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Divorce--Allowance of Alimony to the Wife When the Divorce Is Granted Because of the Wife's Fault

Ramon A. Woodall Jr.
University of Kentucky

but no other case so clearly distinguishes between the two kinds of wills.

A Wisconsin case, *In re Noon's Will*[25] has been often referred to as upholding the view that express revocation is immediately effective. The court referred to the statute, in that case, providing for the revocation of wills by "another will or codicil, executed in writing", and said, "therefore, when a second will is drawn and executed with the formality required by statute, and containing an unlimited revocatory clause, all former wills are wiped out and held for naught". While the Wisconsin statute provided further that a will may be revoked, "*(or) by some other writing," etc.*, the court did not refer to that part of the statute. It might be said, therefore, that this decision is contrary to *Whitehill* v. *Habling* in that it is not based on the theory that a revocatory clause is effective as a "writing" apart from the will. But from the cases cited and the general language of the court, it is obvious that it intended to follow the doctrine as set out by the other cases without going into any detailed reasoning. Although it might be inferred from the language of the court that a will revoking by implication, only, would cause a different decision to be reached, the case does not hold that, and no such Wisconsin case has been found by the writer.

To summarize briefly: The question whether there is a distinction between a later will which revokes by express terms and one which revokes by implication, only, is inseperably connected with the proposition that express revocation is immediately effective. In many states this question is settled by statute. Although there are many dicta on the question only three states are generally conceded to distinguish between the two kinds of wills, and of these, only one has given (so far as the writer has found) an unequivocal decision in both respects.

PALMER L. HALL

DIVORCE—ALLOWANCE OF ALIMONY TO THE WIFE WHEN THE DIVORCE IS GRANTED BECAUSE OF THE WIFE'S FAULT

Alimony was first granted by the ecclesiastical courts of England as incidental to a divorce *a mensa et thoro*. It was considered as the allowance which a husband, by order of the court, paid to his wife living separate from him for her maintenance. This was true because the court could not decree an absolute divorce and the allowance was solely for the wife's support, to continue during their joint lives, or so long as they lived separate and apart.[1]

During the period in which the ecclesiastical court granted the divorce *a mensa et thoro*, the decree *a vinculo matrimonii* was granted only by act of Parliament when the marriage was for some cause unlawful *ab initio*.[2] It should be noted that the husband was entitled to take

[25] 115 Wis. 299, 91 N.W. 670 (1902).

[1] II Poll. & Maitland Hist. of Eng. Law (2d ed. 1911), p. 392 to 396; Madden, Domestic Relations (1931), p. 256 to 261 and 319 to 330.

[2] II Poll. & Mait., Hist. of Eng. Law (2d ed. 1911), p. 390; Madden,

the fruits and profits of the wife's land during the marriage and since they remained married under the divorce *a mensa et thoro*, the husband retained the property of the wife although such property was returned to her under the decree *a vinculo*. In the latter it was impossible to make an award for alimony because the parties were no longer husband and wife (or had never been) and the right to alimony depended upon the duty of the husband to support his wife. From the decisions handed down by the ecclesiastical courts we have the general principle that a wife is not entitled to alimony if the separation or divorce was a result of her own martial fault.[3]

The matter of alimony is regulated altogether by statute in all jurisdictions of the United States but the decisions of the ecclesiastical courts have had a marked influence on the adoption of such statutes as will be noted from the Kentucky Statute as follows: "If the wife have not sufficient estate of her own she may, *on divorce obtained by her*,[4] have such allowance out of her husband's as shall be deemed equitable . . ."[5] Therefore under this statutory provision and the decisions of the Kentucky courts, the general rule is that permanent alimony will not be awarded to the wife from whom the husband obtains a divorce because of her martial fault or misconduct.[6]

The rule is almost universal that permanent alimony will be denied to a wife who has been found guilty of adultery.[7] The Iowa Court stated in *Fivecoat* v. *Fivecoat*,[8] "as a rule of law, it must be very well settled that where a divorce is granted the husband on the ground of

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Dom. Rel. (1931), at p. 257. That the wife's property vests in the husband by act of law, see 1 Bla. Comm. (Sharswood's 1872), 433, and Madden, Dom. Rel. (1931), p. 83 to 94.

[3] 1 Bla. Comm. 441; 3 Bla. Comm. 94; Madden, Domestic Relations (1931), p. 223, ftn. 26; Fisher v. Fisher, 164 Eng. Rep. 1055. (1861).

[4] Italics added.

[5] Kentucky Statutes, sec. 2122 (Carroll's 1938).

[6] Gains v. Gains, 26 Ky. L. Rep. 471, 19 S.W. 929 (1892); Tuggles v. Tuggles, 17 Ky. L. Rep. 221, 30 S.W. 875 (1895); Cottrell v. Cottrell, 24 Ky. L. Rep. 2417, 74 S.W. 227 (1903); Henry v. Henry, 25 Ky. L. Rep. 596, 76 S.W. 130 (1903); Holman v. Holman, 155 Ky. 493, 159 S.W. 937 (1913); Vallandingham v. Vallandingham, 232 Ky. 123, 22 S.W. (2d) 424 (1929). See also Re McKenna, 116 Cal. App. 232, 2 Pac. (2d) 429 (1931); Rybakowicz v. Rybakowicz, 290 Ill. 550, 125 N.E. 370 (1919); Lofvander v. Lofvander, 146 Mich. 370, 109 N.W. 662 (1906); Coffee v. Coffee, 145 Miss. 872, 111 So. 377 (1927); Elliot v. Elliot, 135 Mo. App. 42, 115 S.W. 486 (1909); Damm v. Damm, 82 Mont. 239, 266 Pac. 410 (1928); Isaacs v. Isaacs, 71 Neb. 537, 99 N.W. 268 (1904); Waring v. Waring, 100 N.Y. 570, 3 N.E. 289 (1885); Harris v. Harris, 31 Gratt. 13 (Va. 1878); Van Gelder v. Van Gelder, 61 Wash. 146, 112 Pac. 86 (1910); Martin v. Martin, 33 W. Va. 695, 11 S.E. 12 (1890).

[7] Beeler v. Beeler, 19 Ky. L. Rep. 1936, 44 S.W. 136 (1898); Dollins v. Dollins, 26 Ky. L. Rep. 1036, 83 S.W. 95 (1904); Robards v. Robards, 33 Ky. L. Rep. 565, 110 S.W. 422 (1908); Phelps v. Phelps, 176 Ky. 456, 195 S.W. 779 (1917); Hickling v. Hickling, 40 Ill. App. 73 (1891); Fites v. Fites, 62 Ind. App. 396, 112 N.E. 39 (1916); Leupold v. Leupold, 164 Iowa 595, 146 N.W. 55 (1914); Buerfening v. Buerfening, 23 Minn. 563 (1877); Hulett v. Hulett, 152 Miss. 476, 119 So. 581 (1929).

[8] 32 Iowa 198 (1871).

the adultery of the wife, she is not entitled to alimony out of the husband's estate." Apparently the cases do not go so far as to say that it would be improper to allow alimony to an adulterous wife if it could be shown that the husband had acquired property through the wife or through her efforts, through the joint efforts of the husband and wife, or where the acquisition came through a comparative lifetime of industry on the part of the wife even though the husband was without fault as respects the adulterous act of the wife. However, it should be noted that where the wife was granted a divorce on the ground of cruelty, the husband could set up adultery on the part of the wife as a defense to her action for alimony and although the Court of Appeals was without jurisdiction to reverse the judgment granting the wife a divorce, it would reverse so much of the judgment as awarded her alimony.[9]

The courts have reached a similar result and denied alimony to a wife when she has been guilty of lewd and lascivious conduct,[10] although it is proper to make an award to the wife for contractual obligations which the husband owes to her.[11] But where the evidence shows that the wife has been guilty of such conduct, she would not be entitled to alimony even though she had been granted a divorce on the grounds of cruelty.[12] The courts will also refuse to grant alimony where the evidence shows that the wife was guilty of cruelty,[13] malformation or impotency,[14] and when she had abandoned her husband without legal justification.[15]

However strict the rule might appear, the courts have recognized limitations and exceptions where the husband is granted a divorce and the particular circumstances of the wife justify the allowance.[16] In a

[9] Beeler v. Beeler, 19 Ky. L. Rep. 1936, 44 S.W. 136 (1898).

[10] Tuggles v. Tuggles, 17 Ky. L. Rep. 221, 30 S.W. 875 (1895); Holman v. Holman, 155 Ky. 493, 159 S.W. 937 (1913); Hehr v. Hehr, 203 Ky. 727, 263 S.W. 33 (1924); Davis v. Davis, 210 Ky. 89, 275 S.W. 26 (1925).

[11] Davis v. Davis, 210 Ky. 89, 275 S.W. 26 (1925).

[12] Vallandingham v. Vallandingham, 232 Ky. 123, 22 S.W. (2d) 424 (1929).

[13] Hawkins v. Hawkins, 202 Ky. 55, 258 S.W. 963 (1924); Sales v. Sales, 222 Ky. 175, 300 S.W. 354 (1927); Everett v. Everett, 52 Cal. 383 (1877); Phinney v. Phinney, 77 Fla. 850, 82 So. 357 (1919); Palmer v. Palmer, 1 Paige 276 (N.Y. 1828); Dart v. Dart, 164 Eng. Reprint 1254 (1863).

[14] Axton v. Axton, 182 Ky. 286, 206 S.W 480 (1918); Ward v. Ward, 213 Ky. 606, 281 S.W. 801 (1926). But see Knestrick v. Knestrick, 1 Ohio App. 285 (1913).

[15] Lee v. Lee, 62 Ky. 197 (1864); Woolfolk v. Woolfolk, 96 Ky. 657, 29 S.W. 742 (1895); Garrett v. Garrett, 19 Ky. L. Rep. 1674, 44 S.W. 112 (1898); Smith v. Smith, 27 Ky. L. Rep. 776, 86 S.W. 678 (1905); Lampson v. Lampson, 171 Cal. 332, 153 Pac. 238 (1915); Coffee v. Coffee, 145 Miss. 872, 111 So. 377 (1927); Grush v. Grush, 90 Mont. 381, 3 Pac. (2d) 402 (1931); Wilkins v. Wilkins, 84 Neb. 206, 120 N.W. 907 (1909); Waring v. Waring, 100 N.Y. 570, 3 N.E. 289 (1885); Carr v. Carr, 22 Gratt. 168 (Va. 1872); Martin v. Martin, 33 W. Va. 695, 11 S.E. 12 (1890).

[16] Chandler v. Chandler, 13 Ind. 492 (1859); Prichard v. Prichard, 164 Eng. Reprint 1378 (1864), the court held that a decree for judicial

case where an allowance for alimony would otherwise be denied, it has been held that if the wife had contributed substantially to the property of her husband by her funds or industry, her guilt should not be further punished by a forfeiture of her interest in such property and an allowance of alimony should be made to her.[17]

In a recent Florida case[18] the court found that the wife was guilty of adultery but also found that she had contributed materially in funds and industry over a period of years to the husband's business and since she had a special equity in the business, it was proper for the trial court to award the wife $2,000 for this special equitable interest and $800 for attorney's fees. The court stated, "whatever consequences the wife may be compelled under the law to suffer for her marital dereliction by the severance of the bonds of matrimony, she is not required to incur the forfeiture of any of her already vested equitable property rights which were acquired by her while the matrimonial barque was sailing on smoother seas." But it stated further, ". . . such an allowance is not alimony and should never be awarded . . . unless special circumstances . . . show contributions of funds and services over and above the performance of ordinary marital duties."[19]

Most jurisdictions have held that it was proper to grant alimony to the wife on granting a divorce to the husband when it is found that both parties are at fault[20] but the Kentucky decisions limit such right to cases in which the wife has not been guilty of some *moral delinquency*.[21] In this jurisdiction, where a judgment decreeing a divorce is not reviewable on appeal in so far as it grants a divorce, it has been held proper to make an allowance for alimony where the divorce was

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separation on the husband's petition on the ground of the wife's cruelty should make some provision for alimony. The court said that if there was no judicial precedent for such a provision, the court would make one and overruled Dart v. Dart, 164 Eng. Reprint 1254 (1863).

[17] Luthe v. Luthe, 12 Colo. 421, 21 Pac. 467 (1889); Carlton v. Carlton, 78 Fla. 252, 83 So. 87 (1919); Fulk v. Fulk, 8 Blackf. 561 (Ind. 1847); Conner v. Conner, 29 Ind. 48 (1867); Fites v. Fites, 62 Ind. App. 396, 112 N.E. 39 (1916); Dragish v. Dragish, 241 Mich. 563, 217 N.W. 769 (1928); Dickerson v. Dickerson, 26 Neb. 318, 42 N.W. 9 (1889); Cross v. Cross, 63 N.H. 444 (1885); Dailey v. Dailey, Wright 514 (Ohio 1834); Bent v. Bent, 164 Eng. Reprint 1047 (1861). But see Spitler v. Spitler, 108 Ill. 120 (1883).

[18] Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932).

[19] Note 18 *supra*.

[20] Pence v. Pence, 6 B. Mon. 496 (Ky. 1846); Pore v. Pore, 20 Ky. L. Rep. 1980, 50 S.W. 681 (1899); Green v. Green, 152 Ky. 486, 153 S.W. 775 (1913); Burton v. Burton, 184 Ky. 268, 211 S.W. 869 (1919); Hoffman v. Hoffman, 190 Ky. 13, 226 S.W. 119 (1920); Edwards v. Edwards, 84 Ala. 361 (1887); Reynolds v. Reynolds, 92 Mich. 104, 52 N.W. 295 (1892); Sheafe v. Sheafe, 24 N.H. 564 (1852). Where the wife is partially at fault, see Rose v. Rose, 9 Ark. 507 (1849); Dupont v. Dupont, 10 Iowa 112 (1849); Stiles v. Stiles, 224 Ky. 526, 6 S.W. (2d) 679 (1928).

[21] Green v. Green, 152 Ky. 486, 153 S.W. 775 (1913); Hoffman v. Hoffman, 190 Ky. 13, 226 S.W. 119 (1920).

erroneously granted to the husband and the wife's estate was not sufficient for her support.[22]

RAMON A. WOODALL, JR.

NEGLIGENCE AS CONDUCT

The present discussion is meant to be a treatment of the subject of negligence—a type of conduct giving rise sometimes to civil liability, sometimes to criminal liability,[1] sometimes to both. There is substantial authority for the position that criminal negligence differs from civil only in degree and not in kind.[2] Due to the fact that negligence on the civil side of the docket has received more attention from outstanding legal minds than has that in the field of criminal law, material gleaned predominantly from discussions of civil negligence will be used. It is submitted that the standard for evaluating negligent conduct as discussed in this note is applicable both to civil and to criminal cases; that "reckless disregard" corresponds to "gross negligence",[3] that type of misconduct upon which convictions of involuntary manslaughter are based.[4]

According to the Restatement of the Law of Torts,[5] "negligence is any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm." It will be seen

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[22] Gaines v. Gaines, 26 Ky. L. Rep. 471, 19 S.W. 929 (1892); Hoover v. Hoover, 14 Ky. L. Rep. 680, 21 S.W. 234 (1893); Tilton v. Tilton, 16 Ky. L. Rep. 538, 29 S.W. 290 (1895); Thompson v. Thompson, 27 Ky. L. Rep. 516, 85 S.W. 730 (1905); Caudill v. Caudill, 172 Ky. 460, 189 S.W. 431 (1916); Burton v. Burton, 184 Ky. 268, 211 S.W. 869 (1919).

[1] Clark and Marshall, Crimes (3d ed. 1927) 79, sec. 51; id. at 246, sec. 204; May, Criminal Law (4th ed. 1938) 260, sec. 159; Davis, *The Development of Negligence as a Basis for Liability in Criminal Homicide Cases*, 26 Ky. L. J. 209 (1938).

[2] "This last is really, to my mind, what a crime is. It is a forbidden act in which society as a whole has a peculiar interest, and in the prevention of which it is particularly concerned. It is this concern which brings the state as a juristic person into the matter as a party plaintiff, and, to my mind, it is this procedural matter which is the distinction between a crime and a tort." Levitt, *Extent and Function of the Doctrine of Mens Rea*, 17 Ill. L.R. 578, 583 (1923); ". . . criminal negligence—is largely a matter of degree . . .", State v. Lester, 127 Minn. 282, 149 N.W. 297, 298 (1914); "If he knows or reasonably should know his act *tends* to endanger *life*, and that the death of a human being is not 'improbable' as a result thereof, it is sufficient to sustain a conviction of manslaughter by culpable negligence." State v. Studebaker, — Mo. —, 66 S.W. (2d) 877, 881 (1933).

[3] Cannon v. State, 91 Fla. 214, 107 So. 360, 363 (1926). Compare also the quotation from State v. Studebaker, supra note 2, with the Restatement definition of Reckless disregard, infra note 5. And see Restatement of Torts, sec. 282, comment d, special note: 5.

[4] People v. Adams, 289 Ill. 339, 124 N.E. 575 (1919); State v. Blaine, 104 N.J. Law 325, 140 Atl. 566 (1928); Rex v. Greisman, 4 D.L.R. 738 (Ont. 1926); Clark and Marshall, op. cit, supra note 1, at 330, sec. 264a; Wharton on Homicide (3d ed. 1907) 681.

[5] Sec. 282.