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Domestic Relations

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court on the ground that a rational basis for distinction between the two groups could be made. The purpose of an extradition hearing is to identify an individual as the person wanted by another state. A parolee under section 57.13 has been so identified in advance by the receiving state consciously accepting the obligation of supervision. Since all parolees are treated alike and all absconders are treated alike, no equal protection violation exists.[70]

The court also pointed out that *Morrissey v. Brewer* was applicable to the section 57.13 situation. A preliminary determination was required at or near the place where the alleged parole violation took place to establish that probable cause existed for believing that the conditions of parole had been violated.[71] In *Niederer,* the need for this hearing was obviated by the fact that the parolee had entered a guilty plea to the offense on which the revocation was based.

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DOMESTIC RELATIONS

I. ALIMONY

Societal acceptance of informal living arrangements between unmarried men and women has begun to carry with it certain legal consequences. Affirming a trial court's finding that a "de facto" marriage relationship existed between an ex-wife and another man, the Wisconsin Supreme Court in *Taake v. Taake*[1] held that the ex-wife's cohabitation with this man constituted a sufficient change in circumstances to expunge delinquent alimony payments and terminate the husband's alimony obligation. The supreme court, however, would not bar future alimony since the wife was not actually married. Other circumstances could warrant a resumption of alimony in some degree at a future date.

In 1966 E. Robert Taake and Barbara A. Taake were granted a divorce. The judgment awarded Mrs. Taake certain

70. *Id.* at 323, 240 N.W.2d at 633.
71. *Id.* at 326, 240 N.W.2d at 634-35.

1. 70 Wis. 2d 115, 233 N.W.2d 449 (1975).

property, including the home, custody of the children, as well as child support and alimony. This judgment was later amended to delete the child support provision and grant custody of the children to the husband. Some time thereafter Mrs. Taake sold the house and moved into an apartment. In 1971 she met Lyle Fink who subsequently lived with Mrs. Taake in her apartment until he purchased a house into which they both moved. During the period of this cohabitation Mrs. Taake had a separate bedroom, paid nominal rent and a portion of the grocery bill, and took care of the housework.

Wisconsin Statutes section 247.32, allowing revision or alteration of alimony after judgment, does not enumerate criteria to be used by the court. Rather, it allows the court to "make any judgment respecting any of the said matters which such court might have made in the original action."[2] Mrs. Taake argued that the general rule that the provision for alimony was not to be changed except upon a positive showing of change in circumstances must relate solely to financial circumstances. Though the court did mention other changed cirumstances that could be considered,[3] it based its amendment of the alimony provision solely upon the ex-wife's cohabitation with another man.[4] Thus, while the court acknowledged that a divorced woman owes no duty of sexual fidelity to her former husband, it recognized her cohabitation with another man subsequent to the divorce judgment as a sufficient change of circumstances to affect her former husband's responsibility to

2. WIS. STAT. § 247.32 (1973):

Revision of judgment. After a judgment providing for alimony or other allowance for a spouse and children, or either of them . . . as aforesaid the court may, from time to time, on the petition of either of the parties and upon notice to the family court commissioner, revise and alter such judgment respecting the amount of such alimony or allowance and the payment thereof . . . and may make any judgment respecting any of the said matters which such court might have made in the original action . . . .

The court cited Weber v. Weber, 153 Wis. 132, 140 N.W. 1052 (1913), which cited WIS. STAT. § 2369 (1898). That statute, however, was in essence the same as the pertinent section quoted above.

3. The court mentioned that the transfer of custody of the children to the husband and the wife's sale of the house were material changes that the court considered when the original alimony award was made. 70 Wis. 2d at 121-22, 233 N.W.2d at 453.

4. 70 Wis. 2d at 122, 233 N.W.2d at 453. The court cited two early Wisconsin cases, Weber v. Weber, 153 Wis. 132, 150 N.W. 1052 (1913) and Haritos v. Haritos, 185 Wis. 459, 202 N.W. 181 (1925), for its proposition that alimony modification may be based upon subsequent misconduct of the divorced spouse.

provide alimony for her support.[5] The court did emphasize, however, that it found Mrs. Taake's cohabitation was not "an occasional indiscretion but a continuous living arrangement with arrangements for joint support."[6]

Justice Heffernan, in a dissenting opinion, would have held otherwise. On the basis of Wisconsin case law, a husband has a continuing obligation to support his former wife in the manner to which she was accustomed.[7] Justice Hefferman reasoned that alimony is necessary where it is for the maintenance of one party to the divorce and when, without such assistance, the dependent former spouse would become a public charge.[8] The dissenter found that no consideration was given to the underlying purpose of alimony—the necessity for support and maintenance—nor to the rule in Wisconsin which had been followed without exception in considering the modification of an alimony award, that financial circumstances must be considered in every case.[9]

Admittedly, financial circumstances were not considered in the majority decision. However, the court would not permit Mrs. Taake to enjoy both the benefits of her de facto marriage relationship with another man and the benefit of alimony from her former husband. To condone such an arrangement might dissuade her from remarriage.

In contrast to their reasoning in *Taake,* the Wisconsin Supreme Court in *Lemm v. Lemm*[11] defined alimony in specifically financial terms, stating:

> [T]he purpose of alimony is postdivorce support, and a change in alimony may be predicated only upon a demonstrated proof of changed needs or changed financial resources of the parties.
>
> A divorced husband who seeks to have alimony payments reduced or eliminated has a heavy burden of proof to show

5. 70 Wis. 2d at 121, 233 N.W.2d at 453.

6. *Id.* at 122, 233 N.W.2d at 453.

7. Radandt v. Radandt, 30 Wis. 2d 108, 140 N.W.2d 293 (1966).

8. 70 Wis. 2d at 122, 233 N.W.2d at 453, *citing* Weihert v. Weihert, 265 Wis. 438, 61 N.W.2d 890 (1953).

9. "[S]ince alimony is for the purpose of providing post-divorce support, the change in circumstances that must be proved hinges upon the changed needs or changed financial resources of the parties." 70 Wis. 2d at 123, 233 N.W.2d at 453. *See also* Miner v. Miner, 10 Wis. 2d 438, 103 N.W.2d 4 (1960).

10. Though Wisconsin does not recognize common-law marriages, the trial court found a de facto marriage to exist.

11. 72 Wis. 2d 457, 241 N.W.2d 593 (1976).

> that such alimony payments are no longer necessary to maintain the wife in a status which comports with her standard of living during the marriage.[12]

In 1969 Vivian and Harold Lemm were granted a divorce. The divorce judgment awarded to Mrs. Lemm child support and alimony. Following a division of the marital estate Mrs. Lemm had assets valued approximately at $40,000. Mrs. Lemm later received an inheritance increasing her estate to $157,000. Mr. Lemm subsequently brought an action to terminate alimony. The trial court, although recognizing that Mrs. Lemm appeared to be receiving a windfall because her estate had increased substantially since the time of the divorce, nevertheless refused to modify the alimony. The Wisonsin Supreme Court reversed and remanded for further consideration.

A material and substantial change of circumstances had occurred since the granting of the divorce, almost totally as a result of the inheritance received by Mrs. Lemm from her parents.[13] The supreme court noted that although the trial court considered the income from the wife's newly enlarged estate, it failed to consider the corpus of the inheritance. Recognizing that the trial court's determination should be based on all the facts and circumstances of the case,[14] the court concluded that the trial judge abused his discretion by failing to consider the availability of the corpus of Mrs. Lemm's separate estate, as well as the income therefrom, to meet her needs.[15]

The question whether a trial court may continue to award "permanent" alimony in divorce judgments was raised in *Czaicki v. Czaicki*.[16] Prior to 1971, a trial court could "adjudge to the wife such alimony out of the property or income of the husband, for her support and maintenance . . . as it deems just and reasonable" in judgments of divorce or legal separation.[17] Thus alimony was termed "permanent" alimony to dis-

12. *Id.* at 459-60, 241 N.W.2d at 594, *citing* Miner v. Miner, 10 Wis. 2d 938, 103 N.W.2d 4 (1960).

13. *Id.* at 460, 241 N.W.2d at 595.

14. Markham v. Markham, 65 Wis. 2d 735, 223 N.W.2d 616 (1974).

15. 72 Wis. 2d at 463, 241 N.W.2d at 596. *See also* Bunde v. Bunde, 270 Wis. 226, 70 N.W.2d 624 (1950). The *Lemm* court pointed to this decision as an instance in which the court had stated that where a wife had inherited a substantial estate after divorce, she may be obligated to use some or all of the principal of her inheritance if she wishes to maintain a particular standard of living.

16. 73 Wis. 2d 9, 242 N.W.2d 214 (1976).

17. WIS. STAT. § 247.26 (1969).

tinguish it from "temporary" alimony which could be awarded as support during the pendency of action.[18] In 1971 the state legislature amended section 247.26 to read that the trial court may "adjudge *for a limited period of time* to either party such alimony out of the property or income of the other party for support and maintenance . . . as it deems just and reasonable."[19] It was the contention of the appellant that the inclusion of the phrase "for a limited period of time" in the amended version of section 247.26 outlawed "permanent" alimony.[20]

The Wisconsin Supreme Court interpreted the change as a legislative "spelling out of the right of the trial court to grant alimony in a divorce judgment for a briefer time span as well as for a remarriage-or-death limitation as to its duration."[21] The court referred to the recommendation of the Family Law Section of the State Bar of Wisconsin to the 1971 legislature concerning the amendment of section 247.26: "That Sections 247.245 and 247.26, Wis. Stats., be amended with respect to alimony to provide that the court may award alimony for a limited period of time in its discretion . . . ." No intent was found to abrogate the trial court's right to impose "permanent" alimony unless modified or earlier terminated by the trial court.

The court further reasoned that since the legislature chose not to amend another statute that provided for alimony in an annulment action where the judgment is granted in favor of or against an innocent spouse who has relied upon the representations made by the alleged spouse as to capacity to contract marriage,[22] "permanent" alimony was not outlawed. Thus, absurd and ambiguous results were avoided by the court's harmonizing of the statutes relating to the granting of alimony.[23]

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18. WIS. STAT. § 247.23 (1973).

19. WIS. STAT. § 247.26 (1973) (emphasis added).

20. The term is used by the court to indicate an award of alimony that was to continue until death or remarriage or change of circumstances.

21. 73 Wis. 2d at 16, 242 N.W.2d at 217.

22. WIS. STAT. § 247.245 (1973):

> **Annulment; alimony.** Whenever a judgment of annulment is granted in favor of or against an innocent spouse who has relied upon the representations made by the alleged spouse as to capacity to contract marriage by reason of not having a prior spouse living, or of having completed the 6-month waiting period for divorce or who married the alleged spouse in good faith, because of failure to reveal that permission of the court was required pursuant to s. 245.10, the court may grant alimony payments to the injured party as it deems just and equitable.

23. In addition to WIS. STAT. §§ 247.26 and 247.45 (1973), the court also mentioned

II. CUSTODY OF CHILDREN

In re Guardianship of Schmidt[24] involved a dispute between two contending parties in a general guardianship proceeding involving three minor children. The mother of the children was fatally shot at her residence, and Mr. Schmidt, the children's father, was subsequently charged with the murder of his wife and incarcerated. Schmidt had requested that the children be placed in the care of his sister and brother-in-law, the Barkholtz family. The Brezinskis, the children's maternal grandparents, obtained an appointment as temporary guardians of the children. At the hearing for permanent guardianship the trial court was faced with the task of deciding which of two families, both closely related to the children, would be given custody. Though an award to either of the contending parties would have been adequate, the trial court chose the Barkholtzes.

The dispute before the supreme court arose out of the father's recommendation that the children be placed with his sister and brother-in-law. In affirming the trial court's decision, the supreme court held that the children's father's recommendation should be considered in light of the best interests of the children.

Wisconsin Statutes section 880.09[25] provides that in selecting a guardian "[t]he court shall consider nominations made by any interested person and, in its discretion, shall appoint a proper guardian . . . ." The relevant factors to be considered by the court include a preference for the minor's parents to be the guardian if "suitable and willing."[26] The father himself indicated that he was "unsuitable" as a guardian because of his incarceration. Presumably, then, if the sole surviving parent is unable to take the guardianship, his nomination must carry some weight.

WIS. STAT. § 247.29(1) (1973) which directs that alimony payments be made to the clerk of court where the orders or judgments provide "for temporary or permanent alimony." If § 247.26 banned "permanent" alimony, then it would be difficult to reconcile with § 247.29 and the reference to awards of "permanent" alimony which was left unchanged.

24. 71 Wis. 2d 317, 237 N.W.2d 919 (1976).

25. WIS. STAT. § 880.09 (1973).

26. WIS. STAT. § 880.09(2) (1973): **"Parents preferred.** If one or both of the parents of a minor, a developmentally disabled person or a person with other like incapacity are suitable and willing, the court shall appoint one or both of them as guardian."

The Brezinskis contested the natural father's nomination since he was found and admitted to be not suitable as a guardian. The court reasoned, however, that to bar the consideration of the preference of "unsuitable" parents "would be unreasonable if applied against those parents suffering from physicial disability or failed fortunes, whose intimacy with the minor uniquely qualifies them to make a most suitable recommendation despite their own unsuitability."[27]

In addition to the father's recommendation, the trial court also based its decision on the "best interests of the child" test. The application of this standard was not contrary to the guardianship chapter which indicated a preference to certain nominations.[28] The court noted that this case involved a guardianship proceeding, not an adoption or divorce custody hearing in which the emphasis would be on the natural parent-child relationship. The court should not have estranged that relationship, jeopardizing the natural father's interests. Thus, an appointment should be made that would best preserve those familial ties.[29] Until his rights as a parent are terminated, the trial court is duty bound to consider the father's nomination, reserving the prerogative to do what it finds to be in the best interests of the children.

Wisconsin Statutes section 247.045[30] requires that a guardian ad litem be appointed to represent minor children "[i]n any action . . . when the court has reason for special concern as to the future welfare of the minor children." In *de Montiguy v. de Montiguy*[31] the trial court addressed the question of whether, in view of allegedly changed circumstances, a transfer of custody was warranted.

This case involved an order which modified the divorce

27. 71 Wis. 2d at 326, 237 N.W.2d at 923.

28. *Id.* at 328, 237 N.W.2d at 924. *See also* WIS. STAT. § 880.09 (1973).

29. *Id.* at 331-32, 237 N.W.2d at 926.

30. WIS. STAT. § 247.045 (1973):

Guardian ad litem for minor children. In any action for an annulment, divorce, legal separation, or otherwise affecting marriage, when the court has reason for special concern as to the future welfare of the minor children, the court shall appoint a guardian ad litem to represent such children. If a guardian ad litem is appointed, the court shall direct either or both parties to pay the fee of the guardian ad litem, the amount of which fee shall be approved by the court. In the event of indigency on the part of both parties the court, in its discretion, may direct that the fee of the guardian ad litem be paid by the county of venue.

31. 70 Wis. 2d 131, 233 N.W.2d 463 (1975).

judgment of Barbara and Lionel de Montiguy transferring custody of their five minor children from the mother to the father. During the course of the hearing, the trial judge expressed concern over the possible adverse effects upon the children from the mother's proposed remarriage. Despite this concern, the requirement of section 247.045 and the expressed willingness of plaintiff's attorney that a guardian ad litem be appointed, the judge failed to appoint a guardian ad litem to represent the children's interests prior to the transfer of custody from mother to father. The Wisconsin Supreme Court vacated the lower court's judgment finding the custody proceeding not to be a fair determination of the issues in the best interests of the children:

> By definition, a petition for an order to show cause why the custody of minor children should not be changed raises a question of "special concern" for the future of the minor children. A trial judge faced with a decision to continue a present custody or terminate it in favor of an alternate custody unless the petition for alteration of custody is on its face frivolous, is required to appoint a guardian *ad litem* for the children.[32]

The court did more than merely reaffirm what had been the position of the court for more than twenty years[33] and what had been codified in 1971 by section 247.045. Its decision leaves little room for the trial judge to exercise discretion in determining whether a guardian ad litem should be appointed.

Chief Justice Beilfuss in his concurring opinion noted that many attorneys, family court commissioners and social workers do recognize that the standard of the "best interests of the children" is to be followed in custody proceedings. Often the trial judge has the advice of these individuals. The appointment and opinions of a guardian ad litem in such instances may have but a cumulative effect on the already adequate source of opinions from the family court commissioner and social workers of welfare agencies who impartially and adequately represent the interests of the children.[34]

In the instant case, however, the trial court made no effort to obtain an independent opinion from a recognized social serv-

32. *Id.* at 137-38, 233 N.W.2d at 467.

33. *See, e.g.*, Gochenauer v. Gochenauer, 45 Wis. 2d 8, 172 N.W.2d 6 (1969); Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W.2d 185 (1965); Edwards v. Edwards, 270 Wis. 48, 70 N.W.2d 366 (1955).

34. 70 Wis. 2d at 143, 233 N.W.2d at 470.

ice agency. The children were not permitted to testify. In the original divorce proceeding the family court commissioner was dismissed by the trial judge without it appearing in the record that he had been given an opportunity to carry out his duties as set forth in chapter 247.[35] This case presented a situation where adequate safeguards for the protection of the children's interest were lacking, thus requiring the appointment of a guardian ad litem.

Under circumstances where the trial court in its discretion is satisfied that representation of the children and information concerning their future welfare is adequate, section 247.045 would seem to be satisfied without appointment of a guardian ad litem. The hard and fast rule laid down by the court requiring the appointment of a guardian ad litem where custody of minors is at issue is overly stringent in the absence of a clear showing of abuse of discretion on the part of the trial judge.

DONALD J. WALL

INSURANCE

I. BAD FAITH—EXCESS LIABILITY

Perhaps the most significant decision rendered by the Wisconsin Supreme Court in the field of insurance law during the past term was *Alt v. American Family Mutual Insurance Co.*[1] This decision provided additional answers and guidelines to insurance litigators who are constantly faced with the difficult problems of excess liability for the bad faith handling of settlement negotiations.

The narrow question addressed by the court in *Alt* was, in the words of the court, "whether, in a claim against an insurance company for liability for failure to settle a claim, there

35. It is the court commissioner's duty to represent the public interest in the maintenance of the marriage relationship and to advise the judge "as to the merits of the case and the rights and interests of the parties" in cases where reconciliation efforts fail.

1. 71 Wis. 2d 340, 237 N.W.2d 706 (1976). A major portion of the Litigation Law section meeting at the 1976 Wisconsin Bar Association Convention was devoted to the topic of the current status of the bad-faith excess-liability issue in Wisconsin, with counsel from both sides in the *Alt* case giving presentations on the question.