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Divorce: Cruel and Inhuman Treatment - Absence of Findings of Fact and Conclusions of Law

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junction would constitute unwarranted interference with the state's criminal courts. This conclusion provides a "special circumstance" appropriate to the conventional application of abstention to a request for declaratory relief. Even if a court were faced by this possible consequence, it could invoke the judicial doctrine of comity between the state and federal courts, and thus deny an injunction but still grant declaratory relief to the plaintiff.

Even more fundamental is the question of whether a court can apply any "special circumstance" which might be produced by the request for injunctive relief to the issue of abstention from the prayer for a declaratory judgment. Since the Court says that the questions of injunctive and declaratory relief are "independent," and that under the circumstances present in *Zwickler,* a court's conclusions as to the propriety of an injunction are "irrelevant" to the issue of abstention, it can be inferred that the requests for injunctive and declaratory relief are to be treated as completely exclusive of each other within the prescribed order of decision.

In its opinion, the Supreme Court goes beyond a simple determination of the particular issues in *Zwickler.* As though they were purposefully conceived, the Court implies certain propositions which will be of particular significance when and if a court is confronted by a request for both injunctive and declaratory relief in the context of *Zwickler* and *Dombrowski,* and "special circumstances" are present which would support the conventional application of abstention. It is clear that, at the present time, the Court is not ready to transform these implications into mandates. Therefore, the Court's opinion in *Zwickler* will become additionally meaningful as those implications and inferences are clarified, and established as rules, in subsequent interpretations by the Supreme Court.

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Divorce: Cruel and Inhuman Treatment—Absence of Findings of Fact and Conclusions of Law. The guiding consideration in marriage dissolution cases is set forth in the first section of the Family Code:

> It is the intent of chs. 245 to 248 to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. . . . The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.[1]

[1] WIS. STAT. § 245.001(2) (1967).

The Wisconsin Supreme Court has apparently ignored this legislative mandate in the recent decision of *Walber v. Walber*.[2] The case involved a contested divorce proceeding in which the plaintiff wife sought an absolute divorce on the grounds of cruel and inhuman treatment,[3] return of certain of her assets and a division of property. Defendant husband counterclaimed for absolute divorce, also on grounds of cruel and inhuman treatment. The trial court granted a divorce to the plaintiff and provided for a division of property. The defendant's counterclaim was not formally disposed of by the lower court.

The record of the lower court indicated that the parties were married in 1949. At the time of trial in 1967 the plaintiff was 59 and the defendant 77 years of age. There were no children resulting from their marriage. The majority opinion indicates that the plaintiff's complaints against the defendant stemmed primarily from the latter's penurious characteristics, such as his failure to take the plaintiff out socially, his failure to give her money to spend for herself and his failure to buy her presents at Christmas and on her birthday. Plaintiff also alleged that the defendant had converted a portion of her property to his own use. When the plaintiff would protest such treatment the defendant would criticize and ridicule her. In support of his counterclaim the defendant testified that the plaintiff continually threatened infidelity.

A serious problem was raised on appeal because of the trial court's failure to make specific findings of fact as to what conduct of the defendant constituted cruel and inhuman treatment.[4] This omission made it impossible for the appellate court to determine what evidence was relied upon in granting judgment for the plaintiff. Of course the record contained all of the evidentiary facts which were introduced during the trial, but the facts which the trial judge should find are 'ultimate' facts.[5]

> The ultimate facts which a finding should contain are, generally speaking, the issuable facts which a pleading should contain . . . and practically the same as the facts which a special verdict should contain. . . . In either case it should generally speaking, be such a fact that if it were to be successfully denied, the conclusion of liability based upon the findings as a whole is untenable.[6]

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[2] 40 Wis. 2d 313, 161 N.W.2d 898 (1968).

[3] Such grounds are provided for in WIS. STAT. § 247.07(4) (1967).

[4] Such a failure by the trial court was in direct contravention of WIS. STAT. § 270.33 which provides:

> Except in actions and proceedings under ch. 229, upon a trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk within 60 days after submission of the cause, and shall state separately the *facts found* and the conclusions of law thereon; and judgment shall be entered accordingly. [emphasis added]

[5] Finkelstein v. Chicago & N.W. R. Co., 217 Wis. 433, 439, 259 N.W. 254, 256 (1935).

[6] Cointe v. Congregation of St. John the Baptist, 154 Wis. 405, 418, 143 N.W.

The *object* of the statute in requiring findings of facts and conclusions of law is not only to show what was really adjudicated, but also to facilitate a review of the case on appeal when the matter is challenged.[7]

Even though the language of the section 270.33 appears to make preparation of findings and conclusions mandatory[8] the Wisconsin Supreme Court has repeatedly held that the statute is merely directive. Hence, a failure to comply with the language of the statute is not necessarily error.[9] In such an instance the court has three alternatives: "(1) Affirm the judgment if clearly supported by the preponderance of the evidence, (2) reverse if not so supported, or (3) remand for the making of findings and conclusions."[10] The court appeared to be reluctant to remand the *Walber* case since such action would have necessitated a new trial, because the trial judge who heard the case was no longer sitting on the bench at the time of the appeal. The question that immediately presents itself is whether the case would have been remanded if the trial judge had remained in office. If the answer is in the affirmative, the Wisconsin Supreme Court appears to be tempering justice for the sake of procedural convenience.

It would seem that even though a new trial may have been necessary, the proper action for the court would have been to remand the case for the making of findings and conclusions. Such action would have been more appropriate than affirmance primarily because of the grounds upon which the divorce was granted, namely cruel and inhuman treatment. Cruel and inhuman treatment is incapable of precise definition[11] and the Wisconsin Court has said that each case depends for construction upon its own particular circumstances.[12] It would seem that application of such a subjective test would make it imperative that adequate findings of fact be prepared to accompany the decision. Mental suffering has long been recognized as sufficient cause for divorce on the grounds of cruel and inhuman treatment in Wisconsin[13] in addition to the more widely accepted basis of physical suffering, yet the appellate

180, 186 (1913), followed in Clintonville Transfer Line v. Public Service Commission, 248 Wis. 59, 21 N.W.2d 5 (1945).

[7] Brown v. Suker, 257 Wis. 123, 127, 45 N.W.2d 73, 75 (1950). *See also* Adams v. Adams, 178 Wis. 522, 190 N.W. 359 (1922), and Farmer v. St. Croix Power Co., 117 Wis. 76, 81, 93 N.W. 830, 832 (1903).

[8] "Upon a trial of an issue of fact by the court, its decision . . . *shall* state separately the facts found and the conclusions of law thereon, . . ." [emphasis added]

[9] State *ex. rel.* Skibinski v. Tadych, 31 Wis. 2d 189, 142 N.W.2d 838 (1965); Forest Home Dodge Inc. v. Karns 29 Wis. 2d 78, 138 N.W.2d 214 (1965); Kamachey v. Trzesniewski, 8 Wis. 2d 94, 98 N.W.2d 403 (1959); Engh v. Calvert Fire Ins. Co., 266 Wis. 419, 63 N.W.2d 831 (1953).

[10] State *ex. rel.* Skibinski v. Tadych, 31 Wis. 2d 169, 142 N.W.2d 838 (1965).

[11] Voigt v. Voigt, 21 Wis. 2d 421, 124 N.W.2d 640 (1963); 27A C.J.S. *Divorce* § 24 (1959).

[12] Gordon v. Gordon, 270 Wis. 332, 71 N.W.2d 386 (1954).

[13] Voigt v. Voigt, 21 Wis. 2d 421, 124 N.W.2d 640 (1963); Gordon v. Gordon, 270 Wis. 332, 71 N.W.2d 386 (1954); Mayhew v. Mayhew, 239 Wis. 489, 1

court was left to mere conjecture as to which of these bases was relied upon by the trial court or if both were considered.

The current "definition" of cruel and inhuman treatment in Wisconsin was enunciated by the supreme court in *Heffernan v. Heffernan*,[14] where the court stated:

> In order to constitute cruel and inhuman treatment, such as to warrant the granting of a divorce or a legal separation, the court must consider the totality of conduct and the detrimental effect it has upon necessary marital relationships and its grave effect upon the health of the other spouse. The conduct of the offending spouse must be unreasonable and unwarranted, it must render the parties incapable of performing their marital duties, and it must have a detrimental effect upon the physical or mental health of the offended spouse.

It can readily be seen that while this declaration is a succinct statement of the various factors which must be taken into account in considering a suit for divorce on the ground of cruel and inhuman treatment, the test remains largely subjective and depends upon the trial court for application and interpretation. Therefore, it remains abundantly clear that proper preparation of findings of fact and conclusions of law are necessary if the litigants are to have a meaningful review of their case on appeal. An example of this in the present case is offensive conduct of the defendant which occured more than ten years prior to the commencement of the action for divorce and therefore, was not properly before the court because barred by the statute of limitations.[15] The Wisconsin Supreme Court hurdled this problem by simply saying, "We ignore such evidence."[16] However, because of the absence of findings of fact it is impossible to determine if the trial court considered such evidence and thereby committed error. The effect of affirming the judgment was to usurp the function of the trial court (determination of ultimate facts to support the judgment) thereby denying the litigants a review of the decision.

In addition to the procedural difficulties which the *Walber* case posed, the court seems to have disregarded the public policy involved in encouraging maintenance of marriage and the family. Besides the clear declaration of intent of the legislature,[17] the court itself has recognized the public interest to be protected in divorce cases. In the *Heffernan* case, which spelled out the current test of what constitutes cruel and inhuman treatment, the court stated: "In applying these tests the court

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N.W.2d 184 (1942); Hiecke v. Hiecke, 163 Wis. 171, 157 N.W. 747 (1916); Banks v. Banks, 162 Wis. 87, 155 N.W. 916 (1916).

[14] 27 Wis. 2d 307, 312-3, 134 N.W.2d 439, 442 (1964), followed in Newton v. Newton, 33 Wis. 2d 182, 147 N.W.2d 328 (1966).

[15] WIS. STAT. § 247.03(2) (1967).

[16] 40 Wis. 2d 313, 320, 161 N.W.2d 898 (1968).

[17] WIS. STAT. § 245.001(2) (1967).

should be cognizant of the desirable public policy in maintenance of marriage and family."[18] It is true that there were no children resulting from the marriage of plaintiff and defendant and it is also true that there was sufficent property involved so that neither party would be likely to become a ward of the state following the divorce, but the absence of discussion by the court of the public policies involved seems to indicate that the majority did not consider them significant in this case or that consideration of such policies may not have supported their position. In either event the court disregards a clear legislative directive.

In affirming the judgment for the plaintiff the court seemed to completely disregard the case of *Damman v. Damman*,[19] where a judgment of divorce in favor of the wife was reversed and remanded because of failure of the trial court to make specific findings of fact. The reason for the reversal was the quantity of conflicting evidence presented at trial (not unlike the *inconclusive* evidence presented in the *Walber* case). In remanding the case the court said:

> A large number of witnesses were sworn on either side and there was much conflict in the testimony on material points. This case is essentially one where this court is entitled to the full benefit of specific findings by the trial court, to the end that we may know what his views are on the essential questions that were litigated. We do not think it is one where this court can or should attempt to determine from the record whether the conclusion of the trial court is supported by the mere preponderance of the evidence or not.[20]

It would seem that the reasoning in the *Damman* case is particularly appropriate to the *Walber* case and should have been followed.

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[18] 27 Wis. 2d 307, 313, 134 N.W.2d 439 (1964).
[19] 145 Wis. 122, 128 N.W. 1062 (1911), distinguished in Milwaukee v. Thompson, 24 Wis. 2d 621, 130 N.W.2d 241 (1964). The Damman case was not discussed in the Walber decision.
[20] 145 Wis. 122, 125-6, 128 N.W. 1062, 1063 (1911).