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Domestic Relations--Restoration of Property Versus Lump Sum Alimony

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more in keeping with fundamental justice,[7] as expressed in the *Coleman* case. But the court in the principal case was faced with the practical fact that the Kentucky Habitual Criminal Statute is mandatorily worded. The court conceded the wording of the statute, but apparently has recognized that under the Kentucky system of pronouncing sentence in criminal cases[8] the jury could, as a matter of fact, ignore the instructions in relation to the Habitual Criminal Statute and convict and sentence for the single offense only. Since the Commonwealth cannot appeal from such a verdict,[9] the jury has, in effect, exercised some discretion as to the amount of punishment assessed.

It is submitted that this situation leaves something to be desired. Many juries will not be strong-willed enough to ignore the instructions given them by the court and will return a verdict for a life sentence in an instance where they would have given a lesser sentence under directory instructions because of the special circumstances surrounding the case.

Arthur L. Brooks, Jr.

DOMESTIC RELATIONS—RESTORATION OF PROPERTY VERSUS LUMP SUM ALIMONY—Appellee (husband) was granted a divorce in 1956 in an action in which appellant (wife) counterclaimed for divorce, award of alimony, and restoration of property. Property acquired during the marriage included substantial interests in two successful businesses with an estimated value of almost $200,000, a residence which with improvements had cost $18,000, an automobile, household effects, and other miscellaneous personal property. Appellant had been gainfully employed for 13 of the 16 years of marriage and had deposited her earnings in a joint bank account. The interest in the first of the two businesses was purchased with a $5,000 down payment and deferred payments which were made out of earnings of the business. Of the $5,000 down payment $1,000 was borrowed from appellant's family and repaid out of business earnings. The $4,000 of the parties' own funds was made up from $3,497.04 of appellant's

[7] That is, the principal offense might not be of such magnitude to merit the severe punishment of the statute; or the particular circumstances surrounding the case, or the character of the defendant may be mitigating factors. Also see Hall v. Commonwealth, 106 Ky. 894, 51 S.W. 814 (1899), for further argument along this line.

[8] Under Ky. Rev. Stat. § 431.130 (1959), the jury "shall fix by its verdict a punishment to be inflicted within the periods or amounts prescribed by law. . . ." But compare the system of allowing the jury to only find the fact, and the court to set the punishment in light of the jury's finding.

[9] The Commonwealth may not appeal to affect the defendant but only for the purpose of settling the law on a point. See, e.g., Commonwealth v. Tam Tuyl, 58 Ky. (1 Met.) 1 (1858).

separate funds and $502.96 of appellee's. Title was taken in the name of the appellee by the common consent of the parties. The interest in the second business was purchased with borrowed money, most of which had been repaid out of the earnings of the business at the time of the divorce. The residence of the parties was purchased with a $5,000 down payment from the joint bank account plus $7,000 of borrowed funds. Title was taken in the joint names of the parties as tenants by the entirety, with right of survivorship. Appeal was from a judgment denying appellant's request for alimony and decreeing a restoration of property in the amount of her original contribution to the business purchase ($3,497.04) and her remaining interest in the bank account ($1,500), plus the automobile and household effects. She also appealed from the denial of her subsequent motion to set aside the parts of the judgment relating to alimony and property restoration on the ground of newly discovered evidence. On appeal, the appellant contended for a proportionate part of the property commensurate with the part of the purchase price contributed by her. *Held*: Judgment affirmed as to restoration of property, reversed with direction to award a new trial as to alimony on the basis of the newly discovered evidence. *Kivett v. Kivett*, 312 S.W. 2d 884 (Ky. 1958).

The apparent inequity of the decision in the principal case suggests comment as to the differences in theory and result between lump sum alimony and property restoration, and a consideration of the effect of such differences on the principal case.

In a divorce action in Kentucky the wife may be entitled to a distribution of family assets under either of two theories: (1) As allowance of lump sum alimony, in which case the wife must not have been principally at fault,[1] and must not have sufficient estate of her own. Under this theory the allowance to the wife must be equitable.[2] (2) By way of restoration of that which was hers to begin with and for which no consideration was given.[3] These two

[1] Though the wording of the applicable statute, infra note 2, would seem to authorize an award of alimony only when the wife has obtained the divorce, absence of principal fault has usually been the test applied by the court. See Annot., 34 A.L.R. 2d 313, 344-45 (1954), collecting Kentucky cases. See also Howard v. Howard, 291, S.W. 2d 828 (Ky. 1956).

[2] Ky. Rev. Stat. § 403.060 (1) (1959) provides:

> If the wife does not have sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as the court considers equitable; but no such allowance shall divest the husband of the fee simple title to real estate.

[3] Ky. Rev. Stat. § 403.060 (2) (1959) provides:

> Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the property, not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage.

theories complement each other. The first allows the trial court to make an equitable division of the family assets, while the second provides for the return of specific, identifiable property which the wife wishes to recover in kind. Hence a divorce judgment may, and frequently does, decree awards under both theories.[4]

Since absence of principal fault is a prerequisite to allowance of alimony,[5] it is customary in appropriate cases for the wife to seek both alimony and a restoration of property. Then, if alimony is denied for fault, the wife will at least get back her own property which she has contributed.[6]

"Restoration" of property is necessarily made from the party in whom title reposes to the other party. Restoration is either in kind (whenever possible) or of a sum of money equivalent to its value plus accrued interest.[7] Under this theory no consideration is given to any increase or decrease in value of property into which the contributed asset may have been converted.

Lump sum alimony, on the other hand, is designed to effect an equitable division of the family assets, especially of that which has been accumulated through the joint efforts of the parties.[8] The amount is discretionary with the court but cannot be arbitrary or inequitable.[9] Under Kentucky law a wife who is entitled to a divorce is entitled to alimony as a matter of course.[10] Even though the trial court may have granted the husband the divorce, the wife is entitled to alimony if she has no estate of her own, was not entirely to blame for breaking up the marriage, and was free from moral delinquency.[11]

[4] For illustrations of the application of both theories, see Wells v. Wells, 293 S.W. 2d 718 (Ky. 1956); Burns v. Burns, 173 Ky. 105, 190 S.W. 683 (1917); Duvall v. Duvall, 147 Ky. 426, 144 S.W. 78 (1912).

[5] See note 1 supra.

[6] Ky. Rev. Stat. § 403.065 (1959) provides in part:

> Every judgment for a divorce from the bond of matrimony *shall* contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. (Emphasis added.)

[7] Ritchie v. Ritchie, 311 Ky. 569, 224 S.W. 2d 648 (1949) (specific real estate); King v. King, 214 Ky. 171, 283 S.W. 73 (1926) (money); Burns v. Burns, 173 Ky. 105, 190 S.W. 683 (1917) (specific items of personal property).

[8] 2 Henderson, Nelson on Divorce and Annulment § 14.138 (2d ed. 1945).

[9] 2 Henderson, op. cit. supra note 8, § 14.135; Warren, Schouler Divorce Manual 386 (1944).

[10] The rule has been stated to be that ". . . the wife is entitled to alimony as a matter of course, unless it appear from the proof that she was solely at fault or guilty of such moral delinquency as to forfeit her right to alimony." Maher v. Maher, 295 Ky. 263, 267, 174 S.W. 2d 289, 291 (1943), and cases there cited.

[11] Howard v. Howard, 291 S.W. 2d 828 (Ky. 1956).

By her amended answer and counterclaim, the appellant in the instant case sought an absolute divorce, alimony, and a *division* of the property acquired and accumulated during marriage.[12] On appeal, argument was advanced in support of a monthly allowance of alimony and an equitable division of property under the restoration theory. In view of what has already been said, it would seem to be almost impossible to justify an equitable division under the restoration theory. If the award is to take the form of alimony it may be either a lump sum equitable division of property or an award of periodic payments, or occasionally both. If the award is to include both alimony and restoration of property the alimony may be in either lump sum or periodic form, but the restored property can not exceed the original contribution plus interest.[13]

Thus, it would seem that if the appellant had been seeking an equitable division of the family assets she should have proceeded under the alimony rather than the restoration theory.[14] The Court of Appeals then could have entered such an award as the trial court should have made.[15]

Even though the appellant misconceived her theory on appeal, the court still could have made the equitable division of property contended for as an award of lump sum alimony. Superficially, the case has been remanded for a new trial on the issue of alimony, and a reading of the report would indicate that justice can yet be done. Under the peculiar facts surrounding the case, however, such justice may be more apparent than real.

When the case was remanded, the Court of Appeals knew that the appellee was probably proceeding to dispose of and hide the major portions of the property of which appellant claimed entitlement to a fair share.[16] A subsequent petition for rehearing was denied despite knowledge that appellee had disposed of both business interests and had removed himself from the state.[17]

In view of these matters outside the report of the case, it seems that the court should have done its best to insure that an award to the appellant would be something more than a token award.

[12] Brief for Appellant, p. 61.

[13] Cases cited note 7 supra.

[14] It is recognized that appellant's choice of theory was probably encouraged by the fact that appellee had been awarded the divorce on the basis of appellant's apparent principal fault and that she would not be entitled to alimony unless the trial court should be reversed on appeal. However, it is felt that the new evidence was so overwhelmingly persuasive of appellee's principal fault as to nullify any justification of the choice which might otherwise exist.

[15] Annot., 34 A.L.R. 2d 313, 325-26 & n. 16 (1954), collecting Kentucky cases.

[16] Brief for Appellant, pp. 84-85, 95.

[17] Appellant's Petition for a Rehearing, pp. 16-17.

This seems to be a particularly apt case for the application of the principle that the Court of Appeals may make such an award of alimony as the trial court should have entered.[18] Evidence was available which would tend to establish at least a minimum value of appellee's assets, and an adequate lump sum award of alimony could, and should, have been made on the basis of this minimum. The new trial may very well find no property which can be attached, and it is almost certain to find no defendant who can be served.

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[18] See note 15 supra.