

1961

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Anthony R. Fiorette

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Recommended Citation

Anthony R. Fiorette, *Practical Aspects of Ohio Divorce Proceedings*, 10 *Clev.-Marshall L. Rev.* 482 (1961)

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Practical Aspects of Ohio Divorce Proceedings

*Anthony R. Fiorette**

IN ITS RELATION TO COMMUNITY WELFARE and national well-being, "Family Law" is high in public interest.

In its administration, the courts are vested with an undefined discretion within the framework of a statutory scheme.

In its enforcement, the lawyer, as an officer of the court, occupies a top position of responsibility. The opportunity to deter, and perhaps prevent, the ultimate dissolution of the family comes first to him, and carries with it, a challenge to his patience, tolerance and particularly to his concept of social service.

When pursuit of divorce and consequent family disorganization appears unavoidable, counsel is accorded a further opportunity to minimize expenses, avoid scandal and bitterness, and to plan the future welfare of the minor children and the estranged spouses.

In performing this task he seeks to evaluate how the court may view the available evidence, and what it might do in awarding custody and alimony, ever mindful of the fluidity of the trial court's authority.

Interesting rather than informative, is the often made statement that in "domestic relations" matters the court first decides, and then finds the law. The basis, if any, for this view may have its origin in the belief that the Ohio Statutes appear to be tailored to accommodate the ideology and philosophy of the trial judge.¹

"Upon proof to the satisfaction of the court" is the statutory key to the exercise of judicial discretion in granting a divorce.²

"Upon satisfactory proof of any of the charges in the petition" the court shall make such order for the disposition, care and maintenance of the children as is just and in their best interest.³

As to alimony and division of property, the trial court is permitted a free and full exercise of its general equity powers as it determines will serve the ends of justice.⁴

* Professor of Law, Cleveland-Marshall Law School.

¹ § 3105.01 *et seq.* Ohio Revised Code.

² § 3105.10 ORC.

³ §§ 3105.21, 3109.04 ORC.

⁴ §§ 3105.18, 3105.20 ORC.

The broad sweep of this statutory authority has not been restricted by judicial construction.⁵ Actually, reviewing courts have approved its undefined nature. They have uniformly refused to set aside a decree unless the "record" fails to disclose some evidence of a substantial nature supporting the judgment.⁶

On the other hand, the decisions have established objective standards for the exercise of this discretion by defining the duty imposed on the trial court. The state is a party to every divorce or alimony proceeding, and in Ohio where no provision by law is made for actual representation, the court represents the state.⁷ It is the duty of the court to use every proper means to reconcile parties seeking divorce or separation.⁸ The family relation should be preserved until such time as it appears to the court in a divorce proceeding that a legal right to a divorce has been established.⁹

Because of the public interest in the preservation of the marital status, divorce suits are accorded different treatment from ordinary civil actions and it becomes the duty of the court to be vigilant against collusion and to see that there is compliance with applicable statutes.¹⁰ Whether the trial court thinks it would be better for the parties to have a decree of divorce is not a controlling consideration,¹¹ nor is it proper to grant a divorce because the parties will never reconcile or live together.¹² Neither counsel nor the court may author or advise an agreement between the parties to a divorce action where among other things contemplated is the withdrawal of one spouse from the contest to permit the procurement of a decree of divorce by the other.¹³ A party to a collusive agreement will be denied relief.¹⁴

By amending statutes in force, the General Assembly, in 1951, completely eliminated the element of aggression as controlling the discretion of the trial court in awarding alimony to either

⁵ DeMilo v. Watson, Exr., 166 O. S. 433, 436 (1957).

⁶ Dursa v. Dursa, 78 O. L. Abs. 498, 500 (1958).

⁷ Pashko v. Pashko, 45 O. Ops. 498, 500 (1951).

⁸ Pashko v. Pashko, *supra*, p. 501.

⁹ Phillips v. Phillips, 48 O. App. 322, 324 (1933).

¹⁰ State ex rel. Haun v. Hoffman, 145 O. S. 31 (1945).

¹¹ Phillips v. Phillips, *supra*, note 9, p. 323.

¹² Sevi v. Sevi, 83 O. L. Abs. 257, 259 (1959).

¹³ Maimone v. Maimone, 55 O. L. Abs. 566, 573 (1949).

¹⁴ Maimone v. Maimone, *supra*.

the husband or the wife,¹⁵ notwithstanding the court's language in *Hunt v. Hunt*.¹⁶ The offending party cannot be deprived of all rights bestowed by the marital relationship if to do so would shock the conscience of the court.¹⁷

Not to be minimized in its practical consequences, and which provides a directional guide to the court's discretion, is the judicially imposed clean hands doctrine. In theory, the rule provides that a divorce shall never be granted against an innocent spouse, and that a divorce shall not be granted either spouse where each spouse proves the other guilty of marital fault constituting grounds for divorce.¹⁸ Of ancient origin, the doctrine seems to rest on the equitable principle that one may not be heard to complain of an injury from the acts of another when he is subject to a charge of a similar nature. Its true function, however, is to effectuate the public policy against dissolution of the family through easy divorces.

In applying this rule the trial judge is vested with the widest discretion,¹⁹ and at his discretion the trial judge may, or may not, apply the rule, provided, of course, the spouse to whom the decree is awarded has made sufficient proof to authorize it.²⁰ Where the action for divorce is brought on the statutory ground that "either party had a husband or wife living at the time of the marriage," the court will not apply the rule.²¹

The social usefulness of the rule has been questioned for the reason, among others, that it mistakenly assumes dissatisfied spouses living in an atmosphere of discontent and distrust can preserve and maintain a family unit helpful to the community. In this state, it appears the rule will continue in force until legislative action intervenes.²²

Avoid Scandal and Bitterness

Of the precautions to be heeded, the first to be noted is to avoid scandal and bitterness. The tension suffered in seeking or

¹⁵ *Gage v. Gage*, 165 O. S. 462, 464 (1956).

¹⁶ 169 O. S. 276, 282 (1959).

¹⁷ *Nelson v. Nelson*, 108 O. App. 365, 369 (1958).

¹⁸ *Slyh v. Slyh*, 72 O. L. Abs. 537, 543 (1955).

¹⁹ *Flatter v. Flatter*, 71 O. L. Abs. 89, 91 (1954).

²⁰ *Slyh v. Slyh*, *supra*, note 18, p. 540.

²¹ *Smith v. Smith*, 72 O. App. 203, 217 (1943); *Eggleston v. Eggleston*, 156 O. S. 422, 428 (1952).

²² *Keath v. Keath*, 78 O. App. 517, 520 (1946).

in defending divorce and alimony suits takes its toll of every member of the family. But, the parents present the immediate problem. Many appear in shock from humiliation and injured pride. Others, motivated by anger and hate seem bent on seeking vengeance. If allowed to persist these emotions become serious obstacles for court and counsel. None will dispute that bitterness and scandal serve no useful purpose in resolving any phase of the marital controversy.

Admittedly, the client's tremulous agitation is not easy to neutralize. But some soothing influence is needed to restore normalcy of mind and capacity for calm reflection if a fair and reasonable result is to be reached. Whatever treatment may be required, counsel must administer it.

Haste or Delay

Another absorbing problem is encountered in determining whether the family interests justify haste or delay. Delay may aid, but haste may preclude, a reconciliation of the spouses. Experience would seem to favor rational use of time in seeking to preserve the marriage.

The foremost and primary concern of counsel and court is the welfare of minor children. This paramount duty tends to be ignored by facilitating hasty dissolution of the family unit. Even where violence may be threatened, a quick divorce is not *per se* the solution. Less drastic and more effective legal procedures are available to prevent physical harm.

Moreover, if it be the prevailing judicial view that 'divorce suits are accorded a different treatment from ordinary civil actions,'²³ then this view may be construed to declare that efforts to preserve a family ought not to be compressed to fit the time requirements of a crowded or light court docket or of the judge's calendar. The convenience of administration and of counsel should yield to assure a just result.

No one can prescribe a formula for reconciling unhappy spouses. Each case is unto itself. Every case commands patience and resourcefulness of the highest order. When these fail, and pursuit of divorce seems inevitable, then plans should be considered for such matters as division of property, alimony, custody and support for minor children.

²³ State ex rel. Haun v. Hoffman, 145 O. S. 31 (1945).

Though collusion to obtain a divorce is against public policy, it is equally true that an amicable and reasonable disposition of property rights, obligations of support, custody and other related matters is clearly in the public interest. In these particulars the spouses have the advantage of knowledge and time to effect a result more suitable to each than what a court may order from the evidence before it.

Factual Information Supported by Corroboration in Preparation for Trial

Typical of self-serving assumptions counsel can not afford to enjoy, is that which induces belief in an easy disposition of the case. Normally, the emotional and lengthy recitals by the client of his unhappy marital experiences neither provide what is needed nor establish adequate proof therefor. To be effective in negotiation, in trial or in giving advice, the need for having all available information organized, and evaluated, can not be underestimated. Inquiry into personal and private affairs always presents difficulties, and lack of funds imposes further limitations. Nevertheless adeptness and effort in the execution of this responsibility is expected of counsel.

A list of marital matters to be examined and appraised should include:

1. Place and date of marriage—how long engaged—parental approval or absence thereof.
2. Place and date of birth of each spouse and child.
3. State of health of same . . . any past or present need for medical, mental or dental treatment.
4. Each spouse's family background . . . re marital, financial, and other difficulties.
5. Schooling and education of each spouse.
6. Behavior pattern and unusual traits of each spouse before and during marriage.
7. Behavior pattern and unusual traits of the children.
8. Attitude toward religion and church activities.
9. Origin and duration of marital dissension.
10. Influence, if any, of relatives, in-laws, divorced friends, and other persons.
11. Possible extra-marital activities.
12. Possible pregnancy of wife.
13. Question of the paternity of any child.
14. Social-civic-business activities of each spouse.

15. Spouse participation in family management.
16. Living standards . . . re . . . family income.
17. Wife's earnings, if any, how used.
18. Husband's employment record.
19. Companionship between spouses or lack thereof.
20. Specific acts relied upon for divorce or alimony.
21. Specific circumstances that precipitated seeking legal relief.
22. Present and previous marital domicile.
23. Available corroborating proof of all the foregoing.

Full disclosure of the financial status of each spouse should be established, by an exchange of affidavits covering, if possible:

1. Earnings of each and disposition thereof during marriage.
2. What assets each brought to the marriage.
3. Present holdings of cash and securities of each. How acquired—where kept. Safe deposit box, if any.
4. Antenuptial agreement, if any.
5. Receivables . . . rents, loans, annuities, trust income and other, if any.
6. Expected inheritances.
7. Real estate . . . location . . . value . . . when and how acquired—escrow agent—cost—how paid—legal evidence of title.
8. Household goods, automobiles, boats, heirlooms and other tangible property of value.
9. Nature and amount of life insurance held by each . . . beneficiaries thereof.
10. Business transactions between spouses, if any, circumstances thereof.
11. Current family income.
12. Current living expenses.
13. Debts owed and how current.
14. Minimum requirements of the minor children and of each spouse, if separated.

Until final hearing, preliminary orders are effective instruments for the preservation of family assets and for the enforcement of marital rights. To be considered is the need for an order:

1. Not to molest or harm.
2. Not dispose of assets.
3. Excluding from marital home.

4. For temporary alimony.
5. For temporary custody.
6. For expenses, attorney fees.

Service of Process

Existing circumstances necessarily control whether the service of process shall be personal service or notice by publication. Where personal service cannot be obtained on the defendant in Ohio, the limitations imposed thereby on the court's authority should be made clear to the client.

The Petition

Appropriate regard for the dignity and possible rehabilitation of the family is indicated in drafting the petition. Counsel should not present a bill of infamy. Abandoned defamatory allegations may furnish the offended spouse with a basis for charging extreme cruelty. Pleadings should be brief,²⁴ concise, and legally sufficient, and not serve as scandal sheets to degrade character and further estrange the spouses.

Real estate should be adequately described therein to invoke *lis pendens*, and in proper cases to empower the court to render judgment *in rem*.²⁵

In addition to reciting the particular remedies sought, the prayer for relief should include a request for general relief.²⁶

The Trial

It would seem unnecessary to remind counsel that his skill, industry and the philosophy directing his efforts are mirrored in the "record" he builds in conducting the trial. Significantly, something more than the client's case may be adjudged by "the record."

There can be no judgment by default in a divorce or alimony action. Failure to deny charges of marital fault can not be considered as an admission. And, admissions cannot be received which the court has reason to believe were obtained by improper means.²⁷ By these rules and by Section 3105.10 R. C. a formal trial is mandatory though the action is not contested.

²⁴ *Slyh v. Slyh*, *supra*, note 18, p. 539.

²⁵ § 2703.26 ORC; *Cook et al. v. Mozer*, 108 O. S. 30 (1923); *Reed v. Reed*, 121 O. S. 188 (1929).

²⁶ *Flatter v. Flatter*, *supra*, note 19, p. 96.

²⁷ *Ridgeway v. Ridgeway*, 162 O. S. 119; 69 O. L. Abs. 341, 344 (1954).

Counsel needs more than a barren file and persuasive oratory when he enters the trial room. Quantum of proof, including corroboration must be complied with.²⁸ Trivia and incompatibility are not grounds for divorce.²⁹ In its sound discretion the court may dismiss an uncontested divorce action.³⁰ Where divorce and alimony are denied, the court has no authority to grant custody.³¹ And on appeal, the reviewing court is restricted to the "record" before it in ruling on an assignment of error.³²

Pertinent facts relating to family finances, custody of minor children, need for their support, and need for alimony should be presented in evidence and made part of the record together with, if there be one, the separation agreement.

Separation Agreement

Such agreement is authorized by Section 3103.06 O. R. C., and its validity is controlled by:

- (a) Section 3103.05 O. R. C. which imposes the positive limitation that such agreement shall be subject "to the general rules which control the actions of persons occupying confidential relations," and
- (b) Section 3105.18 O. R. C. which requires that the alimony awarded by the court shall be reasonable "at the time of the decree."

The trial court is under no compulsion to approve the agreement of the parties, but will do so if the evidence shows its provisions are fair, just, and reasonable.³³

It is the husband's duty to advise the wife to seek counsel of her own choice whenever legal advice will assist her in deciding whether to enter into an agreement with him,³⁴ and advice from a law associate of the husband's attorney is not considered to be that independent and impartial advice within the meaning of this rule.³⁵

²⁸ Perry v. Perry, 100 O. App. 15, 19 (1955).

²⁹ Kennedy v. Kennedy, 111 O. App. 432 (1959).

³⁰ Lewis v. Lewis, 103 O. App. 129 (1956).

³¹ Haymie v. Haymie, 169 O. S. 467 (1959).

³² Davis v. Davis, 109 O. App. 519 (1959).

³³ Brewer v. Brewer, 84 O. App. 35, 37 (1948).

³⁴ Brewer v. Brewer, *supra*, p. 40.

³⁵ 26 Am. Jur. § 269, p. 877.