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William J. Harbison

DOMESTIC RELATIONS—1961 TENNESSEE SURVEY

WILLIAM J. HARBISON*

I. ADOPTION OF CHILDREN

In the case of *In re Van Huss' Petition*[1] the Tennessee Supreme Court denied an adoption under a literal interpretation of the residence requirements inserted into the adoption statutes in 1959.[2] Under the 1959 statutes, although the petitioners in adoption proceedings were not required to make Tennessee their legal residence, they were required to "have lived, maintained a home and been physically present in Tennessee, or on federal territory within the boundaries of Tennessee for one (1) year next preceding the filing of the petition...."[3]

In the *Van Huss* case the petitioning husband met all of the other requirements of the adoption statutes. He had lived in Tennessee all of his life, and he and his wife maintained a residence within the state. During the year preceding the filing of the petition, however, he had been in naval service and had been stationed outside the state, having visited the state only during short periods of leave. The majority of the supreme court held that he did not meet the statutory requirements for this reason and denied the adoption. The court pointed out that adoption is entirely statutory in nature and that there must be strict compliance with all statutory requirements.[4] The dissenting member of the court felt that the holding accomplished a result wholly unintended by the legislature and that many residents of the state who were temporarily called out of the state on business would be disqualified by this interpretation of the statutes.[5]

The 1961 General Assembly revised the residence requirements so

*Lecturer in Law, Vanderbilt University; member, Trabue, Minick, Sturdivant & Harbison, Nashville, Tennessee.

1. 338 S.W.2d 588 (Tenn. 1960).
2. Tenn. Pub. Acts 1959, ch. 223, §1.
3. Tenn. Pub. Acts 1959, ch. 223, §1.
4. Clements v. Morgan, 201 Tenn. 94, 296 S.W.2d 874 (1956).
5. 338 S.W.2d at 592.

as to eliminate the problem of the *Van Huss* case. The new statutes require that the petitioners "shall have lived or maintained a regular place of abode" in Tennessee or on a federal enclave within the state during the year preceding the filing of the petition; and in addition to using the disjunctive "or" and eliminating the requirement of physical presence in the state, the amendment contains an express provision that service personnel are not subject to the residence requirement when stationed out of the state if they had lived or maintained a regular place of abode in Tennessee for one year prior to entering the service.[6]

Several other changes were made in the adoption statutes by the 1961 General Assembly. The provisions regarding consent of natural parents were amended so as to eliminate the requirement of a guardian *ad litem* for an incompetent parent where, in a prior independent proceeding, a welfare official or director of a licensed child-placing agency had been appointed guardian of the person of the subject child with authority to consent to the adoption.[7]

The provisions respecting surrender of children were amended so that the person receiving a child under a direct surrender need not be present to witness and accept the surrender, provided the receiving person is related to the child as grandparent, aunt, uncle or step-parent.[8] Similarly where such a relative adopts a child, the court may waive the order of reference, social investigation and report to the court by the local welfare department or licensed agency, all of which are required in ordinary adoption proceedings.[9] Further amendments permit the court to waive the interlocutory decree and probationary period and to grant a final adoption where such a relative is the adopting parent; in other cases the court is authorized to dispense with the interlocutory decree and to grant final adoption when the child has been in the adoptive home for one year.[10] The court is also authorized to reveal to adopting parents the contents of adverse reports submitted by the welfare department or licensed agency after an order of reference.[11]

In the case of *Delamotte v. Stout*[12] the supreme court followed earlier decisions to the effect that an adoption in another state creates no greater rights than are conferred by local adoptions insofar as the inheritance of property is concerned.[13] Under present Tennessee law

6. TENN. CODE ANN. § 36-105 (Supp. 1961).
7. TENN. CODE ANN. § 36-108 (Supp. 1961).
8. TENN. CODE ANN. § 36-114 (Supp. 1961).
9. TENN. CODE ANN. § 36-118 (Supp. 1961).
10. TENN. CODE ANN. § 36-124 (Supp. 1961).
11. TENN. CODE ANN. § 36-118 (Supp. 1961).
12. 340 S.W.2d 894 (Tenn. 1960).
13. Finley v. Brown, 122 Tenn. 316, 123 S.W. 359 (1909).

an adopted child apparently does not inherit from collateral relatives of the adopting parent.[14] Accordingly the court held that a child adopted in Missouri would not be permitted to inherit Tennessee real estate from a collateral relative of the adopting parent, despite express language of the Missouri statutes permitting such inheritance in that state.[15]

II. CUSTODY AND SUPPORT OF CHILDREN

In *Thomas v. Thomas*[16] the supreme court held that the obligation of a father to support minor children under a divorce decree does not terminate because visitation rights granted him are not honored by the mother. The mother had been granted exclusive custody of the children, and upon remarrying had moved with the children to another state. The decree did not restrict her in this regard, nor was the obligation to support made conditional upon the visitation privileges. The decision is in accord with earlier Tennessee cases upon the subject.[17]

Although the power of the courts to enforce support decrees by imprisonment for contempt has long been recognized, the 1961 General Assembly provided that such imprisonment might be in the county workhouse instead of the county jail for periods up to six months.[18] The apparent purpose of the amendment was to create a deterrent to certain types of contemnors who might not object to a jail sentence but who might find time spent in the workhouse less satisfactory than working and supporting their dependents.[19]

In *Kidd v. State ex rel. Moore*[20] the recurring problem of conflicting jurisdiction of divorce courts and juvenile courts was again reviewed. In this case the problem was rendered somewhat more complex because under private legislation in Knox County the juvenile and domestic relations jurisdiction are combined in a single court.[21] By divorce decree in 1954 this court had granted custody of the subject child to her mother. In 1955 the same judge, acting as a juvenile court, declared the child delinquent and dependent and awarded her custody temporarily to her grandmother. In 1960 the circuit court of the county undertook to return the child to the mother. The mother

14. See Fey v. Cato, 197 Tenn. 583, 276 S.W.2d 734 (1955) and discussion of the problem in Harbison, *Domestic Relations—1955 Tennessee Survey*, 8 VAND. L. REV. 1004 (1955).
15. MO. STAT. ANN. § 453.090 (Vernon 1952).
16. 335 S.W.2d 827 (Tenn. 1960).
17. Evans v. Evans, 125 Tenn. 112, 140 S.W. 745 (1911); Pendray v. Pendray, 35 Tenn. App. 284, 245 S.W.2d 204 (E.S. 1951).
18. TENN. CODE ANN. § 36-835 (Supp. 1961).
19. Statement to the writer by one of the sponsors of the bill.
20. 338 S.W.2d 621 (Tenn. 1960).
21. Tenn. Priv. Acts 1925, ch. 634; Tenn. Priv. Acts 1913, ch. 277.

thereupon filed habeas corpus proceedings in criminal court, which held the 1955 juvenile decree void. In reversing, the supreme court held that the Knox County Juvenile and Domestic Relations Court was one court and that it had power to enter the 1955 decree as well as the earlier divorce and custody order. Once a juvenile court finds a child delinquent or dependent, it has power to fix custody despite a previous decree from a divorce court.[22] Both under general law[23] and under the private acts involved in this case[24] the jurisdiction of a juvenile court continues throughout minority of the child. Accordingly, no other court may interfere with a custody decree of a juvenile court except in adoption proceedings.[25]

III. Divorce and Alimony

1. Grounds of Divorce.—The 1961 General Assembly modified the divorce code with respect to desertion by reducing the period required for divorce on this ground from two years to one year.[26]

2. Venue of Actions.—Formerly the venue statutes permitted a divorce action to be filed in the county where the defendant "is found," thereby making the action purely transitory in character. The 1961 General Assembly deleted this provision, so that venue is now limited to the county where the parties last resided as husband and wife or the county of the defendant's residence, except in cases of nonresident defendants.[27] Since venue in divorce cases does not affect the jurisdiction of the court, however, and may be waived,[28] it still may be possible for the parties by consent or by waiver to fix venue in counties other than those prescribed by the statutes. If the General Assembly desired to convert the action into an entirely local one, more specific legislation would seem to be required.

3. Effective Date of Decree.—In the case of *McCown v. Quillin*[29] the validity of a second marriage depended upon the effective date of a prior divorce. A husband was granted a divorce in chancery court

22. Marmino v. Marmino, 34 Tenn. App. 352, 238 S.W.2d 105 (W.S. 1950).
23. Tenn. Code Ann. § 37-263 (1956).
24. Tenn. Priv. Acts 1913, ch. 277, § 9.
25. *In re* Matthews, 204 Tenn. 155, 319 S.W.2d 69 (1958), discussed in Harbison, *Domestic Relations—1959 Tennessee Survey*, 12 Vand. L. Rev. 1183 (1959). In the present case there had apparently been some attempt at adoption of the child, and these proceedings seem to have been the source of the circuit court order in 1960. The adoption petition, however, had been dismissed, and the record on appeal in the present case did not reveal the details of the proceedings.
26. Tenn. Code Ann. § 36-801 (Supp. 1961).
27. Tenn. Code Ann. § 36-804 (Supp. 1961).
28. Kelley v. Kelley, 195 Tenn. 649, 263 S.W.2d 505 (1953); Brown v. Brown, 155 Tenn. 530, 296 S.W. 356 (1927).
29. 344 S.W.2d 576 (Tenn. App. W.S. 1960).

on the morning of June 9, 1953, and he remarried that same afternoon. The clerk noted the ruling of the court on his docket, but a formal decree was not entered on the minutes until June 17, 1953. This decree recited that the cause had been heard on June 9. Both the trial court and the court of appeals in the present case held that the divorce decree was effective from the date when the decision was rendered, rather than from the date when the decree was entered on the minutes. The appellate court also approved the entry of a decree nunc pro tunc in the divorce case so as to provide expressly that the minutes of the divorce court should speak as of June 9, 1953. Although somewhat liberal, these holdings are supported by earlier cases[30] and are consistent with the general policy of upholding the validity of marriages whenever possible.[31] There is, of course, no provision in Tennessee law prohibiting remarriage until a specified time shall have elapsed, and divorced persons are free to remarry at any time unless there has been a violation of the "paramour" statutes.[32] Possibly a statute prescribing the time for remarriage following divorce would help eliminate the problem presented in the foregoing case.

4. Alimony in Solido.—In *Smith v. Smith*[33] the divorce court had awarded the wife as alimony the interest of her husband in two tracts of land. She had been required to assume certain indebtedness thereon and to pay her own counsel fees and certain other obligations. The husband insisted that the award was excessive, contending that the wife had been allowed approximately two-thirds of his entire estate. After affirming the divorce decree on the merits, the court of appeals reviewed the alimony award and concluded that it should not be disturbed. The amount and type of alimony are largely discretionary with the trial court, and in this instance the award was not deemed disproportionate in view of the ages of the parties, the size of their estates, and in view of the fact that no future alimony payments would be required of the husband.

5. Contempt Decrees.—For many years a highly technical rule has been followed in Tennessee with respect to contempt decrees for nonpayment of alimony and support. A number of cases have held that a contempt decree is void if it does not contain on its face a finding that the defendant had ability to make the required payments.[34] In the case of *Leonard v. Leonard*,[35] however, the supreme

30. See Jackson v. Jarratt, 165 Tenn. 76, 52 S.W.2d 137 (1932); Rush v. Rush, 97 Tenn. 279, 37 S.W. 13 (1896).
31. Cole v. Parton, 172 Tenn. 8, 108 S.W.2d 884 (1937); Rutledge v. Rutledge, 41 Tenn. App. 158, 293 S.W.2d 21 (W.S. 1953).
32. TENN. CODE ANN. § 36-831 (1956).
33. 339 S.W.2d 326 (Tenn. App. W.S. 1960).
34. Chappell v. Chappell, 37 Tenn. App. 242, 261 S.W.2d 824 (W.S. 1952);

court reviewed the question and overruled the earlier cases. It pointed out that the earlier rule is in accord with good practice but held that the absence of such a finding in the decree does not affect the validity of the decree. The court noted that contempt proceedings of this nature are not summary in character but are heard on pleadings and proof. Review is by appeal, not by habeas corpus.[36] Accordingly there is a record for the appellate court to examine, and the record should reveal whether the defendant had ability to pay and whether he was properly adjudged to be in contempt. Lack of a recital in the decree, therefore, is immaterial and should not render the decree void. The holding seems sound and eliminates a needless technicality which previously existed.

IV. Parent and Child

1. Actions for Loss of Services.—In *Whitley v. Hix*[37] a question was raised as to whether both parents must join as plaintiffs in an action for loss of services of a minor child. Certain statutes provide generally that parents are "joint natural guardians" of their children and that they are jointly charged with their care and jointly entitled to their earnings.[38] There are, however, express provisions entitling the father to maintain the action for loss of services and giving the mother this right when the father is dead or has deserted the family.[39] The supreme court held that the specific statutes govern, and that the father may maintain the action alone in the ordinary case. The holding seems correct, and it is in accord with the generally accepted practice and procedure in the state.

2. Illegitimate Child as Dependent.—In a case of first impression, and one that must be regarded as approaching the limits of liberality, the supreme court held that an illegitimate child—born six months after the death of its father—was a "dependent" within the meaning of the Tennessee Workmen's Compensation Act.[40] The court relied upon the fact that under existing law the father of an illegitimate is liable for the necessary support and maintenance of the child.[41] Such child, therefore, is to be deemed a "dependent" when paternity is established or conceded, as it appeared to be in the present case.

Loy v. Loy, 32 Tenn. App. 470, 222 S.W.2d 873 (W.S. & M.S. 1949); Crowder v. Hayse, 9 Tenn. App. 55 (W.S. 1928). See Harbison, *Domestic Relations—1954 Tennessee Survey*, 7 Vand. L. Rev. 835, 839 (1954).

35. 341 S.W.2d 740 (Tenn. 1960).
36. State *ex rel.* Wright v. Upchurch, 194 Tenn. 657, 254 S.W.2d 748 (1953).
37. 343 S.W.2d 851 (Tenn. 1961).
38. Tenn. Code Ann. § 34-101 (1956).
39. Tenn. Code Ann. § 20-105 (1956).
40. Shelley v. Central Woodwork, Inc., 340 S.W.2d 896 (Tenn. 1960).
41. Tenn. Code Ann. § 36-223 (Supp. 1961).

Previous cases under the compensation law had required a showing of actual dependency before an illegitimate child could qualify for death benefits.[42] Because of subsequent changes in the general law concerning the liability of the father of an illegitimate, however, the court felt that the earlier decisions were distinguishable. The effect of the holding seems to be to equate paternity with dependency although the statutory definitions of dependents in the compensation law do not go so far.

V. CONTRACTS OF MINORS

Another unusually liberal holding during the survey period is found in *Harwell Motor Co. v. Cunningham.*[43] There a minor, nineteen years of age, purchased an automobile. He kept the car for almost two years. Twice after reaching his majority he executed mortgages and notes to refinance the purchase price. The signed contract of sale contained a representation that he was twenty-one years of age. Nevertheless both the trial and appellate courts permitted the minor to rescind the purchase after reaching his majority and to recover the entire purchase price paid.

The court found that the execution of the two mortgages after attaining majority was not a ratification of the contract. This finding was predicated upon the fact that the purchaser was merely "refinancing" and the court felt that this did not indicate any intention to be bound by the terms of the contract. As to the written misrepresentation of age, the court found from other evidence that the seller had actual knowledge of the minority and therefore declined to permit an estoppel of the minor.

In the last analysis the court of appeals conceded that the decision reached went somewhat "against the grain."[44] One member of the court dissented without opinion. More than anything else, the case points up anew the hazards inherent in business dealings with minors, but a reading of the opinion leaves serious doubt as to the result reached in this particular instance.

VI. MARRIAGE

1. Family Immunity—Effect of Annulment.—The interesting question of the effect of annulment of marriage upon the rules of family immunity in tort was reviewed in *Gordon v. Pollard.*[45] The marriage

42. Sanders v. Fork Ridge Coal & Coke Co., 158 Tenn. 145, 299 S.W. 795 (1927).
43. 337 S.W.2d 765 (Tenn. App. M.S. 1959).
44. 337 S.W.2d at 769.
45. 336 S.W.2d 25 (Tenn. 1960).

of a young couple had been annulled for non-age. Prior to the annulment, however, the wife had been injured in an automobile accident, allegedly because of negligent driving by the husband. After the annulment was obtained, she sued her former husband for the injuries sustained in the accident, joining his parents as defendants under the "family purpose" doctrine. Both the trial court and the supreme court held that the action would not lie. Tennessee, of course, is firmly committed to the doctrine of family immunity.[46] While annulment of marriage for many purposes is said to "relate back" to the inception of the marriage, the supreme court pointed out that this fictional rule is not applied for all purposes, even between the parties to the marriage. During the period while the marriage subsisted, the parties did occupy the status of husband and wife. Given the rule of family immunity, the holding seems correct, and it is supported by decisions from other jurisdictions.[47]

2. *Restraints on Marriage.*—The nice distinctions between a "condition subsequent" and a "conditional limitation" as developed in real property cases dealing with restraint upon the right of marriage were reviewed in *Harbin v. Judd.*[48] In that case certain realty had been deeded in trust for a group of brothers and sisters. The deed provided that "upon the marriage of any of said beneficiaries or equitable owners, his or her interest shall vest in and become the property equally of the unmarried sisters or sister, during her or their unmarried state . . . ." There was a provision re-vesting the respective interests of the beneficiaries "upon the marriage of the last unmarried sister." The evidence showed that this family group had inherited certain funds from their mother and that these funds were invested in the realty to provide a home for the children. The above deed was approved in chancery proceedings in 1901, and the record in that case showed that the purpose of the above provisions was to insure a home for the children and to prevent the independent action of one of them from disturbing the others. Gradually all of the members of the family married or died. Upon the death of the last unmarried sister in 1957 the question of the devolution of title to the property was presented. In declaratory judgment and partition proceedings, the chancellor held that the provisions of the deed were void as being unlawful restraints upon the right of marriage. The court of appeals reversed. It pointed out that the provisions were unquestionably inserted for a proper pur-

46. Prince v. Prince, 205 Tenn. 451, 326 S.W.2d 908 (1959); see Harbison, *Domestic Relations—1960 Tennessee Survey,* 13 VAND. L. REV. 1121, 1127 (1960).

47. Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948); Annot., 2 A.L.R.2d 637 (1948).

48. 340 S.W.2d 935 (Tenn. App. M.S. 1960).

pose. They had been agreed to by all of the adult members of the family and approved by the chancery court on behalf of the minors. The family had used the property for over half a century under the terms of the instrument. The court held that the restrictive provisions constituted merely conditional limitations upon the duration of the estate conveyed in trust and did not work a forfeiture as a condition subsequent. The distinction between these concepts, although having little basis in logic, is firmly imbedded in the law. The courts have frequently used it as a means of upholding provisions which, although tending incidentally to restrain marriage, have some other primary and proper purpose.[49] In the present case the court of appeals indicated strongly that the reasonableness or unreasonableness of a provision of this sort should be a controlling factor in determining whether the provision should be allowed to stand.

49. Annot., 122 A.L.R. 7, 41 (1939); 35 AM. JUR. *Marriage* § 258 (1941).