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Chapter 7: Domestic Relations and Persons

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CHAPTER 7

Domestic Relations and Persons

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§7.1. Alimony and child support: Test of husband's resources. There was but one significant case decided by the Supreme Judicial Court during the 1961 SURVEY year in the field of domestic relations. However, that case is of great importance to all practitioners for it may radically curtail the power of the probate judge to award alimony and support.

In *Hillery v. Hillery*,[1] the wife obtained a decree of divorce on the ground of cruel and abusive treatment and was awarded custody of the two children of the marriage, $125 per week for the maintenance of the minor children of the marriage, and $125 per week as alimony. It appeared that the libelee was paid a salary of $12,000 a year by the M. H. Hillery Company, Inc., of which he was treasurer and secretary, this being his principal source of income. His net therefrom after tax and other deductions amounted to $9876 per year or $189.93 per week. It was found, however, that his standard of living was enhanced appreciably by gifts from his father and sister and by payment of certain of his personal expenses by the corporation.

The libelee appealed from that part of the decree ordering the payment of $250 per week. The trial judge made a report of material facts, in which he found that: (1) the libelee was a member of the Bar with little or no practice; (2) he was treasurer and secretary of the family corporation; (3) his sister was president of said corporation; (4) he and his sister held all of the stock of the corporation as trustees under the will of their mother for their father's benefit for life and that, upon the father's death, the libelee and his sister were to receive all of the stock; (5) the libelee has a yearly salary of $12,000; (6) the corporation paid living expenses of the libelee and his family, e.g., automobile fuel, telephone bills, and restaurant dinners; (7) he received $25 per week expense money from the corporation; (8) he received $200 per year from investments; (9) he and his wife owned, as tenants by the entirety, their home having an $8000 equity; (10) he and his wife owned commercial property having an $8000 equity; (11) he owned shares of an investment trust worth approximately $1500; (12) his and his sister's remainder interest in the trust of the

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§7.1. [1] 342 Mass. 371, 173 N.E.2d 269 (1961).

corporate stock was worth $16,000; (13) the records of the corporation were kept in a very irregular and unusual manner; (14) no records were kept at the corporation's place of business; (15) an outside bookkeeper worked on the books entirely on information furnished by the libelee, his sister, or his father; (16) his sister and his father were reluctant to furnish any information relative to the income of the libelee; (17) the libelee and the corporation's bookkeeper were obviously evasive; and (18) the libelee did not furnish the true information he had in his possession. The evidence was reported.

The question before the Supreme Judicial Court was whether the trial judge could properly have found that the libelee's resources were sufficiently in excess of his admitted salary so as to justify the payments ordered. It was held that gifts given to the libelee by his father and sister, and the corporation's payment of certain of his personal expenses, were not factors upon which the libelee's ability to pay could be based. Advances to the libelee from the corporation were either gifts or loans that could be discontinued at any time and did not constitute additional resources that would afford the basis for the challenged orders. The libelee's evasiveness or untruthfulness cannot be the basis of a finding that his income was substantially in excess of what was actually shown. The decree, insofar as it ordered payments by the libelee of $250 per week, was held not to be supported by the evidence and to be plainly wrong.

The probate judges and practitioners alike are now faced with the task of determining the full import and effect of the *Hillery* case. The decision suggests a few very important questions: (1) Should not the corporation's payment of its officer's personal expenses be a factor in determining his net worth, when the officer's ability to pay alimony is in issue? (2) Are not accounting chicanery and a sketchy, irregular, and unusual manner of keeping corporate books and records on the part of the libelee factors to be taken into consideration by a probate judge in making an award for alimony and support? (3) Is the net result of this decision a serious curtailment of the discretion of the probate judge?

It may be that the Court is saying no more than that the libelant has failed to supply the Probate Court with sufficient evidence to warrant the award that was made by the probate judge. Such a circumscribed interpretation of the opinion is doubtful. To say in one sentence that gifts from the libelee's father and sister and the payment of certain of his personal expenses by the corporation "enhanced appreciably" the libelee's standard of living, and in the next sentence to say that the libelee's ability to pay cannot be based on either of these factors, is to open up a challenging issue. It is one thing to take the position that these factors *alone* would not warrant the probate judge's action; it is quite another to say that these factors are entitled to no consideration.

Ordinarily it is virtually impossible in cases of this type for counsel for the libelant to adduce the kind and quality of evidence that this decision seemingly would require. It would seem that the libelee's

worth has been enhanced by the corporation's payment of his personal expenses. He and his family lived very well under this arrangement, and the fact that it is illegal for corporate officers so to use corporate funds or that this "service" of the corporation could be discontinued at any time should not mean that the trial judge is precluded from considering this source of enhanced worth in determining how much the libelee can afford to pay. The fact is that the family corporation has paid these expenses in the past, and it is not wrong for a trial judge to determine that these payments were in reality a form of additional compensation and an integral part of the libelee-officer's worth. The trial judge did no more than recognize that expense account living has become an accepted fringe benefit for countless close corporation officers.

One major source of "additional income," which in these cases is most difficult of accurate proof, is the "loan-gift" source. In speaking of advances made by the corporation to the libelee, the Supreme Judicial Court said that these advances were either gifts or loans, and if gifts they could be discontinued at any time, but if loans they did not enhance the libelee's net worth and could likewise be discontinued at any time.[2] The argument that "loans" and "gifts" and "paid expenses" could be "discontinued at any time" by the corporation seems to overlook the possibility that salary also could be "discontinued at any time." Since gifts like this are of questionable validity at best, most close corporations that operate in this manner assign the label "loan" to this type of advance. What the Court has said is of course true, but is it not paying more attention to form than to substance?

Obviously the Court is aware that a close corporation accountant may, by manipulation, show a profit or a loss in any given week or month if the furtherance of a tax evasion, or other, scheme so demands. The Court is likewise aware that this same type of manipulation is available when it is desired that "additional compensation" to its officers be depicted as "loans to officers" on the corporate books. Thus it is difficult to understand how the Court can expect counsel to show income from the corporation in excess of salary when his only tools are the subpoenaed books and records of the close family corporation which, in fact, he is fighting. Perhaps the Court, on these issues, should distinguish between the close and publicly held corporations.

The Court has never established any precise formula to be employed in ascertaining the amount of alimony and support awards, nor did it attempt to do so here. In its opinion the Court cited *Whitney v. Whitney*,[3] *Coe v. Coe*,[4] and *Wilson v. Wilson*[5] in support of the proposition that, in cases of this type, "The decision is largely within the discretion of the judge after a consideration of all the facts, including the needs of the wife and the children, the financial worth of the

2 342 Mass. at 373-374, 173 N.E.2d at 271-272.
3 325 Mass. 28, 30, 88 N.E.2d 647, 650 (1949).
4 313 Mass. 232, 235-236, 46 N.E.2d 1017, 1019-1020 (1943).
5 329 Mass. 208, 211, 107 N.E.2d 195, 197 (1952).

husband, the station in life of the parties, and their mode of living." [6] This is an enumeration of the various broad guiding principles that Massachusetts courts have followed in arriving at proper amounts of alimony and support.[7]

It is submitted that the sum total of the trial judge's action in the present case amounts to a realistic appraisal of the evidence offered and an equally realistic appraisal of the reasons for the refusal of the libelee and his family to present to the court the information concerning the libelee's financial standing, which was exclusively within their control. Instead of upholding the probate judge's exercise of discretion, the Court labels this decision "plainly wrong." The Supreme Judicial Court thus requires probate judges to blind themselves to the realities of close corporation life and in so doing has seriously curtailed that traditional discretion that has been the hallmark and essential characteristic of probate courts in this Commonwealth.

It seems that in cases of this type the trial judge is now precluded from going beyond "tax return worth" or beyond the libelee's own evidence of his financial worth. He has been forbidden to delve into the reasons prompting a libelee to conceal a true and complete statement of his worth. He is not to make estimates of a libelee's future worth based upon an intelligent appraisal of evidence concerning past financial worth.

Other jurisdictions, however, have given their approval to much broader exercises of probate discretion than has the Supreme Judicial Court.[8] The following statement seems to sum up current judicial expression elsewhere in this area:

> Probably the most widely accepted expression of judicial thought is that the alimony should be such as to maintain the wife in the station in life to which she belongs and in the style which the resources and the social standing and pecuniary faculties and future prospects of the husband entitle her.[9]

[6] 342 Mass. 371, 372-373, 173 N.E.2d 269, 271 (1961).

[7] See Briggs v. Briggs, 319 Mass. 149, 65 N.E.2d 9 (1946); Topor v. Topor, 287 Mass. 473, 192 N.E. 52 (1934); Brown v. Brown, 222 Mass. 415, 417, 111 N.E. 42, 43 (1916); Graves v. Graves, 108 Mass. 314 (1871); Burrows v. Purple, 107 Mass. 428, 435 (1871).

[8] The New York courts usually consider all items touching upon the financial status of the husband as well as the parties' social station and standard of living. Stevens v. Stevens, 125 Misc. 451, 211 N.Y. Supp. 192 (Sup. Ct. 1925), *aff'd*, 214 App. Div. 785, 211 N.Y. Supp. 193 (2d Dept. 1925) (amount and size of estate); Hoas v. Hoas, 298 N.Y. 69, 80 N.E.2d 237 (1948) (capacity to earn rather than current income); Rodgers v. Rodgers, 229 N.Y. 255, 128 N.E. 117 (1926), and DeBrouwere v. DeBrouwere, 203 N.Y. 460, 96 N.E. 722 (1911) (manner in which parties have lived). Cf. Brokow v. Brokow, 66 Misc. 307, 123 N.Y. Supp. 17 (Sup. Ct. 1910). New York courts have the discretion to take all relevant factors into consideration in computing the amount of alimony to be awarded. N.Y. Civ. Prac. Act §§1155, 1164, 1169, 1170.

[9] Schwent v. Schwent, 209 S.W.2d 546 (Mo. App. 1948).

The Missouri and Virginia courts have held that the husband's earning capacity is an important consideration in determining his abilty to pay.[10] This "earning capacity" includes not only the husband's actual income, which is determined by substracting his business expenses[11] and his income taxes, according to the Minnesota court,[12] but also his ability to earn more than he receives at present.[13]

The Louisiana court held in *Butterworth v. Butterworth*[14] that, under an alimony statute, the court was not required to lower an award by taking into consideration income which a husband lost by resigning his position in order to deprive his family of additional income. Estimates of a husband's future income also have been held to make up part of the husband's earning capacity.[15]

Other factors that courts of other jurisdictions have considered in determining the husband's ability to pay are his debts,[16] the amount and value of the property he owns,[17] whether such property produces income,[18] the source from which it was acquired,[19] the wife's contribution to its accumulation,[20] and whether it was acquired before or after the marriage.[21] The fact that the husband's property is in another state will not exempt it from consideration.[22] In some states the courts adopt as their guide, in determining the amount to be awarded, the social standard that the wife would have enjoyed if she had continued living in a state of domestic happiness with her husband. This appears to be the rule in New Jersey.[23] In Michigan, the wife is to be left in a position "not inferior" to what she would have been if the marriage had been undissolved.[24]

It is interesting to note that the *Hillery* case seems to be in direct conflict with the well-reasoned Kentucky case of *Rigsby v. Rigsby*,[25] which held that when the husband is an unwilling witness, refuses to disclose the amount and extent of his property, and shows a disposition to conceal or withhold from the court the exact value of his property and his financial standing, doubts arising from the available evidence as to these factors may be resolved against him.

10 Bittel v. Bittel, 147 S.W.2d 139 (Mo. App. 1941); Cecil v. Cecil, 179 Va. 274, 19 S.E.2d 64 (1942).
11 Goodloe v. Goodloe, 294 Ky. 100, 171 S.W.2d 18 (1943).
12 Baker v. Baker, 224 Minn. 117, 28 N.W.2d 164 (1947).
13 See Hawkins v. Hawkins, 187 Va. 595, 47 S.E.2d 436 (1948).
14 203 La. 465, 14 So.2d 59 (1943).
15 See Nelson v. Nelson, 100 Cal. App. 2d 348, 223 P.2d 636 (1950); Flanders v. Flanders, 241 Iowa 159, 40 N.W.2d 468 (1950).
16 Russell v. Russell, 142 F.2d 753 (D.C. Cir. 1944).
17 Braiser v. Braiser, 200 Okla. 689, 200 P.2d 427 (1948).
18 Nickerson v. Nickerson, 152 Neb. 799, 42 N.W.2d 861 (1950).
19 Timme v. Timme, 103 Ind. App. 569, 9 N.E.2d 111 (1937).
20 Poppe v. Poppe, 144 Ind. App. 348, 52 N.E.2d 506 (1944).
21 Rovder v. Rovder, 78 N.E.2d 422 (Ohio App. 1946).
22 See Fuller v. Fuller, 175 Ore. 136, 131 P.2d 979 (1944).
23 See Polyckronos v. Polyckronos, 17 N.J. Misc. 250, 8 A.2d 265 (Ch. 1939).
24 Wood v. Wood, 288 Mich. 14, 284 N.W. 627 (1939).
25 266 Ky. 291, 97 S.W.2d 235 (1936).

It is submitted that the Supreme Judicial Court either should establish a precise method of ascertaining "worth" for use in cases in which the husband-libelee is an officer-shareholder in a close family corporation or should adopt the philosophy underlying the Kentucky court's decision in *Rigsby v. Rigsby*. Probably the better course would be to set out a precise method for these particular cases. It is suggested that a variation of the "percentage method" or the "net worth method," both presently employed by the Internal Revenue Service in federal tax evasion cases, might be the answer.[26] The adoption of such a formula for ascertaining a libelee-officer's worth would enable a libelant's counsel in actions similar to the present case to establish an arbitrary figure as the net worth of the libelee who shows a disposition either alone or in concert with his fellow officers to conceal the exact extent of his property, present financial standing, and probable future prospects.

If one of these arbitrary methods had been employed in the *Hillery* case and if the "paid expenses," "loans," and "gifts" were "discontinued" by the corporation at some future time, the libelee would not be without a remedy, since he could file a petition for modification of the decree. However, to leave the present libelant with no remedy except the petition for modification leaves her with nothing, since once the libelee has successfully concealed his worth it becomes virtually impossible for the libelant to point up the lie.

[26] The Tax Court and other courts have approved use by the Commissioner of Internal Revenue of the so-called "percentage method" of computing taxable income. This method is often resorted to in the case of taxpayers whose books are lost or destroyed or so confused as to be useless in determining net income. Under this arbitrary method, net income is computed by the use of an average percentage table based on returns from taxpayers in the same kind of business. P-H, Fed. Tax. Serv. ¶¶6902-6903.

The "net worth increase" and the "bank deposits-expenditures" are other methods of reconstructing income used by the Commissioner of Internal Revenue where the taxpayer's books are unsatisfactory. The Tax Court has approved a reconstruction of the income of a horse race bookmaker from the amount of increase in his net worth plus $50 a week living expenses and an unexplained withdrawal from the bank. When there were no bank deposits, the Tax Court has approved a computation of a taxpayer's income based on the use of capital assets as reflected by record ownership of stock, plus personal and living expenses. It approved reconstruction of income based on high payments of mortgage interest, living expenses, medical expenses, and money in a safe-deposit box. P-H, Fed. Tax. Serv. ¶¶6872-6881, 6892-6896.