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SEPARATE MAINTENANCE—WIFE'S RIGHT TO, WHEN DIVORCE REFUSED BECAUSE OF FAULT OF BOTH PARTIES

A wife awarded a divorce for the fault of the husband is generally entitled to alimony;¹ but, on the other hand, where the husband is awarded a divorce for the fault of the wife, she is generally not entitled to alimony, in the absence of a controlling statutory provision otherwise. There remains to be determined whether the wife is entitled to separate maintenance when she is denied a divorce because of the fault of both parties.

The weight of authority is to the effect that the wife will not be allowed separate maintenance where it appears that the separation arose from the fault of both parties. It must be shown that the wife has not by her own fault caused the separation since, to prevail, she must come into court with clean hands.⁴

However, certain jurisdictions by operation or construction of statutes have allowed alimony to the wife in spite of the fact that she was not free from fault. Under a California statute providing that although divorce is denied, the court may in an action for divorce provide for the maintenance of the wife and children, or any of them, the court interpreted this statute as giving discretionary power to make an award to a wife who was not without fault.⁵ The Oklahoma court said that the court was empowered by statute to award alimony notwithstanding that both parties were in fault, where the parties had lived together for nineteen years and the wife assisted the husband in his work.⁶ Under a North Dakota statute providing that an award of maintenance may be made where divorce is denied, the court awarded maintenance to a wife not free from marital fault, saying, "An award may be made upon facts showing a reasonable necessity for action on the part of the court."⁷ The court considered the primary obligation of the husband to support the wife,

¹ Gercke v. Gercke, 331 Ill. 413, 163 N. E. 323 (1928). Converse v. Converse, 225 Iowa 1359, 282 N. W. 368 (1938). Hawkins v. Hawkins, 272 Ky. 252, 114 S.W. 2d 97 (1938).

² Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932), Smith v. Smith, 303 Ky. 316, —S.W. 2d— (1946). Coffee v. Coffee, 145 Miss. 872, 111 So. 377 (1927), Grush v. Grush, 82 Mont. 239, 3 P. 2d 402 (1938).

³ Piper v. Piper, 116 N. J. Eq. 587, 174 Atl. 734 (1934). Ivanhoe v. Ivanhoe, 68 Ore. 279, 136 Pac. 21 (1913), 2 SCHOULER, MARRIAGE AND DIVORCE (6TH ED. 1921) SEC. 1321.

⁴ Ivanhoe v. Ivanhoe, 68 Ore. 279, 136 Pac. 21 (1913) 2 SCHOULER, MARRIAGE AND DIVORCE (6TH ED. 1921) SEC. 1321.

⁵ Mohr v. Mohr, 33 Cal. App. 274, 91 P. 2d 238 (1939).

⁶ Hartshorn v. Hartshorn, 67 Okla. 45, 168 Pac. 822 (1917).

⁷ Pulkrabek v. Pulkrabek, 48 N. D. 243, 183 N. W. 850 (1921).

under the circumstances of this case, as sufficient necessity for action by the court here.

Other departures from the majority rule have been made in the absence of a statute in cases where divorce was either refused or not requested, although proof of the wife's fault was introduced. In granting separate maintenance to the wife who was not without fault, the Kentucky court has taken into consideration the facts that the wife has not been guilty of any moral delinquency and has contributed to the support of the family while the husband accumulated property in his own name.⁸ The same court made an award of alimony to a wife who had left her husband but had sought a reconciliation at a later date, to no avail, on the basis of the legal duty of a husband to support his wife.⁹ In an extreme case, where both the husband and the wife were living in adultery, a New York court awarded separate maintenance to a wife where she would otherwise have become a charge on the community.¹⁰

There is considerable variation among the states allowing separate maintenance as evidenced by the following summary from a compilation by a leading authority. Thirty-nine states have specific provisions therefor, and eight more reach the same result by judicial decision. Seven states specifically provide for alimony although divorce is denied. An additional two states have the same provision where divorce from bed and board is denied. Only two states specifically state that the wife must be without fault.¹¹ A few other states deny separate maintenance where the wife has been guilty of adultery.¹²

It is not suggested that a wife contributing to marital difficulties should be granted alimony merely because she married. A marriage license should not provide a permanent meal ticket to a woman who has shown no regard for the sanctity of marriage. This should be a limiting factor to be considered in the disposition of her prayer for alimony. We should consider this limitation and the following factors in the problem, the nature of alimony does not arise from a business transaction but from the natural and legal duty of a husband to support his wife;¹³ some states have seen fit to ignore the "clean hands" maxim where both parties were at fault,¹⁴ there is also authority that a wife may be awarded alimony where she alone is

⁸ *Hayes v. Hayes*, 275 Ky 273, 121 S.W. 2d 298 (1938).

⁹ *Pelphrey v. Pelphrey* 231 Ky 80, 21 S.W. 2d 122 (1929) But see: *Compton v. Compton*, 298 Ky. 488, 183 S.W. 2d 479 (1944).

¹⁰ *Germer v. Germer*, 4 N. Y. Supp. 2d 747, 167 Misc. 882 (1938).

¹¹ 2 VERNIER, *AMER. FAMILY LAWS* (1932) Sec. 139.

¹² Note (1933) 82 A. L. R. 540, 548.

¹³ *Audubon v. Schufeldt*, 181 U. S. 575, 577 (1901).

¹⁴ *Mattson v. Mattson*, 181 Cal. 44, 183 Pac. 443 (1919).

at fault "upon an equitable consideration of the whole record,"¹⁵ there is increasing criticism of the doctrine of recrimination which unwarrantedly prevents dissolution of a marriage which from a social viewpoint should otherwise be dissolved.¹⁶ For these reasons, it is submitted that a better solution than that of the general rule should be developed.

In conclusion, it is submitted that an arbitrary refusal of alimony to a wife because she had contributed to the marital discord may be a denial of justice to her. In the event that property has been acquired through the joint effort of both parties during the marriage and is held in the name of the husband, the wife might be denied the right of sharing therein. To avoid this or the wife's becoming a charge on the community, it would seem desirable to have legislation which would assure the court of power to grant separate maintenance to the wife although she has not been free from marital fault.¹⁷ Such authority should be discretionary, permitting the court to reach its decision on the merits of the whole case by weighing such factors as whether there are children dependent upon the wife, the husband's financial condition, the wife's assistance in acquiring property, the extent to which the husband's misconduct has contributed to the misconduct of the wife, and her ability to support herself.

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¹⁵ *Mathews v. Mathews*, 117 Fla. 60, 157 So. 195 (1934).

¹⁶ *Silving, Divorce Without Fault* (1944) 29 IOWA L. REV. 527, 557; Note (1945) 21 IND. L. J. 53, 55.

¹⁷ Note (1935) 35 COL. L. REV. 939, 941.