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Domestic Relations - Alimony Does Not Terminate with Husband's Death - Stoutland v. Stoutland, 103 N.W.2d 286 (N.D. 1960)

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"In the assessment of damages . . . much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages . . . as will fully indemnify the creditors."[22] Basically then, damages should equal the loss sustained, and where the damage is certain, but the pecuniary value of the damages are not, much discretion is left to the trier of fact.[23]

Recently, where the father of the deceased paid numerous bills (such as hospital and funeral costs) but did not claim against deceased's minor son, the court held that the "minor child . . . [had] not suffered any loss or been damaged in any way in the amount of these bills, and for this reason recovery should not be permitted."[24]

It appears that certainly nowhere in the Louisiana Civil Code, or in any of the cases, is there anything which even borders on the area of suggesting a consideration of the "divorce rate, the percentage of remarriages of widows, particularly to second husbands whose earnings are greater than those of the first,"[25] insofar as calculation of "loss of support" is concerned. Rather than allowing it to become a precedant, therefore, it would seem best to treat this "sociological decision" as a derelict in the stream of law.

[22] Block v. McGuire, 18 La. App. 417 (1866).

[23] Duree v. State, 96 So. 2d 854 (La. App. 1957).

[24] Andrus, Tutrix v. White, 236 La. 28, 33, 106 So. 2d 705, 707 (1958). *Contra,* Aymond v. Western Union, 151 La. 184, 91 So. 671 (1922), wherein, the parent of a fourteen year old boy who was not assisting his father in any way, but on the contrary, was dependent upon him, was awarded $5,000.00.

[25] Brown v. Bourg & Sons, Inc., 239 La. 473, 118 So. 2d 891, 895 (1960).

DOMESTIC RELATIONS–ALIMONY DOES NOT TERMINATE WITH HUSBAND'S DEATH

On July 7, 1937, the plaintiff obtained an absolute divorce from her husband upon the ground of habitual intemperance. The divorce decree entered by the court required " 'that the defendant pay to the plaintiff the sum of $50.00 on the first of each and every month . . . said payments to continue until the remarriage of said plaintiff or her death. . . .' "[1] The plaintiff's ex-husband died May 26, 1954; she made a claim against his estate for alimony payments that accrued subsequent to his death. The county court disallowed the claim, but the District Court of Cass County, North Dakota, reversed the county court. In affirming the district court's decision, the Supreme Court of North Dakota held that since the statute[2]

[1] Stoutland v. Stoutland, 103 N.W. 2d 286, 287 (N.D. 1960).

[2] N.D. Rev. Code § 14-0524 (1943).

authorized the court to make a suitable allowance to the other party for support during "life," the term "life" meant that the alimony payments to the wife were not to terminate with the death of her former husband. *Stoutland v. Stoutland*, 103 N.W. 2d 286 (N.D. 1960).

Alimony "comes from Latin 'alimonia' meaning sustenance, and means, therefore, the sustenance or support of the wife by her divorced husband. . . ."[3] Alimony had its origin in the English ecclesiastical courts. The canon law allowed divorce to be granted from bed and board, *i.e.*, divorce *a mensa et thoro*. The divorce *a mensa et thoro* amounted to little more than a judicial separation. Blackstone wrote: "In divorce a mensa et thoro, the law allows alimony to the wife, which is that allowance made to a woman out of her husband's estate, being settled at the discretion of the ecclesiastical judge on considering the circumstance of the particular case."[4] Therefore, under canon law, alimony was grounded on the concept that in a divorce *a mensa et thoro*, the marriage relationship was deemed to continue, and the husband had the duty to support his spouse.

Absolute divorce and alimony are creatures of statutory development in the United States. With absolute divorce, the marital obligation of support is terminated, and the husband's continued duty to support his spouse is predicated on the divorce decree[5] The canon law concepts, however, have pervaded the modern theory of alimony. In *Bialy v. Bialy*,[6] it was succinctly stated:

> Alimony, by whatever authority it is conferred, is an incident of marriage, and based upon the underlying principle that it is the duty of the husband to support his wife, not necessarily to endow her. Primarily it signifies, not a certain portion of his estate, but an allowance or allotment adjudged against him for her subsistence, according to his means and their condition in life during their separation, whether it be for life or for years.[7]

Against this backdrop of historical development and concepts, the American divorce law evolved. Accepting the basic concepts of canon law, the general rule developed in the United States that a decree granted in an absolute divorce case for regular periodical payments of alimony to the wife for her maintenance and support, terminated at the husband's death.[8] Alimony is a *personal* obligation owed by a husband to his wife.

[3] BLACK, LAW DICTIONARY 97 (4th ed. 1951).

[4] 1 BLACKSTONE COMMENTARIES 22 (3rd ed. 1884).

[5] Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905).

[6] 167 Mich. 559, 133 N.W. 496 (1911). [7] *Id.* at 565–6, 133 N.W. at 499.

[8] Van Sciver v. Miami Beach First Nat'l Bank, 88 So. 2d 912 (Fla. 1956); Dickey v. Dickey, 154 Md. 675, 141 Atl. 387 (1928); Hagen v. Hagen, 193 Ore. 369, 238 P. 2d 747 (1951); Wilson v. Wilson, 195 Va. 1060, 81 S.E. 2d 605 (1954); Foster v. Foster, 195 Va. 102, 77 S.E. 2d 471 (1953).

The duty, being personal, lasts only for his lifetime, and with his death, it terminates.[9] Therefore, in *Mead v. Mead*,[10] a decree allowing alimony subsequent to the husband's death was held void on the ground that the right to alimony is dependent upon the existence of a valid marriage. A similar decision resulted in *Daggett v. Commissioner*,[11] where the court concluded that the New York courts lacked authority to decree alimony for the life of the wife because to so decree would render the husband's estate liable where he predeceased his wife.

There are, however, a number of courts which have refused to follow the general rule, and have concluded that the periodic alimony payments due to the wife during her lifetime do not terminate with the death of the ex-husband.[12] Three basic trends of thought support the continuance of payments: (1) express statutory authority,[13] (2) an intention expressed in or circumstances surrounding the decree,[14] and (3) a consent decree or an agreement of the parties incorporated in the decree.[15]

One group of courts, in order to continue payments after the ex-husband's death, rely on statutory authority, *i.e.*, a statute which expressly authorizes the court to decree that such payments shall be paid to the wife during her lifetime.[16] A California statute provided that an allowance could be made to "the wife for her support during her life."[17] The California Supreme Court construed the latter to mean that the court could order the payments for the life of the wife, and that they would not necessarily cease with the husband's death.[18]

Even if this statutory power is had, the courts in many jurisdictions will not allow alimony payments beyond the life of the ex-husband, unless the decree expresses such an intention.[19] The decree must order the

[9] Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905).

[10] 205 Ill. App. 327 (1917).

[11] 128 F.2d 568 (9th Cir. 1942).

[12] Parsons v. Parsons' Estate, 70 Colo. 333, 201 Pac. 559 (1921); Cross v. Cross, 5 Ill. 2d 456, 125 N.E. 2d 488 (1955); Storey v. Storey, 125 Ill. 608, 18 N.E. 329 (1888); Lennahan v. O'Keefe, 107 Ill. 620 (1883); Farrington v. Boston Safe Deposit & Trust Co., 280 Mass. 121, 181 N.E. 779 (1932); Garber v. Robitshek, 226 Minn. 398, 33 N.W. 2d 30 (1948); DeRoche v. DeRoche, 12 N.D. 17, 94 N.W. 767 (1903); Murphy v. Shelton, 183 Wash. 180, 48 P. 2d 247 (1935); Stone v. Bayley, 75 Wash. 184, 134 Pac. 820 (1913).

[13] DeRoche v. DeRoche, 12 N.D. 17, 94 N.W. 767 (1903).

[14] Garber v. Robitshek, 226 Minn. 398, 33 N.W. 2d 30 (1948).

[15] Parsons v. Parsons' Estate, 70 Colo. 333, 201 Pac. 559 (1921).

[16] DeRoche v. DeRoche, 12 N.D. 17, 94 N.W. 767 (1903).

[17] CAL. CIVIL CODE § 139.

[18] *Ex parte* Hart, 94 Cal. 254, 29 Pac. 774 (1892).

[19] Garber v. Robitshek, 226 Minn. 398, 33 N.W. 2d 30 (1948).

payment of alimony "for the remainder of the life of the wife," or in words of a like effect.[20] These words will be deemed to show such an intent.[21] As one court put it:

> [I]f the judge intended that the payments were to cease with the death of the libellee, it would be assumed that he would not have included in the decree a phrase that the payments were to be made 'during the term of her life,' for it could not be contended that in the absence of such a phrase they would continue after the libellant's death, and hence its only function can be to show that the payments are to continue during the libellant's life regardless of the death of the libellee. The language of the decree indicates an intent to bind the libellee's estate.[22]

From the very circumstances surrounding the decree, the court also concluded that the intent was to continue the payments.[23]

Although the parties to a divorce action may not enter into an agreement for divorce, a number of courts have held that the amount of alimony and the terms of its payment may be provided for by the parties themselves by consent[24] or by contract.[25] The court will embody their agreement into the decree.[26] The contract may be made even though statutory authority be lacking to continue payments after the ex-husband's death.[27] The contract, however, must manifest an intent that the payments are to survive the death of the spouse, and if the contract does not manifest such an intent, the payments necessarily cease with the death of the husband.[28]

Illinois uses a "combination approach" for alimony allowed after the ex-husband's death.[29] In decisions, the courts of Illinois suggest that they follow the general rule that alimony payments terminate upon the death of the husband because the payments "constituted a personal decree against the defendant and did not affect his estate."[30] However, if the lan-

[20] Storey v. Storey, 125 Ill. 608, 18 N.E. 329 (1888).

[21] Garber v. Robitshek, 226 Minn. 398, 33 N.W. 2d 30 (1948).

[22] Farrington v. Boston Safe Deposit & Trust Co., 280 Mass. 121, 126, 181 N.E. 779, 781 (1932).

[23] Murphy v. Shelton, 183 Wash. 180, 48 P. 2d 247 (1935).

[24] Storey v. Storey, 121 Ill. 608, 18 N.E. 329 (1888).

[25] Parsons v. Parsons' Estate, 70 Colo. 333, 201 Pac. 559 (1921).

[26] *Ibid.*; Storey v. Storey, 121 Ill. 608, 18 N.E. 329 (1888).

[27] Stratton v. Stratton, 77 Me. 373 (1885); Stone v. Bayley, 75 Wash. 184, 134 P. 820 (1913).

[28] Parsons v. Parsons' Estate, 70 Colo. 333, 201 Pac. 559 (1921).

[29] Cross v. Cross, 5 Ill. 2d 456, 125 N.E. 2d 488 (1955); Storey v. Storey, 125 Ill. 608, 18 N.E. 329 (1888); Lennahan v. O'Keefe, 107 Ill. 620 (1883); Kramp v. Kramp, 2 Ill. App. 2d 17, 117 N.E. 2d 859 (1954).

[30] Kramp v. Kramp, 2 Ill. App. 2d 17, 21, 117 N.E. 2d 859, 861 (1954).

guage of the decree awarding permanent alimony to the wife manifests "unequivocally an intent" to bind the heirs of the husband after death, the allowance of alimony will not terminate with the death of the husband.[31] Thus, "the court does have power to decree that alimony shall be paid after the death of the spouse, and where the decree expressly so provides, it will be enforced and recognized. . . ."[32] In Illinois, the situation also presents itself whereby the parties to a divorce action can consent to incorporate their agreement into the decree.[33]

Each of the two different views concerning alimony after the death of the husband has its own particular disadvantages. In states where the rule is that alimony terminates on the death of the husband, the wife who has divorced the husband for his fault may after his death—no matter how large his estate—find herself destitute. On the other hand, under the holdings allowing payments after the husband's death, the estate of the husband may be changed by or encumbered with the duty of support owing to the ex-wife. The settlement of estates could thus be indefinitely prolonged, and funds belonging to the assets might have to be diverted, and used to make provision for such support. Therefore, a court, in deciding what rule to adopt, would seem to be limited to choosing between two rules, both of which, as pointed out, are subject to certain inherent weaknesses.

[31] Lennahan v. O'Keefe, 107 Ill. 620 (1883).

[32] Cross v. Cross, 5 Ill. 2d 456, 462, 125 N.E. 2d 488, 491 (1955).

[33] Storey v. Storey, 125 Ill. 608, 18 N.E. 329 (1888).

DOMESTIC RELATIONS—U.S. SUPREME COURT HOLDS THAT HUSBAND AND WIFE CAN BE GUILTY OF CONSPIRACY

The defendants, husband and wife, were charged with conspiring to illegally bring goods into the United States and thereafter to conceal and transport the goods. The indictment charged the defendants with violating section 371 of title 18 of the United States Code.[1] The United States District Court for the District of Southern California dismissed the indictment on the grounds that it did not state an offense. The case went to the United States Supreme Court on direct review. The Court, in

[1] 18 U.S.C.A. § 371 (Supp. 1959), which provides: "If *two or more persons* conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined. . . ." (Emphasis added.) This section was enacted in connection with 18 U.S.C.A. § 545 (Supp. 1959), which deals with smuggling goods into the United States.