine if the prevailing view tends to support our contention. It would be helpful if there were one state with a statute on separate maintenance the same as Colorado's but such is not the case. There is a wide divergence in the provisions of the various jurisdictions, ranging from one extreme to the other.

Kansas is the one state that clearly permits a division of the property and an adjudication of the property rights at the time of the legal separation.[11] As early as 1900,[12] the Kansas Supreme Court stated that the division or disposition of the property, and the relinquishment by one of any claim or interest, actual or contingent, in the estate of the other by reason of the marital relationship, in a separate maintenance decree was not contrary to public policy. The court has consistently followed this theory.[13] Kansas obviously does not follow the theory that there will be a future reconciliation, but that at the time of the separa-

[6] 313 Mass 232, 46 N.E. 2d 1017 (1943).
[7] Decker v. Decker, 56 Mont. 338, 185 P. 168 (1919).
[8] Rhodes v. Rhodes, 92 N. J. Eq. 252, 114 A. 414 (1920).
[9] Rhodes v. Rhodes, *supra*, note No. 8.
[10] Reeve v. Reeve, Mo. App., 160 S. W. 2d 804 (1942).
[11] General Statutes of Kansas Annotated, Art. 15, Sec. 60-1506, 1516 (1935).
[12] King v. Mollohan, 61 Kan. 683, 60 P. 731 (1900).
[13] E.G., Hardesty v. Hardesty, 115 Kan. 192, 222 P. 102 (1924); Wulf v. Fitzpatrick, 124 Kan. 642, 261 P. 838 (1927).

tion, because of health, religious factors, age or obstinacy, there will never be a divorce; that the separation is permanent. Therefore, a division of the property would seem only equitable to the wife. It is also notable that there is an unusually large number of separate maintenance actions brought in Kansas.

California also permits a division of property by the court according to this section: " . . . The court in granting the husband or wife permanent support and maintenance of himself or herself shall make the same disposition of the community property . . . as would have been made if the marriage had been dissolved." [14] Sec. 146 of the Cicil Code provides that at the dissolution of a marriage, the community property shall be equally divided.

In spite of the above clear language which permits the court to adjudicate property rights at the rendition of separate maintenance decrees, the court said in *Blache v. Blache*:[15]

> If the action is one for separation and maintenance, a dissolution is not contemplated, the parties remain as before, husband and wife. The rights of the wife in the community property are not destroyed by the decree for maintenance unless there is an agreed property settlement or the court awards the community property in accordance with the statutes. In a maintenance action, periodical payments, not an absolute allowance are ordinarily contemplated, though the court has the right to order otherwise.

Thus, even the court with clear authority to divide the property indicates it ordinarily would not want to do so.

Two other community property states, Idaho and Washington, do not allow division because there is no statutory authority to do so.[16] The Idaho court pointed out that Idaho had no statute similar to California's and reversed a lower court decree which gave the wife all the property real and personal, both community and separate.[17] The Washington court in *Cummings v. Cummings*[18] upheld the separate maintenance decree but denied the division of the community property. The court said: "The courts do not have the power to dispose of community property when granting a decree of separate maintenance but the extent of their jurisdiction is to impose liens to secure the payment of any award which may be made."

The Illinois statute seems to be a more typical separate maintenance provision.[19] It provides for an award for reasonable sup-

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[14] California Civil Code, Sec. 137.
[15] Blache v. Blache, 69 Cal. 2d 616, 160 P. 2d 136 (1945).
[16] Idaho Civil Code, Sec. 14-103.301 (1932); Washington Rem. Rev. Stat., Sec. 6890.
[17] Radermacher v. Radermacher, 59 Ida. 716, 87 P. 2d 461 (1939).
[18] Cummings v. Cummings, 20 Wash. 2d 703, 149 P. 2d 155 (1944).
[19] Smith-Hurd Stat., Chap. 68, Sec. 22 (1935).

port and maintenance while husband and wife live apart. The court is to take into consideration the condition in life of the parties at the place and residence of the wife or husband, and the circumstances of the respective cases. There is no mention of an adjudication of property or power to settle property rights.

However, there are some Illinois cases where the property was divided. In *Decker v. Decker* property rights were settled on the theory that the husband had abandoned the wife without her fault.[20] In *Cox v. Cox,* the court said that the property of the the husband could bear the burden of providing for support of his wife, where he had left the state.[21] In the *Ribegard* case the court stated that the usual rule was that property rights should not be adjusted, but in this case the parties themselves asked for an adjudication.[22] These various exceptions illustrate how the Colorado statute could be applied if the "ors" were construed in the alternative. Where the husband is not available to provide support or has no income or ability to work, then if he has property it should be made available for the wife's support. This construction also gives some meaning to the Colorado statutory language "in the proper case."

The Ohio statute [23] provides *inter alia,* that the court is allowed to give alimony out of H's property, as is equitable which may be allowed in real or personal property, or both, payable either in gross or installments. In a 1922 case [24] the court would not decree a division of property on the basis that there might be future reconciliation. In 1933 [25] the court would not give the wife one car in addition to periodic payments when the husband had two, saying the car was not necessary for her reasonable support. In 1949 [26] in refusing a property division the court recognized that in a suit for alimony alone, the court is much more limited than in a divorce case. In a very recent case,[27] when the lower court had awarded the wife ninety dollars a week and ordered the husband to transfer one-half interest in the family dwelling to the wife, the Supreme Court sustained the decree, and stated:

> Sec. 11998 clearly provides that in granting separate support to the wife the court may allow alimony payable in real or personal property. . . . Here the court granted, as alimony, the husband's one-half interest in the family dwelling as well as weekly payments of money. Such

[20] 279 Ill. 300, 116 N.E. 688 (1917).
[21] 192 Ill. App. 286 (1916).
[22] Ribegard v. Ribegard, 349 Ill. App. 99, 110 N.E. 2d 89 (1953).
[23] Pages Ohio General Code, Sec. 11998.
[24] Durham v. Durham, 104 Ohio St. 7, 135 N.E. 280.
[25] Daily v. Daily, 48 Ohio App. 83, 192 N.E. 287.
[26] Neal v. Neal, Ohio Com. Pl., 85 N.E. 2d 147 (1949).
[27] Glassman v. Glassman, Ohio App., 103 N.E. 2d 781 (1951).

> an award is not a division of the property as claimed by defendant. Unquestionably, the court found that providing the wife the right to the family dwelling as a place to live was more desirable than increasing the money award to provide for housing of the family elsewhere.

Michigan,[28] Kentucky,[29] and Tennessee[30] seemed to have had this situation in view for by their respective statutes the wife is allowed the use and possession of the husband's property although not title to it. To illustrate: in Michigan in 1951,[31] Mrs. Mackie was awarded $300 per month and the use of the home owned jointly, with Mr. Mackie paying the taxes and insurance. The court said, "In a statutory proceeding for separate maintenance the courts do not award the wife title to any of the husband's property. In determining a proper allowance for the wife, the court should take into consideration the husband's income, the age and health of both parties, the station in life, and manner of living of the parties prior to the separation."

Some of the other states which do not allow a division of property at the time of the separate maintenance decree are: Massachusetts,[32] Florida,[33] Maryland,[34] New Hampshire,[35] West Virginia,[36] and Montana.[37] The Montana court said, "a reconciliation may be effected, and the marital relations resumed, and any decree which is made is subject to alteration or modification any time. To sustain a division of property would put it beyond the power of the court to make any further order in respect to the property."

Although the decisions by the courts of the other jurisdictions do not have any application to separate maintenance actions in Colorado, since the matter is governed by statute, they do reflect, for the most part, an attitude that conforms to the underlying principle that separate maintenance entitles the wife to reasonable support only, and does not warrant both support and a division of the property.

CONCLUSION

At the outset the question was raised as to whether the "ors" in Sec. 28 should be read in the conjunctive or the disjunctive. The author has attempted to show that because of the basic concept of separate maintenance, and the views expressed by the other jurisdictions, they should be read in the disjunctive.

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[28] Michigan Compiled Laws, Secs. 552.301, 552.302 (1948).
[29] Kentucky Revised Statutes, Sec. 403.060.
[30] Williams Tennessee Code Anno., Sec. 8446 (1934).
[31] Mackie v. Mackie, 329 Mich. 595, 46 N.W. 2d 393 (1951).
[32] Dunnington v. Dunnington, 324 Mass. 610, 87 N.E. 2d 847 (1949).
[33] Lamoureaux v. Lamoureaux, Fla., 25 So. 2d 859 (1946).
[34] Nicodemus v. Nicodemus, 120 Md. 584, 48 A. 2d 442 (1946).
[35] Pflug v. Pflug, 92 N.H. 247, 47 A. 2d 829 (1946).
[36] Davis v. Davis, W. Va. 70 S.E. 2d 889 (1952).
[37] Decker v. Decker, 56 Mont. 338, 185 P. 168 (1919).

Any doubt cast on our opinion would come from an attorney for a wife who wanted a division of the property in addition to periodic payments in a separate maintenance action, and who relied on the case of *Shapiro v. Shapiro,* 115 Colo. 505, 117 P. 2d 363, a 1946 case in which the court construed the divorce section, Sec. 8, Chap. 56, 35 C. S. A. This section provides for the court to decree alimony "or" a division of the property. The court held that the conjunction "or" should be construed synonymous with "and" so that payments or alimony, and a division of property could be made. The court stated: "There is nothing to indicate that the legislative intent was to restrict the court or give its authority only in the alternative. It appears rather to indicate an intent specifically to grant full authority in the court to make just provision for the wife and children."

Because of the inherent difference between the action for divorce and separate maintenance, it is the feeling of this writer that this construction should be limited in its application to Sec. 8 and not applied to Sec. 28. Divorce is final; separate maintenance is not. The marital relationship is not over and ended and the court should not treat the property as if it were.

HAVE YOU PAID YOUR DUES?