
Domestic Relations - Wife's Remarriage Automatically Terminates Alimony

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duty of the judge to admit the defendant to bail until the determination of a writ of error.²¹ This statute restates the common law rule and makes no attempt to restrict the exercise of judicial discretion.

Generally, the states do not legislate on the question of bail after conviction, but leave such questions to the sound discretion of the courts. Practically all decisions have been concerned with whether the prisoner has the right to bail after conviction, and not whether the court has the power to grant bail if it so desires. The court in the *Ex Parte Herndon* case²² upheld a statute similar to South Carolina's as being constitutional. It should be remembered, however, that in the instant case, the court stated that the lower courts of the state are bound by the statute, and that only the Supreme Court, by virtue of its constitutional authority, is above the statute. The court agreed with the general rule that the convicted man has no right to bail, but it maintained that the discretionary power of the Supreme Court to allow bail cannot be hampered by legislation.

Thus the Supreme Court has made the granting of bail after conviction a function of the court, reserving under the doctrine of separation of powers this power to them alone, not to be regulated by the legislature. This constitutional reservation of the bail question to the Supreme Court seems to be a unique view as to the control of bail in American constitutional law.

DOMESTIC RELATIONS—WIFE'S REMARRIAGE AUTOMATICALLY TERMINATES ALIMONY

On October 8, 1945, plaintiff obtained a decree of divorce. Plaintiff was awarded custody of four children and defendant was ordered to pay \$125.00 per month for support of plaintiff and the children. Soon after, plaintiff left the state with the children, and a year later remarried. Plaintiff tried to conceal her second marriage from defendant. He, however, learned of it, and went to see plaintiff and the children. At this time plaintiff told defendant that she wished no further support and told him to take the children. From that date until the commencement of this action, defendant had custody of the children most of the time. Also, from the date of plaintiff's refusal of further support, defendant has paid only for the support of one or more children when they were with their mother. Plaintiff instituted this proceeding to compel defendant to pay all the arrears of alimony. The trial court awarded plaintiff a small portion of the amount she sought. The Supreme Court of Utah affirmed, holding

²¹ Ill. Rev. Stat. (1953) c. 38, § 774.

²² 18 Okla. Cr. 68, 192 Pac. 820 (1920).

that alimony automatically terminates upon the remarriage of the wife. *Austad v. Austad*, 2 Utah 2d 49, 269 P. 2d 284 (1954).

It is imperative that we distinguish alimony awarded for support, from a lump sum settlement to be paid in installments and a property settlement. It is well settled that in these two latter situations, the remarriage of the wife has no effect upon the husband's duty to pay, and an action to compel the payment of arrears will be sustained.¹ Also, there is no question but that the first husband still has the obligation to pay for support for his children after the remarriage of the wife.² Thus we narrow the question to the effect of the remarriage of the wife on the duty of the husband to pay alimony for monthly support.

The decision in the instant case directly overrules the precedent in that jurisdiction; it denies the doctrine set down in *Myers v. Myers*,³ by stating that though it is purported to be the general rule, it was, in fact, given only lip service. In the *Myers* case, the lower court had ordered the husband to pay only the alimony between the original decree of divorce and the wife's remarriage. The Supreme Court reversed this decision and declared that alimony did not terminate automatically upon the remarriage of the wife, and that this was only a factor to be considered in a petition by the husband to vary or modify the original decree as to installments not yet due. The power to vary the original decree as to installments in the future is not questioned when a proper petition is presented to the court.⁴

The reasoning in the instant case was that the problem was one of public policy and equitable principles. The court said:

One is hard pressed to find any rational basis to support the view that remarriage does not terminate the obligation of the former husband to pay alimony.⁵

And again:

It is illogical and unreasonable that she (the wife) should have the equivalent of an obligation for support by way of alimony from a former husband and an obligation from a present husband for adequate support at the same time.⁶

¹ *Green v. Starling*, 203 Ga. 10, 45 S.E. 2d 188 (1947); *White v. Murden*, 190 Ga. 536, 9 S.E. 2d 745 (1940); *King v. King*, 38 Ohio St. 370 (1882); *Dobson v. Dobson*, 320 Ill. App. 685, 51 N.E. 2d 1010 (1943).

² *Potinger v. Potinger*, 133 Fla. 442, 182 So. 762 (1938); *Cunningham v. Faulkner*, 163 Ga. 19, 135 S.E. 403 (1926); *Tooker v. Tooker*, 137 N.Y. Misc. 158, 241 N.Y. Supp. 623 (1930).

³ 62 Utah 90, 218 Pac. 123 (1923).

⁴ *Parker v. Parker*, 203 Cal. 787 (1928); *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21 (1881); *Nelson v. Nelson*, 282 Mo. 412, 221 S.W. 1066 (1920).

⁵ *Austad v. Austad*, 2 Utah 2d 49, 269 P. 2d 284, 288 (1954).

⁶ *Ibid.*

The court is extremely careful to point out that this decision does not hold that there cannot be circumstances in which a wife may receive alimony after her remarriage. The court says that in those cases where it might be so unconscionable or inequitable to deny the wife alimony after her remarriage, the court might, under its equitable powers, decree that alimony shall continue. In this circumstance, the burden would be on the wife to prove that it would be inequitable to deprive her of further alimony.

The instant case cites jurisdictions holding that alimony automatically terminates upon the remarriage of the wife.⁷ In *Sides v. Pittman*,⁸ the court says that in its opinion, when a wife remarries, a new status is created which relieves the former husband from further duty to support her.

The wife in *Bowman v. Worthington*⁹ tried to compel the payment of alimony from her former husband after her second husband died. The court, in refusing to compel the husband to pay, said that since she could not get alimony while her second husband was alive, she could not get it after his death. The Maryland Court of Appeals said bluntly in *Knabe v. Knabe*¹⁰ that though the rule that alimony ceases unconditionally is contrary to the general weight of authority and ignores the amount of change in the wife's resources and circumstances occasioned by remarriage, it was the law of that state.

The court in the instant case further cites some jurisdictions that hold that the court may, upon proper petition, retroactively eliminate the alimony back to the date of the wife's remarriage.¹¹

The Supreme Court of Minnesota had originally held that alimony does not terminate on the remarriage of the wife.¹² In the second case between the same parties, however, the court stated that while remarriage did not in and of itself as a matter of law require a modification of a decree of divorce which calls for monthly payment of alimony, still it was in ordinary cases a very powerful argument in favor of a modification.¹³

In *Brandt v. Brandt*¹⁴ the same theory was employed. The court said

⁷ Arkansas: *Bowman v. Worthington*, 24 Ark. 522 (1867); Maryland: *Knabe v. Knabe*, 176 Md. 606, 6 A. 2d 366 (1939); Mississippi: *Sides v. Pittman*, 167 Miss. 751, 150 So. 211 (1933).

⁸ 167 Miss. 751, 150 So. 211 (1933).

⁹ 24 Ark. 522 (1867).

¹⁰ 176 Md. 606, 6 A. 2d 366 (1939).

¹¹ Connecticut: *Cary v. Cary*, 112 Conn. 256, 152 Atl. 302 (1930); Minnesota: *Hartigan v. Hartigan*, 145 Minn. 27, 176 N.W. 180 (1920); Oregon: *Brandt v. Brandt*, 40 Ore. 477, 67 Pac. 508 (1902); South Dakota: *Wenzel v. Wenzel*, 67 S.D. 537, 295 N.W. 493 (1940).

¹² *Hartigan v. Hartigan*, 142 Minn. 274, 171 N.W. 925 (1919).

¹³ *Hartigan v. Hartigan*, 145 Minn. 27, 176 N.W. 180 (1920).

¹⁴ 40 Ore. 477, 67 Pac. 508 (1902).

that a wife should not expect support from both present and former husband, but it was careful to point out that the decision should not be interpreted as holding that remarriage *ipso facto* dissolves the obligation of the husband from continuing payments.

Again, in *Cary v. Cary*,¹⁵ it was stated that a wife by her remarriage gives up her right to alimony, except for the very unusual case, since she elects whether she wishes to be supported by her former or her intended husband. Also, the court said that the wife must evidence the reason for not stopping alimony. Also, the Supreme Court of South Dakota has ruled that it was sound judicial discretion to modify a decree of divorce when the record showed the wife had remarried.¹⁶

The concurring opinion in the instant case agrees with the result that the majority reached but differs with its reasoning. It states that whether alimony should terminate upon the wife's remarriage should be left to the discretion of the court rather than automatically terminating. The concurring opinion further states that the statute relating to divorce fully covers his problem and leaves the decision in the hands of the court.¹⁷ Since the majority ruling has left the door open for a wife to petition in the extreme case to continue the payment of alimony, the point that the concurring opinion makes seems only to be procedural.

Illinois has gone further than the general statute of Utah and has a statute which specifically terminates the privilege to receive alimony after remarriage.¹⁸

By this decision, Utah has adopted an equitable and workable situation to a very perplexing problem. It is certainly true that when a woman remarries she should not receive support from both present and former husband. It is also true, however, that to hold absolutely and without recourse that a wife may not get alimony after her remarriage could produce injustice in rare instances. Such circumstances as the pecuniary positions of the original husband, the wife, the number of children and the health of all parties, could present a situation wherein the wife could justly receive alimony after her remarriage. The holding foresees these extreme cases and leaves the door open for a reinstatement of alimony if a wife can prove that she deserves the continued support.

To leave the decision to the court without a general rule, as the

¹⁵ 112 Conn. 256, 152 Atl. 302 (1930).

¹⁶ *Wenzel v. Wenzel*, 67 S.D. 538, 295 N.W. 493 (1940).

¹⁷ Utah C.A. (1953) § 30-3-5. "The court may make such orders in relation to the children, property and parties and the maintenance of the parties and children as may be equitable. . . . Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable or proper."

¹⁸ Ill. Rev. Stat. (1953) c. 40, § 19; "A party shall not be entitled to alimony and maintenance after remarriage. . . ."

concurring judge advocates, is to ignore the overwhelming number of cases in which the general rule can be justly applied. It is certainly better to have a general rule and an exception that can be applied in an extraordinary case, with the burden upon the wife to prove that the general rule is inequitable, than to have a rule by which it is necessary for the husband each time to come in and prove his former wife's remarriage supplies sufficient reason for an abolishment of the duty to pay alimony.

INSURANCE—DELIVERY TO INSURER'S AGENT HELD
SUFFICIENT WHERE POLICY REQUIRES
ACCEPTANCE BY INSURED

Plaintiff made an application for insurance on February 20, 1948, through defendant's agent. After plaintiff paid the first year's premium, his application and a favorable report on his physical condition were sent to defendant. On March 16, 1948, a policy was issued and mailed to defendant's agent, at which time the plaintiff was alive and in good health. On March 17, 1948, the day the agent says the policy was delivered to him, plaintiff was found dead as a result of asphyxiation. The application provided that before the policy was to take effect, it should be "delivered to and accepted by" applicant. The Superior Court entered judgment for plaintiff and defendant appealed. The Supreme Court of Oklahoma, three justices dissenting, with a fourth dissenting in part, held that since there was an unconditional delivery to the agent, manual delivery or further acceptance was unnecessary. *Mid-Continent Life Ins. Co. v. Dees*, 269 P. 2d 322 (Okla., 1954).

The problem in the instant case revolves around the question of whether delivery to the agent of the insurer constitutes delivery to the insured. Before attempting to analyze the problem, it is important to determine how the courts define delivery. In the case of *Harris v. Register*¹ the court defined delivery as a transfer of possession or control of the policy to the insured. This interpretation has been clarified to mean that the intention of the parties as to when delivery is to take effect controls, and not the manual possession of the policy.² The court in *New York Life Ins. Co. v. Smith*³ held:

Where there is an intention on the part of the insurer to part with the control of the policy, and to place it in the control of the insured or some person acting for him, that is sufficient to constitute delivery.⁴

¹ 70 Md. 109, 16 Atl. 386 (1889).

² *New York Life Ins. Co. v. Smith*, 129 Miss. 544, 91 So. 456 (1922).

³ *Ibid.*

⁴ *Ibid.*, at 546 and 458.