Kentucky Law Journal

Volume 36 | Issue 3 Article 12

1948

Divorce: Agreement of Parties as to Alimony

Doyle B. Inman
University of Kentucky

DIVORCE: AGREEMENT OF PARTIES AS TO ALIMONY

The number of recent cases on record involving agreements of parties in regard to alimony is an attestation that during the last few decades they have become increasingly popular. Generally, it may be said that courts favor them, and there are many reasons why they should do so. Where marital difficulties are in existence and reconciliation is not possible, a voluntary settlement of many of the problems that beset the parties is a great aid to the courts. That the parties have been able to reach some sensible and amicable agreement must influence the court when it considers how often during litigation of this kind the parties allow their unrestrained hate and resentment to add to the delay and expense of the suit. An amicable adjustment has much to recommend it, and many courts have given judicial utterance to the encouragement of them. Typical of the esteem in which the more modern courts hold them is this statement:

> "Marriage is the basis of orderly society. The preservation of the marital status is of the utmost importance to the community and should be jealously guarded. Unfortunately, in our present civilization, the necessity for separation or divorce in certain instances and oft-times the desire for freedom in other instances have become forces of destruction to the marital status. This condition must be recognized as a reality. It is in the interest of society that, when the marriage relationship has been destroyed and the parties no longer continue to cohabit, the termination of the marital relationship be arranged between the husband and wife in an orderly fair and equitable manner. Where husband and wife have agreed to an orderly settlement of their disputes and have entered into a written separation which on its face appears to be fair and equitable, a court should hesitate to set aside such an agreement. Orderly society in a sense has been preserved. The will of the parties as expressed by their agreement should be disturbed only where their agreement is repugnant to justice as between them or contrary to the interest of society in the form of the state "[1]

It would be well if the discussion could be concluded on this pleasing note, but unfortunately this cannot be done, for all courts do not hold the same opinion, particularly if the agreement concerns the amount of alimony to be awarded the wife. If the parties in settling their many difficulties, succeed in reaching a settlement as to alimony, and this agreement comes before the court in a subsequent suit for divorce, a conflict may arise between the wishes of the parties and the discretion of the court on dissolution of the marital res.

[1] Fales v. Fales, 160 Misc. Rep. 799, 290 N.Y. Supp. 655, 659 (1936).

The precise question presented by this situation is, to what extent, if at all, is a court of equity bound to sustain the wishes of the parties to a divorce suit as to the amount of alimony determined by them and expressed in a separation agreement?

From a study of the decisions on this point it was found that the court might (1) consider it advisory to the discretion of the court,[2] or (2) adopt it, if it is fair and reasonable.[3]

Perhaps the greater number of cases support the first view. All cases wherein it is said that such agreements are evidential,[4] where a recommendation[5] will be considered,[6] and may be adopted or rejected[7], are of this type.

Such stipulations or agreements can not bind the court, it is said, because the power to grant alimony is inherent in the procedure of divorce,[8] an action over which the courts possess exclusive jurisdiction, and the parties cannot by agreement oust the court of jurisdiction to so award alimony. A contention that the subject of alimony can be removed from the jurisdiction of the court by the voluntary action of the parties is as untenable as a claim that they could effectively agree upon a divorce and its terms.[9] Alimony does not arise from any business transaction, but from the relation of marriage.[10] It is a status which the state is interested in maintaining and in every action for divorce the state is therefore an interested party. The state has deemed it to be contrary to the public interest to permit the husband, if he is the wayward party, not only to bring about the dissolution of the marriage but to escape the duty of support arising from marriage status as well. Therefore, while it is true that by giving the parties an unrestricted right to make and enforce an agreement as to alimony, none of these fundamental

[2] See notes 4, 5, 6, and 7 *infra.*

[3] Gallemore v. Gallemore, 94 Fla. 516, 114 So. 371 (1927), Petty v. Petty, 147 Kan. 342, 76 P 2d 850 (1938), Shaffer v Shaffer, 135 Kan. 35, 10 P 2d 17 (1932) Clark v Clark, 301 Ky. 682, 192 S.W 2d 968 (1946), Alderson v. Alderson, 247 Ky. 12, 56 S.W 2d 534 (1933), Luttmer v. Luttmer, 143 Ky. 844, 137 S.W 777 (1911), Parsons v. Parsons, 23 Ky L. Rep. 223, 62 S.W 719 (1901), North v North, 339 Mo. 1226, 100 S.W 2d 582 (1936).

[4] Lum v Lum, 138 N.J. Eq. 198, 47 A. 2d 555 (1946) Perry v. Perry, — Tenn. — 192 S.W 2d 830 (1946), Brown v. Brown, 156 Tenn. 619, 4 S.W 2d 345 (1928).

[5] Jones v Jones, 104 Utah 275, 139 P 2d 222 (1943), Barraclough v. Barraclough, 100 Utah 196, 11 P 2d 792 (1941)

[6] Cahill v. Cahill, 316 Ill. App. 324, 45 N.E. 2d 69 (1942), Rinehart v. Rinehart, 52 Wyo. 363, 75 P 2d 390 (1938)

[7] Russell v Russell, 247 Ala. 284, 24 So. 2d 124 (1945), Herrick v Herrick, 319 Ill. 146, 149 N.E. 820 (1925), Shoop v. Shoop, 58 S.D. 593, 237 N.W 904 (1931).

[8] Sessions v. Sessions, 178 Minn. 75, 226 N.E. 701 (1929).

[9] *Ibid.*

[10] Audobon v. Shufeldt, 181 U.S. 575, 45 L. Ed. 1009, 21 Sup. Ct. 735 (1901).

principles may be violated, still there is always the chance that the parties will act in abuse of them, and this possibility has induced in the courts a cautious policy which is responsible for the rules and conditions with which they surround any agreement between the parties as to alimony.[11]

The tendency of the later decisions seems to be toward adoption of such agreements, if they are found fair and reasonable, the proposition of the second category.

It is true that the court itself is the final arbiter as to the fairness and reasonableness of the contract, and it may be argued that the terms of alimony which are submitted to the court in the form of a contract can not be considered to be more than, in substance, advisory to its discretion.

But this argument is in the end unsatisfactory, because it is apparent that the rule imposes more than advice upon the court. There is a wide latitude wherein fairness and reasonableness reside, and if the terms of the contract can be found within those bounds, the court should be but little less than compelled to adopt the agreement.

There is a position to be taken in regard to these agreements which as yet has been unmentioned. That would be to hold the agreement unqualifiedly obligatory upon the court. Needless to say there are no judicial decisions which support this view, although it would be possible from a strictly contractual approach to reach such a result. But whether the result would be desirable is another question. There seems to be no escaping the fact that all such contracts should be fair and reasonable. If the personal interest of the wife were the sole consideration, it might well be argued that she should be bound by her agreement, but there are considerations of public concern present that militate against giving her this ability to irrevocably consent to such a settlement of the duty of support. It is upon the courts to enforce these considerations of public concern, and any denial or abridgment of their supervisory powers is also a disavowal of the public's interest in the matter.

Considering the problem from a practical standpoint, few objections can be made to the approach utilized in the second category.

[11] This problem of what effect to give to an agreement of the parties as to alimony is not only raised at the time of the divorce, but often, even years after the court has found the contract fair and equitable and in its discretion adopted its terms as part of the decree, a party will resist modification of the decree on the contention that the court may not disregard an agreement between the parties which at the time of divorce it had found fair and adequate. This argument has found no support, for it is not the contract that the court is modifying, but its own decree. This is one of the most potent reasons why the terms of a contract as to the amount of alimony, if found by the court to be just, should always be adopted by the decree, rather than left to stand as a mere contract between the parties. The court will never thereafter encounter any difficulty if a modification of it is sought.

It gives to the parties the greatest amount of freedom in contracting consistent with the demand of the state for an interest in the support of the wife.

DOYLE B. INMAN