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Divorce--Does Recrimination Remain in Kentucky?

Thomas P. Lewis
University of Kentucky

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hearing a divorce case involving children.³³ Certainly all the children in this state who will have their lives affected by a divorce decree deserve the opportunity to have presented to the court a fair and dispassionate account of all the factors which will have a bearing on their ultimate custody disposition. Therefore, the "friend of the court" should be required to investigate *all* divorce cases affecting children. Since some counties may not alone be able to bear the financial burden of hiring a "friend of the court", it might be advisable to allow the counties in a circuit court district to share the expense, especially where the divorce docket would not justify a full-time "friend" in all the counties of the district. In any event the ultimate benefits to be derived by children of divorced parents and by the state and its counties might more than offset the expense of the office.³⁴

CHARLES N. CARNES

DIVORCE — DOES RECRIMINATION REMAIN IN KENTUCKY?

In most states the fact that the complainant in an action for divorce has been guilty of conduct which would constitute a ground for divorce affords the defendant an adequate defense to the action.¹ This defense, referred to as the doctrine of recrimination, is most simply defined by the oft-repeated statement that if both parties have a right to a divorce neither has. This principle has often been criticised as too harsh,² and as a result, some states have passed statutes which limit its application in several different ways.³

³³ 3 MICH. COMP. LAWS sec. 552.251 (1949) provides for a friend of the court for all counties who must see that all decrees effecting children are properly followed, and the chancellor may call upon him to make an investigation and submit recommendations during the original action. 1 ILL. REV. STAT. c. 28 sec. 438 (1947) allows the chancellor to call upon the County Welfare Department to make such an investigation.

³⁴ For a comprehensive treatment of the problem see *Children of Divorced Parents; A Symposium*, 10 LAW AND CONTEMP. PROB 697-866 (1944) and see Cochran, *Children of Divorce*, 11 Ky. B. J. 201 (1947).

¹ Brazell v. Brazell, 54 Cal. App. 2d 458, 129 P. 2d 117 (1942); McMillan v. McMillan, 120 Fla. 209, 162 So. 524 (1935); Smiley v. Smiley, 114 Ind. App. 138, 51 N.E. 2d 98 (1943); Rigsby v. Rigsby, 266 Ky. 291, 97 S.W. 2d 835 (1936); Boyd v. Boyd, 177 Md. 687, 11 A. 2d 461 (1940); Reddington v. Reddington, 317 Mass. 760, 59 N.E. 2d 775 (1945); Tebbe v. Tebbe, 223 Mo. App. 1106, 21 S.W. 2d 915 (1929); Studley v. Studley, 129 Neb. 784, 263 N.W. 139 (1935); Cilente v. Cilente, 104 N.J. Eq. 605, 146 Atl. 469 (1929); Weiger v. Weiger, 59 N.Y.S. 2d 444 (1946); Phillips v. Phillips, 48 Ohio App. 322, 193 N.E. 657 (1935); Gray v. Gray, 232 Wis. 400, 287 N.W. 708 (1939).

² Note, 36 Ky. L. J. 342.

³ For a comparison of statutes of 32 states, see 2 VERNIER AMERICAN FAMILY LAWS 82 (1932).

In Kentucky, as in most states, it is not necessary that the recriminatory acts pleaded by the defendant spouse be of the same character and furnish the same grounds for divorce as those relied upon in the complaint.⁴ For example, if a husband sues for divorce on ground of his wife's adultery, it should not be granted when he himself is guilty of cruel treatment sufficient to warrant the granting of an absolute divorce to the wife.⁵

The doctrine of recrimination is based on the maxim of equity that he who comes into equity must come with clean hands.⁶ This clean hands doctrine extends to two types of cases in divorce law: (1) where plaintiff has provoked the conduct of which he complains, and (2) where plaintiff is himself guilty of conduct constituting a ground for divorce.⁷ The latter is recrimination, the former is the defense of provocation. These two defenses sometimes overlap, for conduct which amounts to a ground for divorce might also be conduct which provoked the defendant's acts. In such a case, in Kentucky, it would make no difference which defense the defendant pleaded. The one important difference between the two defenses is that if the defense is provocation, the courts will compare the fault of the parties, and if the plaintiff is less at fault, his divorce will be granted.⁸ If the defense is recrimination, the courts will not compare the fault of the parties because no difference in degree of wrong in different statutory grounds for divorce is recognized.⁹ So if provocation was relied upon as a defense where the provoking act complained of amounted to a ground for divorce, the parties would be considered equally to blame and the divorce would be denied.

An exception to the rule that neither party will be granted a divorce where each proves a right to a divorce seems to have been made in a recent Kentucky case, *Shofner v. Shofner*.¹⁰ There the plaintiff sought a divorce on the ground of cruel and inhuman treatment,

⁴ *Smith v. Smith*, 181 Ky. 55, 203 S.W. 884 (1918).

⁵ *Smith v. Smith*, *supra* note 4

⁶ *Hartstern v. Hartstern*, 311 Ky. 564, 224 S.W. 2d 447 (1949).

⁷ *McMillan v. McMillan*, 113 Wash. 250, 193 P. 673 (1920) citing NELSON,

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⁸ *Dixie Gadie Hoagland v. John W. Hoagland*, 218 Ky. 636, 291 S.W. 1044 (1927). In this case the plaintiff sued for divorce on the ground of cruel and inhuman treatment, and the defendant cross-petitioned, alleging lewd and lascivious conduct on the part of the plaintiff. After finding that plaintiff was not guilty of acts sufficient to grant a divorce to defendant, but finding that plaintiff's acts provoked defendant's acts of cruelty, the court said: "Both of these parties were to blame for their unfortunate domestic trouble, and in such cases neither of them is entitled to an absolute divorce unless the blame of one is so much greater and out of proportion to that of the other that the misdoings of the latter would not furnish sufficient provocation for the one guilty of the excess."

⁹ *Rigsby v. Rigsby*, 266 Ky. 291, 97 S.W. 2d 835 (1936).

¹⁰ 310 Ky. 869, 222 S.W. 2d 933 (1949).

and defendant by counter-claim sought a divorce on the same ground. The lower court granted an absolute divorce to each party and defendant appealed from the award of alimony to the wife. The Kentucky Court of Appeals affirmed the judgment, saying:

"It appears to us from this record that the husband was more at fault, and alimony was correctly allowed to the wife."¹¹

The court did not comment on the doctrine of recrimination, and impliedly at least, seemed to accept the granting of an absolute divorce to each party as the usual practice. This may be explained by the fact that the Court of Appeals cannot reverse that portion of a judgment granting a divorce,¹² but the correctness of the lower court's determination on the divorce is an important factor almost invariably decided upon by the court in reviewing the award of alimony.¹³

Does the *Shofner* case represent a trend away from the doctrine of recrimination? Before considering that question, the ways a court might escape applying the doctrine should be considered with a view to determining whether or not there might have been a reason for not applying the doctrine in the *Shofner* case.

One way in which the result in the *Schofner* case might have been correctly reached would be through a substitution of the principle of provocation for the principle of recrimination. Such a substitution affords the most probable explanation as to why the courts in the state of Washington have been able to reach the same result as in the *Shofner* case, yet stay within their doctrine of recrimination. In *McMillan v. McMillan*,¹⁴ the plaintiff sued for divorce alleging cruelty. It was found that the plaintiff's "irregularities" had provoked his wife into ill-tempered and aggravating conduct towards him. The Supreme Court of Washington held that he was barred from a divorce by the doctrine of recrimination, which the court explained as being that a person seeking a divorce "must be innocent of a substantial wrong towards the other party of the same nature as that of which the complaint is made." In a later Washington case,¹⁵ plaintiff sued for a divorce alleging cruelty, and the defendant proved that plaintiff also was guilty of cruelty.

¹¹ *Id.* at 371, 222 S.W. 2d at 934.

¹² *Ahrens v. Ahrens*, 313 Ky. 55, 230 S.W. 2d 73 (1950).

¹³ "The law is well settled, and indeed is of statutory enactment, that there can be no appeal from a judgment granting an absolute divorce, but the rule is firmly fixed in this jurisdiction that although the judgment for divorce may not be disturbed on appeal, still this court may look into the evidence to see whether the judgment was authorized under the proof, and if found not to be authorized the judgment for alimony may be reversed." *Stapp v. Stapp*, 178 Ky. 337, 338, 198 S.W. 935 (1917).

¹⁴ 113 Wash. 250, 193 P. 673 (1920).

¹⁵ *Hokamp v. Hokamp*, 32 Wash. 2d 593, 203 P. 2d 357 (1949).

The lower court awarded plaintiff an absolute divorce and offered to award defendant a similar decree if she would recast her pleadings. The defendant refused, and appealed on the ground that the doctrine of recrimination should have barred plaintiff from receiving the divorce. The Supreme Court of Washington, in affirming, held that recrimination as set out in the *McMillan* case did not apply. Thus, in interpreting recrimination as applied in the *McMillan* case, the Washington court apparently limited the doctrine to a situation wherein the plaintiff's misconduct provoked the defendant's acts. The fact that a plaintiff is guilty of acts constituting a ground for divorce is immaterial unless these same acts can be said to have provoked defendant. Kentucky, on the other hand, would apply provocation where the plaintiff's misconduct provoked the defendant,¹⁶ and would reserve recrimination for the situation in which Washington denied its application—where the plaintiff is guilty of acts constituting a ground for divorce.

Another means by which a divorce might have been granted would be through a relaxation of the doctrine of recrimination because of some peculiar circumstance. An example of this is found in *Stepp v. Stepp*.¹⁷ In that case the Kentucky Court, in determining whether the wife was rightly granted a divorce (a determination made necessary in connection with an appeal from judgment allowing alimony) cited the record as showing that Mrs. Stepp had suffered a paralytic stroke afflicting her mind to some extent. Subsequently she exhibited a temper, breathing threats against her husband and calling him "inelegant" names. In approving the divorce in favor of the wife, the Court said her conduct amounted to cruelty, but while she probably would not be entitled to a divorce under ordinary circumstances, her transgressions should not bar her right to a divorce in view of her condition. The Court in effect said that, had the husband sued for divorce on ground of his wife's conduct he would not have been granted a divorce because the wife's conduct, though amounting to cruelty under ordinary circumstances, did not amount to cruelty in view of her condition. In the *Shofner* case, the husband and wife were each granted a divorce, so each had to be guilty of acts which amounted to a ground for divorce. Therefore the approach taken in the *Stepp* case could not have been applied in the *Shofner* case. It seems improbable that circumstances would ever justify the granting

¹⁶ *Kreidler v. Kreidler*, 301 Ky. 105, 190 S.W. 2d 1012 (1945); *Grove v. Grove*, 239 Ky. 32, 39 S.W. 2d 193 (1931); *Kahr v. Kahr*, 199 Ky. 434, 251 S.W. 199 (1923).

¹⁷ *Supra* note 13.

of a divorce to both parties, conceding that they might necessitate deciding for one party or the other.

About the only other way to avoid the application of recrimination is by adopting the doctrine of comparative rectitude. Under that doctrine the court compares the fault of the parties¹⁸ and grants a divorce to the party less at fault. It would not enable a court to award each party an absolute divorce.

There seems to have been no reason in the *Shofner* case for not applying recrimination. This conclusion is strengthened by the fact that the judgment in the case was contrary to the express provisions of section 403.020 of the KENTUCKY REVISED STATUTES, which limit cruelty as a ground for divorce to a wife "not in like fault". Disregarding recrimination entirely, the statute would have barred a divorce to the wife here. For this same reason it is probable that the *Shofner* case does not represent a trend away from recrimination. The fact that the lower court not only failed to apply recrimination as established by precedent, but also failed to apply the above statute, shows that the *Shofner* case probably represents a segregated case of indifference on the part of the lower court rather than a valid trend away from recrimination which might be recognized as precedent in future decisions. As for the apparent acceptance of the lower court's decision by the Court of Appeals, the most accurate explanation, in all probability, is the haste with which the Court must dispose of appeals as a result of its heavy burden. The recent case of *Hartstern v. Harstern*,¹⁹ decided after the *Shofner* case, shows that the *Shofner* case has not lessened the hold of recrimination in Kentucky. In that case the Court said:

"Recrimination is a complete bar to the right of a party to obtain a divorce, although he may have established the grounds supporting his charge by conclusive evidence. It is strictly a plea in defense of an action, and may be established by showing that the plaintiff has been guilty of such conduct towards the defendant as, standing alone, would justify the Court in granting a divorce to the defendant."²⁰

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¹⁸ *Roberts v. Roberts*, 103 Kan. 65, 173 P. 537 (1918).

¹⁹ 311 Ky. 564, 224 S.W. 2d 447 (1949).

²⁰ *Id.* at 567, 224 S.W. 2d at 449.