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DENIAL OF ALIMONY TO SOLVENT WIFE

RICHARD CROUCH

The question: When will the wife's capacity for independent self-support allow a divorce court to entirely excuse a transgressing husband from any obligation to pay alimony? In Virginia the answer depends partly upon the character of that capacity, for a distinction is drawn here between future wage-earning prospects and the possession of independent property.

Substantial earning capacity will do it; in that respect at least our Virginia rule is clear. Not in every case will steady salary prospects for the wife result in an unencumbered break, for of course the husband's circumstances are the primary consideration, but it *can*. The precedent is there. In a series of well-established cases, the latest of which is *Baytop v. Baytop*,¹ the rule has operated in favor of husbands whose conduct occasioned the divorce.

In *Baytop*, the Court, in refusing alimony, cited (without more) *Babcock v. Babcock*,² a 1939 case wherein an aged and infirm husband was not required to support a healthy young wife. As the dissenting justice in *Baytop* pointed out, the result was to extend the rule of *Babcock* to divorces from equally young and healthy husbands, an area which he felt it ought not reach.³

Mrs. Baytop was a colored school teacher. She must have possessed in the Court's (majority) opinion, a certain degree of stamina, for they noted that notwithstanding her physical inability to secure a job at the time, she certainly could always get one.⁴ She had "the opportunity for employment."

What the Court usually calls "opportunity for employment" has been the controlling consideration in the other cases through which the rule of *Babcock* has evolved: *Barnard v.*

¹ 199 Va. 388, 100 S.E. 2d 14.

² 172 Va. 219, 1 S.E. 2d 328.

³ *Supra*, Note 1, at 395.

⁴ *Id.*, at 394.

*Barnard*⁵ in 1922, and *Hulcher v. Hulcher*⁶ in 1941. In *Hulcher*, discontinuance of alimony was refused on the distinguishing point that here the wife did *not* have opportunities for employment.

But what of the wife whose post-marital source of independent income is not her job potential, but a sizeable estate in property? This involves us in a more interesting inquiry: first, as to what the law now is, and second, what, as revealed by sister-state decisions, perhaps it ought to be.

Initially, it must be said that a comparatively recent case, *Klotz v. Klotz* seems to yield a rather definite rule: Property holdings, be they ever so extensive, can never absolve a culpable husband of wife-supporting duties.⁷

Yet the *Klotz* opinion's dogmatic language notwithstanding, a husband's attorney might still argue the opposite most convincingly. First, of course, the question lies within the realm of equity jurisprudence where the particular circumstances of individual parties are often of more importance than is precedent—where the chancellor can render substantial justice with a flexibility which may quite permissibly, approach caprice.

More significant, however, is a matter which goes to the very foundations of the new rule, if such it be, enunciated in the *Klotz* decision. If the ruling here is new, it is not so labelled; if it overrules an earlier holding, the justices do not say so. The opinion does, however, appeal, albeit by nothing more explicit than bare citation, to former precedent. *Ring v. Ring*,⁸ a 1946 Virginia case, is cited.

Now, until the time of the *Klotz v. Klotz* opinion, the contrary view as to what Virginia's law was seems to have prevailed. Perhaps the best evidence of this prevalence, is a bar examination question from the year 1961, identical to the question *Klotz* presented. The answer given was:

⁵ 132 Va. 155, 164; 111 S.E. 227.

⁶ 177 Va. 12, 18; 12 S.E. 2d 767.

⁷ 203 Va. 677, 127 S.E. 2d 104.

⁸ 185 Va. 269, 38 S.E. 2d 471.

The Court erred in granting alimony to the wife who has independent means of her own which will enable her to live as she has been accustomed to living. No public policy is served by making it possible for a former wife who has been relieved of all marital duties to live a life of luxuriant idleness at the expense of her former husband even though he was the guilty party in the divorce case. Alimony is not given to punish the husband. See 199 Va. 388.⁹

Note please that this is not put forth as the "probable" answer to a so-far-unencountered question. Nor is it expressly grounded in the Chancellor's broad discretion in tailoring his justice to the individual case. No, it is blandly stated as the case-supported rule.

The question naturally and insistently then presents itself: What could possibly have been the basis for this attitude on the part of the Examiners, and the other Virginia legal scholars who must have stood with them? Did those learned jurists see it as a matter of natural justice so obvious as to be taken quite for granted? Hardly. What then gave rise to this now declared erroneous opinion? The first possibility of course is the case they actually cited. Yet this turns out to have been only *Baytop*, which, as we have seen, turned entirely on opportunity for earning (Independent property was not once so much as mentioned, and hence is readily distinguishable here).

Since this analysis, if based upon an extension of *Baytop* to the independent-property situation, was 100 per cent erroneous, the question becomes post pertinent: What other precedent, perhaps more valid although uncited, could have been present in the Virginia legal mind? And conversely, why—if it was the then existing law, and constituted the precedent for the later *Klotz* opinion—was the case of *Ring v. Ring* ignored?

If the *Ring* opinion meant exactly what the 1962 court by citation said it did, then it was either totally overlooked or grievously misinterpreted in 1961. Yet a look at *Ring* itself dis-

⁹ Answers in form approved by the Examiners, supplied as part of Bar Review Materials compiled by D. W. Woodbridge, Dean Emeritus of Marshall-Wythe School of Law.

closes all too readily its weaknesses as a foundation for the present rule. There, the court's reaction to the problem was a wholly negative statement—hardly intended, one would think, as furnishing anything but a negative precedent. The Court said:

. . . . There is no rule of law that requires her to expend her estate to ameliorate the condition of Appellant, brought about by his unfaithfulness to his marriage vows.¹⁰

The Court did *not* say that on the other hand there *is* a rule which forbids the equity court to in its discretion take cognizance of a wife's estate or even "require her to expend" it. The court in other words chose in this one instance not to consider the adequacy of Mrs. Ring's estate, and since no rule of law required that they choose otherwise, the choice was justifiable. The court was being, in other words, *discretionary*. Discretion might or might not "require her to expend . . . etc.", but no inflexible *rule of law* required, and hence there was room for discretion to be exercised. It is obvious, then, that this case furnished no real indications that the position which the Examiners took would be in 1962 the wrong one.

The decision in *Ring*—irrespective of the dubious validity of its interpretation in *Klotz*—is itself quite arguably correct. In Virginia at least there is no "rule of law which so requires." One obvious defect of *Ring*, however, is that it treats the question as one of first impression—which actually it was not. And this brings us to the case which provides the most promising answer to our original question—what case law gave rise to the idea that the wife's property is a relevant consideration?

Ultimately, it is Professor Phelps's textbook¹¹ which provides the answer. Moreover, the book itself is evidence that the contrary 1961 attitude was generally persisted in right up to the moment of the *Klotz* decision. The author's statement of the law on this point is a single sentence—succinctly dispositive of the matter under a rule which he obviously took to be long past contention: "When a wife's estate is more ample than that of

¹⁰ *Supra*, Note 8, at 273-4.

¹¹ Phelps, Arthur W., *Divorce and Alimony in Virginia 2nd West Virginia*. Charlottesville: Michie, 1963.

her husband, she *may* not be entitled to an award of permanent alimony.”¹² (Emphasis added.) The citation is to *Myers v. Myers*,¹³ a case wherein the wife was the very epitome of blamelessness, and the husband almost a caricature of “guilt.”

Myers v. Myers was decided in 1887. Now this, not *Baytop*, is precedent for the 1961 examination-answer. The court here refused alimony (disregarding entirely any question of employment capacity) because the wife had ample separate property:

But as the said Sarah J. Myers owns and possesses an estate ample for the purpose, and much greater in value than that owned and possessed by the said Albert J. Myers, it would, under all the circumstances of the case, be inequitable to decree—and this court refuses to decree—that the said Albert J. Myers shall contribute to the support of his wife or of his child.¹⁴

It should be obvious from the above that the holding in *Myers* rests upon the most permanent base which it could possibly have—the Chancellor’s broad traditional discretion. The statement that “it would, under all the circumstances, . . . be inequitable” creates, ultimately, a more durable precedent than would a case declaring merely, “We so decide because this is the rule.” It is a precedent for flexibility. It invokes our concept of equity in its classic role: a sensitive mechanism for maintaining constant equilibrium in a structure which without it soon would topple. As such, equity involves a process of perpetual innovation, yet each innovation is characterized as a return to ancient principles unconsciously veered away from.

Myers seems not to have been some remote and soon-forgotten aberration. Indeed, the indications are that its principle—that the Chancellor may decide to look or not to look to the wife’s material assets, as he sees fit—was always taken to be the rule. If the negative implications of *Ring* are unpersuasive, take for example, *Hulcher v. Hulcher*. Here the court refused to *discontinue* alimony, distinguishing the other cases¹⁵ on the

¹² Phelps, Divorce and Alimony . . . § 11-3, N.18.

¹³ 83 Va. 806, 6 S.E. 630.

¹⁴ *Id.* at 815.

¹⁵ *I.e.*, Barnard and Babcock, Notes 5 and 2 *supra*.

ground that here the wife was *not* capable of earning. Where her separate property was brought up, the court dismissed the argument with an observation that the matter was considered in making the original award. That is, the court explained, had her property not been so considered, the original award would have been larger.¹⁶ Now certainly this affords no precedent for the *Klotz* decision.

This much the cases prior to 1962 have in common: None is productive of a rigid and therefore fragile rule. They all seem to be founded on considerations more of ad hoc justice than of precedent. The cumulative consensus, if such an historical fiction may be postulated, of Virginia Supreme Courts over this period is apparently as follows—that a wife's possession of independent means is a fact which may, but does not absolutely have to be, considered in granting, denying or setting the amount of alimony.¹⁷ In short, our present rule is an unacknowledged and perhaps unconscious departure. If injustices, not to mention occasional absurdities, are to be avoided, then the older and more flexible may prove to be the wiser rule.

Indeed, if a dichotomy of employability and property ownership *must* be made, it might be more sensible were the rule of *Klotz* applied inversely.¹⁸ The justices who decided *Myers* would certainly have thought so. It would not be extravagantly unjust if one recognized purpose of the decree were to keep the divorcee from having to work when alimony can, and is necessary to, prevent it. And then if she were already so affluent as never to be faced with the necessity of working, alimony or no, the husband would not be burdened with an unjustifiable obligation to augment her affluence. This rule would rest of course on the ancient assumption that women should not have to labor in a masculine world for which they are too demure and delicate. Yet this hardly compares with our present rule in relative absurdity: for under *Klotz* the propertied woman is conclusively

¹⁶ *Supra*, Note 6, at 18.

¹⁷ "In regard to the allotment of alimony, there is no fixed rule. It is a matter within the discretion of the court." (Citing Bishop, Marriage and Divorce § 603, 1 Minor, Institutes 282-3, and *Myers v. Myers*) Cralle v. Cralle 84 Va. 198, 203.

¹⁸ This *was* in fact the rule, certainly after *Myers* and until the *Babcock* holding. (Phelps, Note 12, *Supra*, at p. 100, citing *Harris v. Harris*, 31 Grat. (72 Va.) 13, *Miller v. Miller*, 92 Va. 196, 23 S.E. 232).

presumed a non-existent creature, and even a millionairess must be considered destitute.

Now plainly, the matter is one of objective truth, and the optimal rule would be one which incorporates no inviolable assumptions. The earning capacities of both the spouses and their respective properties as well, should all be receivable in evidence. West Virginia, in fact, has made this the law by statute.¹⁹ *American Jurisprudence* takes it to be the uncontroverted rule.²⁰ So, apparently, do the courts of Ohio, Kentucky and Kansas.²¹ In fact, the peculiar position of our 1962 decision seems never, if seriously contended, to have been taken seriously enough for judicial refutation.

The frank statement that our present standard for denial of alimony is not what it should be, is a tempting one. In any event, there certainly exist alternatives to the present rule, and the case for any one of them might be easily made. One wonders just how resilient the supposedly general rule of *Klotz* would prove to be, given only slightly different circumstances. In short, the point is quite profitably arguable.

One stone, of course, remains unturned: The possibility that the Justices perhaps did not mean exactly what to all indications they have said. That is, that the old discretionary rule was what the justices attempted, however unsuccessfully to enunciate, and what was in fact applied. Surely then the choice of language is regrettable, for one sees in tracing the rule through its several nuances of judicial alteration, how serial imprecision is compounded until misinterpretation is practically inevitable. In terms of potentialities, the difference between "we know of no rule of law" and "the law does not require" is not altogether illusory. Slightly careless wording in *Ring* becomes dangerous, if not totally derelict, wording in *Klotz*, to produce what may be altogether embarrassing words tomorrow.

¹⁹ W. Va. Code § 4715(1).

²⁰ 17 Am. Jur., Divorce and Separation § 689.

²¹ *Henry v. Henry*, 157 O. St. 319 (47 O. Op. 189), 105 N.E. 2d 406; *Oliver v. Oliver* 258 S.W. 2d 703 (Ky.); *Field v. Field* 343 S.W. 2d 168 (Kans.).

Yet should this be a case of careless misstatement, and the intended rule be not so general a one as is naturally supposed, the wife who contends "the law will not and cannot require" will probably be successful.

It can only be hoped that in the next such case, the court will give this particular point the attention it deserves, and will re-examine conscientiously—i.e., by going back through cases farther than the last one—the wavering line of its own decision. Then the rule arrived at, as well as the disposition to be made of prior holdings should be stated specifically and without equivocation. Even if, as seems most advisable, this rule should be one of broad discretion, then that itself could be explicitly set down.