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ALIMONY IN WASHINGTON: A NOTE TO THE LEGISLATURE

RAMÓN E. BROWN

The award of permanent alimony upon a divorce *a vinculo*, though involving the judicial process, is historically and theoretically dependent upon such power as the legislature of the particular jurisdiction deems fit to confer upon the courts.¹ The Washington court has necessarily recognized this since in every case where the point was raised the court looked to the statutes for its authority. The divorce act now in effect, however, does not confer such power upon the courts! Undoubtedly there have been many awards of alimony since the passage of the present divorce act in 1949, but not under it. Unless the legislature acts in this regard, a difficult situation will arise when the courts' assumed power is one day challenged. The problem can be better understood by a brief study of the history of alimony in this state.

There was no mention whatever of alimony in the divorce acts of 1854² and 1891;³ not until 1906 did the court find the requisite legislative authorization, and this it did by implication from a provision dealing with the distribution of the property of divorced parties. The cases that led to this interpretation of the 1891 act, and the cases that followed it, are very interesting—though occasionally hard to reconcile. Discussions of "alimony" appeared in the cases at an early date; however, the word was used as a synonym of property settlement.⁴ The courts' power to award alimony, *i.e.*, periodic payments by the husband to his divorced wife for her support, was first questioned in 1894, in the case of *King v. Miller*.⁵ The court in that case found it unnecessary to settle the question because it had not been raised properly, but found,

¹ For a concise account of the history of divorce and its incidents, see Ruge v. Ruge, 97 Wash. 51 at 54, 57, 165 Pac. 1063 at 1064, 1065 (1917).

² Wash. Laws 1854, p. 405.

³ Wash. Laws 1891, p. 43.

⁴ *Madison v. Madison*, 1 Wash. Terr. 60 (1859), held that *H* could be ordered to place a sum in trust, the interest to be payable periodically to *W* and the principal to revert to *H* on *W*'s death. In *Prouty v. Prouty*, 4 Wash. 174, 29 Pac. 1049 (1892), *H* objected to the court's inquiry into an allegedly fraudulent conveyance, on the ground that he had sufficient other property to satisfy his wife's claims should she be successful in the divorce proceedings. The court justified its investigation in that the subject of the questionable conveyance was the only property within the court's jurisdiction, and if it could not reach that property it could not award *W* any "alimony." As to the distinction between alimony and property settlement, see Ruge v. Ruge, 97 Wash. 51, 65, 165 Pac. 1063, 1068 (1917); 9 WASH. L. REV. 54 (1934); 2 BISHOP ON DIVORCE § 591 (1871).

⁵ 10 Wash. 274, 38 Pac. 1020 (1894).

however, that the award was "a good allowance as to the children and could, at least, be sustained as to them."⁶ The problem next occurred in *In re Cave*,⁷ where the husband, imprisoned for contempt for failure to comply with a court order to pay alimony, petitioned for a writ of habeas corpus on the theory that the court was powerless to award alimony. The court justified the order as a distribution of the property of the parties brought before the court at the time of the divorce suit. "It may be disposed of in a lump sum, or by installments. . . . This method of disposing of the property of the parties, call it alimony or whatever name you will, has been recognized by this court in a number of cases."⁸ It is quite startling to find this case cited, five years later, as authority for the proposition that "Bal. Code, § 5723 (P.C. § 4637) confers upon the courts of this state power to award alimony in the form of monthly or annual payments for support and maintenance." The above proposition, invoked in *Mahnke v. Mahnke*,⁹ already unsound, was weakened further when a year later the court, in *Claiborne v. Claiborne*,¹⁰ where the point was again raised, refused to decide whether the power to award alimony could be implied from the division of property provision (referred to in the *Mahnke* case) and upheld the order, instead, as a valid award of support for the *child* of the parties, and compensation for the services of the guardian—the *wife*!¹¹

In 1921 a new divorce act was enacted repealing the act of 1891. The division of property provision¹² was retained, and a new provision expressly providing for the award of alimony¹³ was added. That provision was involved in the case of *Krieg v. Krieg*,¹⁴ where the husband tried

⁶ There has always been express statutory provision in Washington for the support of minor children by their divorced father.

⁷ 26 Wash. 213, 66 Pac. 425 (1901).

⁸ This section on division of property can be found in the divorce acts of 1854, 1891, 1921, and, with some modifications, 1949: "In granting the divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties . . . and to the party through whom the property was acquired . . . and shall make provision for the guardianship, custody, and support and education of the minor children. . ." Cases considering the extent of the court's power under this provision, and the necessary factors for the court's jurisdiction, are *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864 (1891); *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358 (1894).

⁹ 43 Wash. 425, 427, 86 Pac. 645, 646 (1906).

¹⁰ Both cases were later cited in *Cotter v. Cotter*, 225 Fed. 471 (9th Cir. 1915), for the proposition that "There would seem to be no further question respecting the court's power to grant alimony in divorce proceedings in Washington." There was also a "see also" reference to *Claiborne v. Claiborne*.

¹¹ 47 Wash. 200, 201, 91 Pac. 763, 763 (1907) ". . . we are satisfied that the statute is broad enough to authorize the court to decree . . . sufficient support for both the child and the guardian."

¹² REM. REV. STAT. § 989 [P.P.C. § 23-23]; see note 10 *supra*.

¹³ REM. REV. STAT. § 988 [P.P.C. § 23-15].

¹⁴ 153 Wash. 610, 278 Pac. 223 (1929).

unsuccessfully to persuade the court that inasmuch as his marriage was a "civil contract" it could be dissolved only under the law as it existed at the time the marriage was contracted, and since such law did not provide for alimony (referring to the act of 1891) the award under the 1921 act was unconstitutional. Apparently the court was unimpressed with the husband's argument and concluded that "since the statute at the time the decree was entered permits the award of alimony . . . it is needless to inquire what it may have permitted prior to that time." The alimony question lay at rest for twenty-eight years.

In 1949 the legislature repealed the 1921 act and passed the one now in effect; the alimony provision was lost in the shuffle.¹⁵ Ironically, a 1933 amendment to the 1921 act, permitting the court to *modify* decrees of alimony,¹⁶ was retained. The following is the pertinent provision of the present act:

. . . If the court determines that either party . . . is entitled to a divorce . . . judgment shall be entered accordingly . . . and making such disposition of property of the parties . . . as shall appear just and equitable . . . and shall make provision for the costs, and for the custody, support, and education of the minor children of such marriage. Such decree as to alimony and the care, custody, support, and education of the children may be modified from time to time as the circumstances may require.¹⁷

It will be noted that, substantially, this is the same division of property provision that first appeared in 1854, with a few modifications.

Almost certainly, unless the present act is amended, the court will be faced with the argument that it lacks the power to award alimony. The dilemma is not merely an academic jawbreaker; the problem is a real and troubling one, either from the viewpoint of the husband's pocket-book or from a consideration of the social policies involved in placing the burden of supporting the ever-increasing multitude of divorced wives on their divorced husbands. It is a certainty that the first impulse of the court will be to find the requisite authority—at all costs; no one

¹⁵ The reasons for the repeal of the 1921 act, and the intent of the legislature in passing the 1949 act, appear in the reports of the drafting committee: 22 WASH. L. REV. 320 (1948); 24 WASH. L. REV. 123 (1949). No mention of alimony can be found.

¹⁶ The court, in 1917, had found itself without the necessary statutory authorization to modify alimony awards, where there were no children, and where the court had not reserved jurisdiction in the decree itself (*i.e.*, "pay . . . until further order of the court."). In spite of the plea to the legislature in the concurring opinion, nothing was done until 1933, when the 1921 act was amended. J. Webster's opinion in that case (*Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063 (1917)) is excellent; the problem that faced the court in that case is closely analogous to that which may one day confront the present court.

¹⁷ REM. REV. STAT. (1949 Supp.) § 996-11.

would seriously question the place and importance of alimony in our society. It is here to stay. On the other hand, *where* can the court find the necessary authority? Any attempt to imply the authority from the power to distribute the property of the parties, as was attempted in *Mahnke v. Mahnke*, *supra*, would fly in the face of the clear meaning of that provision,¹⁸ and its legislative history. In fact, an inspection of the cases dealing with the problem prior to 1921, discussed earlier in this note, would tend to dissuade the court from further search, rather than afford any aid. Moreover, it is at least arguable that the construction adopted in the *Mahnke* case was repudiated by the legislature when, in 1921, it adopted an express provision covering alimony. It might also be argued that the power to modify alimony decrees necessarily includes or presupposes the power to award such decrees in the first instance—but is that true? The power to modify may just as logically be explained on the theory that such power applies only to existing decrees granted under the 1921 act which authorized both the granting and modification of such decrees.

The means of settling the problem lie solely with the legislature. The existence of the problem is startling—perhaps that is the reason for its having been heretofore overlooked by litigants.

Surely, in the face of the ever-increasing divorce problem, this situation deserves some attention by the legislature.

¹⁸ See cases cited in note 10 *supra*.