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Further on "Alimony" for the Support of Both Wife and Child - Knabe v. Knabe

FURTHER ON "ALIMONY" FOR THE SUPPORT OF BOTH WIFE AND CHILD

Knabe v. Knabe[1]

In the decree of March 5, 1935, granting the wife an absolute divorce and custody of the children, the trial court included, in accordance with an agreement between the parties, an order that the husband-father pay separate sums of $10.00 per week for permanent alimony, and $8.00 per week for the support and maintenance of the minor children. On October 25, 1935, a petition by the father for the custody of the children was dismissed, and the trial court directed that he pay to the mother "as alimony, and for the support and maintenance of the infant children $14.00 per week." The father, on June 20, 1936, consented to this being raised to $16.00 per week. On petition of the mother of December 6, 1938, this joint allowance was first raised to $30.00 per week and then, by order of January 26th, 1939, set at $21.00 per week.

In opposition to this last-named order the husband contended that the allowance in the decree of March 5, 1935, was not alimony, and hence was not subject to any modification, because based upon an agreement of the parties; that the trial court lacked the power to combine the orders for wife and children into one order; and that the attachment issued should be vacated. On appeals from the various orders, *held:* That the trial court did have the power so to modify its original order for alimony and support, and that the husband-father could be punished for contempt for non-compliance.

With reference to the form of the decree and the power to punish for contempt, this casenote forms a sequel to the earlier one on the *Cohen* case.[2] It was there pointed out that *Bushman v. Bushman*[3] had decided that, whereas a separate order for alimony for the wife could be enforced by punishment for contempt of court, that sanction could not be imposed for violation of a separate order for support and maintenance of minor children, because to do so would violate the Maryland Constitutional provision forbidding imprisonment for debt. The problem in the *Cohen* case was whether a single order of a divorce court, pro-

[1] 6 A. (2nd) 366 (Md. 1939).
[2] Cohen v. Cohen, 197 A. 564 (Md. 1938), discussed in Note, *"Alimony" for the Support of Both Wife and Child* (1938), 3 Md. L. Rev. 93.
[3] 157 Md. 166, 145 A. 488 (1929).

viding one sum periodically for both the wife and minor children, could be enforced by contempt sentence without violating the constitutional prohibition. It was there decided that the contempt sentence could, constitutionally, be imposed. Thus, in the case now under discussion, if the latest order was itself properly entered, a violation of it could be punished by a contempt sentence.

In the earlier casenote on the *Cohen* case a query was stated[4] as to one of the points which was raised in the later *Knabe* case now under discussion. This was whether the trial court had the power, over the objection of the husband-father, to make a single order embracing both alimony and support in one item, and whether the husband-father, by timely appeal (which was not done in the *Cohen* case) could get a reversal on the form of the order. For lack of any authority, the point was treated in the earlier casenote only by speculation, although implicit in the approval of the *Cohen* case was the suggestion that the answer to the query should be that the trial court does possess the power to combine the orders into one for a single sum.

While that point was involved in the *Knabe* case, yet the Court did not have to answer it squarely, as they were able to answer appellant's contention involving it by pointing out[5] his waiver of it through his consent to an order in a similar form at an earlier stage of the proceedings. A strong dictum, however, gives some insight into the Court's view of the subject. Said the Court:[6] ". . . it is not apparent why it (the trial court) had not also the correlative power of changing the form of the allowance." Further language regarding the desirability of considering the children's needs in fixing the amount for the wife, and treating of the flexibility of the single order for both, also goes to show the Court's answer to the query to be one approving the practice.

In addition to contesting the power of the trial court to modify the orders as it did, the appellant apparently also contested the later orders on the theory that the trial court had no power to modify the original order for alimony in any fashion, because, so he contended, that order was entered by the consent of the parties, was not true alimony, and was incapable of modification.

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[4] *Supra* n. 2, 3 Md. L. Rev. 93, 96-7.
[5] 6 A. (2nd) 366, 371.
[6] *Ibid.*

In dealing with the question of the modification of a divorce decree with respect to alimony, two Maryland cases must always be kept in mind. *Marshall v. Marshall*[7] held that where an absolute divorce was granted the wife, with neither any alimony being awarded her, nor power reserved in the decree later to reopen the case to award it, the Court could not later award it. On the other hand, if some alimony was awarded, or if the power was so reserved, or if the case were an *a mensa* one or an award of alimony without divorce, then the jurisdiction of the Court remained later to modify. *Emerson v. Emerson*[8] held that where the order for alimony was incorporated into the decree by consent of the parties, and was of such a nature as the court, of its own motion and over the objection of the husband, could not have entered, the order could not be subsequently modified. Thus, consent decrees for lump sum payments[9] or for periodical payments to continue beyond the joint lives of the spouses[10] are incapable of subsequent modification, as not being "true" alimony.

In the case now under discussion, the Court had no trouble in getting around the *Marshall* case, inasmuch as some alimony had been awarded, which fact always continues the jurisdiction of the Court to modify the award for supervening circumstances. The *Emerson* case presented more difficulty, but that, too, was surmounted. The Court pointed out that if the allowance of the decree falls within the definition of alimony, even though founded on agreement, the Court retains the same power over it as if there had been no agreement. The agreement in this case contemplated periodical payments, not to go beyond the joint lives of the parties, and consequently was of a nature which the Court itself could have imposed without consent. This being so, the consent nature of the original decree did not prevent its modification. This is particularly so in view of the fact that the decree only incorporated the amount and specified due date of the payments and substituted "subject to the further order of this Court" for the contractual provisions terminating the payments upon the remarriage of the wife or the death of either.

One statement of the Court in the opinion needs to be queried. This is to the effect that "alimony ceases uncon-

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[7] 162 Md. 116, 159 A. 260, 83 A. L. R. 1237 (1932).
[8] 120 Md. 584, 87 A. 1033 (1913).
[9] As in Bushman v. Bushman, *supra* n. 3, 157 Md. 166, 171 et seq.
[10] As in the Emerson case.

ditionally upon the wife's remarriage.''[10a] The opinion made this statement in that fashion, after quoting from *Hood v. Hood*[11] to the same general effect. Examination of the *Hood* case discloses that the statement quoted was entirely dictum, supposedly supported by the *Wallingsford*,[12] *McCaddin*,[13] and *Emerson*[14] cases. The dictum was to the effect that the death of either, the remarriage of the wife, or the reunion of the spouses, caused alimony to cease. Examination of the *Wallingsford* and *McCaddin* cases indicates that they were treating only of death or reunion. The *Emerson* case does not support the *Hood* dictum but, quite the contrary, indicates that the alimony does *not* cease automatically, but rather that the husband must petition the Court to be relieved because of the wife's remarriage and ". . . there may exist facts and conditions that would induce the Court to withhold this relief.''[15]

Furthermore, examination of the remaining cases cited in the opinion in the *Knabe* case[16] to support the statement that alimony ceases upon the remarriage of the wife, discloses that not one of them, even by so much as a casual dictum, bears out the point, and that the only reference in any to remarriage is in one case[17] where a husband sought relief because of his wife's remarriage and was denied it because the alimony decreed was consent alimony and not true alimony and hence was incapable of modification under the doctrine of the *Emerson* case. That case gives no hint as to what would be the effect of remarriage on the modification or termination of true alimony. Most of the cases cited, like the *Wallingsford* and *McCaddin* cases, merely bear out that part of the dictum which terminates true alimony on the death of either spouse or the resumption of cohabitation.[18]

[10a] 6 A. (2nd) 366, 368-9. The statement quoted is at 6 A. (2nd) 369. A similar statement is part of a more general statement found at the bottom of page 368 and top of page 369.

[11] 138 Md. 355, 365, 113 A. 895, 899 (1921).

[12] Wallingsford v. Wallingsford, 6 H. & J. 485, 488 (1821).

[13] McCaddin v. McCaddin, 116 Md. 567, 573, 82 A. 554 (1911).

[14] *Supra* n. 8.

[15] *Ibid*, 120 Md. 584, 596.

[16] Viz., the Keerl, Hokamp v. Hagaman, Helms v. Franciscus, Jamison, Polley, Newbold, Blades v. Szatai, Bushman, and Cohen cases, all cited in the opinion in the Knabe case at the beginning of page 369 of 6 A. (2nd).

[17] Newbold v. Newbold, 133 Md. 170, 104 A. 366 (1918).

[18] The cases mentioning resumption of cohabitation are, obviously, ones thinking in terms of divorce *a mensa*, or of alimony without divorce. On the other hand, remarriage becomes a problem when alimony is granted after an *a vinculo* divorce.