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Domestic Relations-Support Orders-Arrearages

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DOMESTIC RELATIONS—SUPPORT ORDERS—ARREARAGES

The recent case of *Seery v. Seery,* 183 Pa. Super. 322, 131 A.2d 845 (June, 1957), in which the Superior Court vacated a support order and remitted all arrearages due on the order, illustrates several of the problems inherent in Pennsylvania's current procedure in handling divorce and support proceedings. The "juridicial chronology" found in the Brief for Appellant, Appendix, and Record,[1] in the appeal to the Superior Court lists over sixty separate steps taken in this dispute during the period from May 9, 1955, the date of the original support order, to June, 1957, the date of the opinion of the Superior Court. These included numerous petitions and hearings before different courts and various judges within the same court. A review of the development of this case illustrates the diversity of procedure now existing in Pennsylvania domestic relations cases.

In addition to illustrating the questionable results of the existence of procedural diversity in this area, the *Seery* case raises, by implication, several quasi-procedural questions which directly affect the rights of the parties.

Since a chronological history of the juridicial developments in the case is essential to an understanding of the questions raised, a synopsis follows:

Oct. 24, 1954—Wife left husband.

May 9, 1955—Support order issued against husband, in favor of wife, in the Municipal Court of Philadelphia.

May 21, 1955—Wife instituted divorce proceedings in the Court of Common Pleas in Philadelphia County, her first attempt to secure a divorce in 1948 having been unsuccessful.

Oct. 16, 1956—The Common Pleas Court dismissed the wife's second divorce action.

Nov. 13, 1956—Husband filed a petition with the Municipal Court to vacate the support order and remit all arrearages due.

Mar. 11 & 12, 1957—After numerous hearings and continuances (not all before the same judge), the Municipal Court reduced the order by $10 a week, but denied the petition to have arrearages remitted.

May 3, 1957—On appeal, the Superior Court vacated the support order and remitted all arrearages.

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[1] Brief for Appellant, Appendix, and Record.

The Superior Court's decision disposed of three separate appeals. It affirmed the lower court's dismissal of the wife's divorce action; it affirmed the lower court's decision that the husband pay $500 additional counsel fees and an additional $1500 master's fees in her unsuccessful divorce action; and it reversed the lower court by vacating the support order and remitting all arrearages.

Those arrearages which were due from the date of the original order, May, 1955, to October 26, 1956, were remitted in order ". . . to accomplish indirectly what we conceive must be done to compel the wife to discharge her just obligation to pay a part of the fees of her counsel and of the master in the divorce case." [2]

Thus the court found that in effect the husband's contention that the wife should pay part of her divorce proceeding costs was justified, but the court chose an indirect remedy. It gave as its reason for this indirection ". . . to avoid confusion in the record of these appeals." [3] Ordinarily, it would seem that the most direct method of providing a remedy would be the least confusing. However, the court may have been influenced by the practical consideration that the wife probably did not have tangible resources available to pay counsel and master's fees; and by the removal of the husband's obligation to the wife on the arrearages, the wife was in effect paying, but the husband's resources would be available, if necessary, for payment of the fees.

The arrearages which accrued after October, 1956, were remitted, according to the court, because beginning with that date the wife had been guilty of continuous, wilful, and malicious desertion for a period of two years. The significance of the two-year period is that when one spouse has been guilty of continuous, wilful, and malicious desertion for a period of two years, this constitutes a ground of divorce for the other spouse. The procedure by which the court determined that this second period of arrearages should be remitted is the main subject of inquiry here.

The Pennsylvania courts have fairly consistently applied the following principles in dealing with support orders and arrearages accrued thereunder:

> 1. A wife who left her husband and seeks a support order against him must show the court that she left him for a legally adequate reason, but this reason need not be sufficient to entitle her to a divorce from him.[4]

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[2] 183 Pa. Super. at 332.

[3] *Ibid.*

[4] Com. ex rel. Cooper v. Cooper, 183 Pa. Super. 36, 128 A.2d 181 (1956); Com. ex rel. Sosiak v. Sosiak, 177 Pa. Super. 116, 111 A.2d 157 (1955); Com. v. Sgarlat, 180 Pa. Super. 638, 121 A.2d 883 (1956); Com. ex rel. Rankin v. Rankin, 170 Pa. Super. 570, 87 A.2d 799 (1952); Com. ex rel. Geiger v. Geiger, 167 Pa. Super. 26, 74 A.2d 739 (1950); Com. ex rel. Berry v. Berry, 165 Pa. Super. 598, 69 A.2d 442 (1949).

2. The only legal cause which will justify a refusal on the part of the husband to support a separated wife is conduct on her part which would be a valid ground to the husband for divorce.[5]

3. The courts (including the Municipal Court of Philadelphia) have continuing power over support orders and may increase, reduce, or vacate such orders where material changes have occurred in the circumstances of the parties since the original order.[6]

4. A support order becomes res judicata as of its date; a subsequent petition to vacate the order may not substitute for an appeal and cannot bring up for review the court's discretion in making the original order.[7]

To what extent, if any, did the court deviate from these principles in the *Seery* case?

When the husband petitioned the lower court to vacate the support order, Judge Gilbert (Philadelphia Municipal Court) in refusing to vacate the order, said:

". . . the husband contends that the refusal of a divorce in her favor convicts her of desertion within the meaning of the Divorce Law of 1929, P. L. 1237."

"If this were the law, the vacation of the said support order should follow as a corollary. However, in a proceeding for the support of a wife, where she left him, she is not required to show that she did so for such cause as would entitle her to a divorce. All she is required to show is that she left him for what the law calls an "adequate legal cause", which is something less than a ground of divorce. This is so well established by cases appearing in recent volumes of the Superior Court that no citation is deemed to be necessary." [8]

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[5] Com. ex rel. Rovner v. Rovner, 177 Pa. Super. 122, 111 A.2d 160 (1955); Com. ex rel. Rankin v. Rankin, 170 Pa. Super. 570, 87 A.2d 799 (1952); Com. ex rel. Geiger v. Geiger, 167 Pa. Super. 26, 74 A.2d 739 (1950); Com. ex rel. Whitney v. Whitney, 160 Pa. Super. 224, 50 A.2d 732 (1947); Com. v. Sincavage, 153 Pa. Super. 457, 34 A.2d 266 (1943); Com. v. Goldstein, 105 Pa. Super. 194, 160 Atl. 158 (1932).

[6] P. L. 440, June, 1939, 17 P. S. 263; Com. v. Schneiderman, 162 Pa. Super. 461, 58 A.2d 196 (1948); Com. ex rel. Barnes v. Barnes, 151 Pa. Super. 202, 30 A.2d 437 (1943); Com. ex rel. Thompson v. Thompson, 171 Pa. Super. 49, 90 A.2d 360 (1952); In Com. v. Cummerick, 69 D. & C. 108 (1949), the court at page 122 *et seq.* discussed the application of 17 P. S. 263, P. L. 440, to support orders, cited numerous cases, and quoted from them to show that courts will use the power where circumstances have changed since the original order was made, but will not use it to relitigate what should have been determined in the original hearing.

[7] Com. v. Honcz, 25 Northumb. L.J. 61 (1953); Com. ex rel. Johnson v. Johnson, 181 Pa. Super. 172, 124 A.2d 423 (1956); Com. ex rel. D'Alfonso v. D'Alfonso, 181 Pa. Super. 71, 121 A.2d 900 (1956); Bosher v. Malin, 177 Pa. Super. 532, 110 A.2d 772 (1955); Com. ex rel. Soprani v. Soprani, 160 Pa. Super. 542, 52 A.2d 234 (1947); Com. ex rel. Highland v. Highland, 159 Pa. Super. 433, 49 A.2d 529 (1946); Com. ex rel. Goldenberg v. Goldenberg, 159 Pa. Super. 140, 47 A.2d 532 (1946); Com. ex rel. Crandall v. Crandall, 145 Pa. Super. 359, 21 A.2d 236 (1941).

[8] Brief for Appellant, Appendix, and Record, pg. 25a.

In reversing the lower court, the Superior Court came to the conclusion that the dismissal of the wife's divorce action meant that her separation from her husband constituted desertion.

> "In the divorce case before us in appeal No. 143 the master and the lower court found that the wife was not an innocent and injured spouse, and the dismissal of her complaint in effect was a legal conclusion that she was not justified in leaving her husband. We agree with this conclusion. She therefore is chargeable with desertion begun on October 24, 1954 and persisted in for more than the statutory period of two years." [9]

If a wife need not prove, in order to obtain support from her husband, such justification for leaving him as would entitle her to a divorce, can it be maintained that the dismissal of Mrs. Seery's divorce complaint was in effect a legal conclusion that she was not justified in leaving her husband (for the purpose of determining her right to support)?

A review of the *testimony* taken in the wife's divorce action might have supported a finding by the court, in the petition to remit arrearages, that she had not such justification for leaving him as would entitle her to support, and that her separation from him constituted desertion. But this is quite different from the finding that the dismissal of her divorce complaint by the lower court was in itself a legal conclusion that her separation amounted to desertion. If the appellate court meant, in its opinion on the arrearages appeal, that after an independent review of the divorce *testimony,* it was reversing the lower court's finding that the wife had such legally adequate reason for leaving as to entitle her to support, this is not clear from its opinion.

Moreover, the court did not discuss under what circumstances the record of testimony in a collateral proceeding, such as a divorce action, can be permitted to be used as controlling evidence in determining the rights of parties in a support action. Assuming that the use of the record of divorce proceedings was proper and that the Superior Court's finding was based on the testimony itself, this raises the question—how were principles numbers 2, 3, and 4, above, applied in the disposition of the arrearages?

In view of the fact that an innocent spouse can not obtain a divorce on the ground of desertion until the desertion has been persisted in for a continuous period of two years, but support orders are usually sought shortly after the separation and therefore before the cause for divorce has matured, it might be maintained that numbers 2 and 4 are inconsistent. Should the husband be bound by the original determination of his obligation to provide support to a wife who has left him, when his status in having a valid ground for divorce cannot be established until two years after she left him?

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[9] 183 Pa. Super. at 332.

It will be noted that it is her *conduct* which determines whether he has a good defense against her claim for support, not the possession by him of a presently matured cause for divorce. In the absence of intervening factors, such as her conduct during the period of separation, the conduct which is relevant is the separation itself and the circumstances under which it occured.[10] If the separation by the wife was under such circumstances as to meet the definition of desertion, this is available to the husband as a defense immediately after the separation by the wife.

Since Mrs. Seery left her husband October 24, 1954, the defense of her having left him without legally adequate reason was available to him at the time of the original support hearing in May, 1955. He did not appeal that order. Should not the issue as to whether her separation was for such legally adequate reason as not to deny her the right to support have become res judicata?

A decree granting a support order is different in nature from an ordinary decree granting a money judgment in that its effect is to create a recurring obligation, continuing into the future, until changed by further decree or death of one of the parties. Therefore, questions involving the application of res judicata to adjudications on support matters involve different considerations from those in the ordinary decrees giving money judgments.

The following is a typical description of the doctrine of res judicata:

> "If the first suit was between the same parties and involves the same cause of action, the judgment in the former suit is conclusive, not only as to all questions actually decided but as to all questions which might properly have been litigated and determined in that action." [11]

In support cases the doctrine is modified because of the continuing nature of both the need giving rise to litigation and the obligation incurred by the decree, to the extent that a redetermination of the right to support may be had if conditions have changed since the original determination. Petitions for modification or vacation of support orders, based on allegations which could have been raised as defenses in the original support hearings, have been consistently denied by the Superior Court on the ground that the doctrine of

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[10] Com. ex rel. Lipschultz v. Lipschultz, 179 Pa. Super. 527, 117 A.2d 793 (1955), (where wife left husband December, 1954 and Superior Court denied a support order in 1955). In Com. ex rel. Arbitman v. Arbitman, 161 Pa. Super. 529, 55 A.2d 586 (1947), the parties were separated in September, 1946 and the Municipal Court of Philadelphia denied a support order in October, 1947. See also Com. v. Popkin, 165 Pa. Super. 489, 69 A.2d 160 (1949) and Com. ex rel. Van Wagenen v. Van Wagenen, 167 Pa. Super. 354, 74 A.2d 740 (1950).

[11] Quoted from City of Elmhurst v. Kegerries, 392 Ill. 195, at 203; 64 N.E. 2d 450, at 453 (1946) in Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339-350.

res judicata applies. A typical case is that of *Cellucci v. Cellucci,* in which the court said:

> "Joseph Cellucci has appealed from the dismissal of his petition to modify an order of support entered Jan. 20, 1950 wherein he was ordered to pay $25 a week for the support of his wife and child. Appellant sought to have his wife removed from the order on the ground that she left the domicile without legal justification.
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> "A determination of the wife's right to support culminating in the order of Mar. 20, 1950 is not before this court. No appeal was taken from that order and is thus res judicata as to the wife's right to support at that time." [12]

If the *Seery* case is to be distinguished as to the applicability of the doctrine of res judicata, it might be said that a change occurred in the status of the husband after the original support order was issued, in that he gained an actionable ground for divorce, the ground of desertion. This change might conceivably meet the requirements of principles numbers 2 and 3. The mere passage of time, however, did not make the wife's leaving any more legally inadequate than it was originally,[13] and the husband had just as valid defense to her original petition for support as he had grounds for petitioning the court one and one-half years later to vacate the support order and remit the arrearages. The only significant difference was that at the later time he had the additional testimony of the divorce proceedings to bolster his contention, not previously asserted or at least not adjudicated in his favor, that her separation from him was without such legally adequate cause as to entitle her to support.

Although the court in the *Seery* case did not refer to any statutory basis for its holding, an act of 1939,[14] relating to the powers of courts over support orders, undoubtedly gave the court power to deal with the arrearages in however manner it saw fit. The act reads as follows:

> "Any order heretofore or hereafter made by any court of this Commonwealth for the support of a wife, child, or parent, may be altered, repealed,

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[12] 173 Pa. Super. 1, 93 A.2d 861 (1953); see Com. ex rel. Skulsky v. Skulsky, 168 Pa. Super. 635 (1951), where the lower court vacated the support order previously made, on the ground that the original order should not have been issued because the marriage was the result of mercenary greed. The appellate court, in reversing, said: "The original order had not been appealed from and at least upon the facts presented here, was a final adjudication of the defendant's liability to support his wife. A subsequent petition to vacate an order of support is not a substitute for an appeal, and cannot bring up for review the court's discretion in making the first order." See also Com. ex rel. Jamison v. Jamison, 149 Pa. Super. 504, 27 A.2d 535 (1942).

[13] In Com. ex rel. Rovner v. Rovner, 177 Pa. Super. 122, 111 A.2d 160 (1955), the court said that where the husband's conduct constitutes reason adequate in law to permit the wife to separate from him and obtain an order for her support, but such conduct is not adequate in law to permit her to obtain a divorce, the wife's right to support does not cease at the end of two years on the ground that the husband would then be entitled to a divorce on the ground of desertion.

[14] P. L. 440, June, 1939, 17 P. S. 263.

suspended, increased, or amended, and the said court may, at any time, remit, correct, or reduce the amount of any arrearages, as the case may warrant."

The birth of this statute has an interesting history and may help to give perspective to the courts' handling of arrearages. In the case of *Commonwealth ex rel. Martin v. Martin,*[15] decided in January, 1939, the Superior Court held that the courts did not have power to make orders which applied retroactively, remitting all or part of the arrearages due and unpaid. Within four months the above statute was introduced into the legislature. When the bill was introduced on the floor from committee, the spokesman for the committee members reported that all the members agreed that the bill should not be passed as introduced, but that an amendment should be added, confining the act's application to support orders issued prior to the *Martin* decision.[16] The requested amendment was never added, never referred to again on the floor, and the bill passed, in its original form, by unanimous vote! What happened?

At any rate, the courts have had full power to remit arrearages since the act of 1939, but this power has been exercised cautiously,[17] and no appellate court decision has been found, prior to the *Seery* decision, in which arrearages were remitted expressly because of a defense which the husband could have raised at the time of the original hearing.

It may be that the *Seery* decision indicates the beginning of a trend in the direction of making original support orders provisional in effect. Possibly this might be justified for policy reasons similar to those which underlie the legislative requirement for divorce on the ground of desertion; e.g., that the desertion must have been for a continuous period of two years.

Considering the personal relations which are in the process of adjustment at the time of separation and afterward, and the inevitable influence of financial considerations on this adjustment, the courts might deem it undesirable to have the original determination of the wife's right to support become res judicata. A temporary support order unaccompanied by immediate final decision on the justification for the separation might contribute a more favorable atmosphere for possible reconciliation. If after a period of time the parties have not been able to effect reconciliation, the courts would then determine, with res judicata effect, whether the separation was under such circumstances as to entitle the wife to support.

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[15] 134 Pa. Super. 345, 4 A.2d 217 (1939).

[16] LEGISLATIVE JOURNAL, 1939, Vol. 3, pg. 3524, 3525.

[17] See Com. v. Cummerick, Note 6 *Supra.*

However, if the *Seery* case indicates such a trend, and if the courts will only occasionally exercise this power to redetermine the original right to support, by way of disposition of arrearages as well as by vacation of orders, a wife who obtains an order shortly after separation, may find later, in case of relitigation, that the order was illusory protection against destitution. It would appear the better part of strategy for a husband, who has a support order issued against him, not to make the payments if he feels the order was unjustly made. He need not take the initiative in bringing an appeal, because if the wife should ever bring action against him to collect the arrearages, there is always the chance he may be freed of the obligation entirely, if he can convince the court the order should not have been made originally; and this, long after the appeal period has expired on the original order.

If the courts were to go one step further and make it a fixed policy to permit relitigation at a later date of the right to support, by expressly making support orders provisional for a certain period, but not permitting arrearages accrued during this period to be remitted, this could be justified as providing desirable stability in the financial relations of the parties during this provisional period.

If the *Seery* decision means that the courts are acting within the proper exercise of their discretion by remitting arrearages on the basis of facts which occurred before the original support order was issued, new criteria are being developed by the courts in determining the applicability of res judicata to support orders.

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