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Domestic Relations, Divorce, Retroactive Modificiation of Accrued Alimony

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down the ordinance as unconstitutional. Different considerations are involved depending on whether a state or federal statute is before the court. If states have greater scope than the federal government in barring material as obscene then the court should remand the case for a further showing by the city of necessity for such an ordinance. Harlan implies that he would consider an adequate showing of sufficient public need justification for upholding the constitutionality of the ordinance. Even though its effect might be to induce booksellers to restrict their offerings of non-obscene literary merchandise for fear of unwittingly having on their shelves an obscene publication, Harlan feels a state may constitutionally do this to protect its citizens against the dissemination of obscene material.

The entire field of obscenity regulation involves the drawing of fine lines, the setting of delicate balances, and the laying of flexible boundaries. A legal line must be drawn between decency and indeceny.[29] A balance must be struck between the community's need for regulation of obscenity and the continuance of freedom of expression. And finally the difference in scope between state and federal power to legislate against it must be determined. All of these factors must be considered by legislators in devising statutes and the courts in interpreting them. The role of the Supreme Court is to indicate to these bodies the boundary points of the territory covered by the First Amendment freedoms, beyond which they must not trespass in pursuing their respective social needs. One of those points is defined clearly by the decision in the instant case.

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[29] Chafee, Free Speech in the United States, 531-535 (1941).

DOMESTIC RELATIONS, DIVORCE, RETROACTIVE MODIFICATION OF ACCRUED ALIMONY

A recent Nebraska decision, *Rhuehle* v. *Rhuehle*, serves as a competent guide in examining the question of the ability of the courts to retroactively modify accrued installments of alimony.[1] This was an action by a wife to recover the amount

[1] Rhuehle v. Rhuehle, 169 Neb. 23, 97 N.W. 2d 868 (1959); See Rhuehle v. Rhuehle, 161 Neb. 691, 74 N.W. 2d 690, (1956).

owed by her husband for the support of their child under a divorce decree. However, the defendant had actually paid a sum in excess of the amount owing under the decree to his daughter, for her support and maintenance. The plaintiff claimed in her appeal that the trial court erred in allowing a credit to the defendant to apply to a child support order, when the defendant had made payments of cash and had given gifts of property to the child, none of which was acquiesced in or requested by the wife. The plaintiff also claimed that the court erred in not holding, that under a decree granting a wife a divorce and custody of minor children, monthly installments of alimony and support become vested as they accrue, and unpaid past due portions thereof are final judgments and are beyond the power of the court to reduce by retroactive modification of the original decree.

In deciding for the plaintiff, the court cited *Wassung* v. *Wassung*, in which the same court said:

> The general rule is stated in 19 C.J. 359, as follows: "Payments exacted by the original decree of divorce become vested in the payee as they accrue, and the court, on application to modify such decree, is without authority to reduce the amounts or modify the decree with reference thereto retrospectively."[2]

The problem of retroactive modification of alimony or support decrees involves a pronounced conflict of authority. In general, the majority rule is that installments of alimony become vested when they become due; and in the absence of fraud the courts are without authority to modify the decree in regard to installments past due.[3]

It has been stated by the courts that the power to cancel or modify installments of alimony or support which have already accrued should not be recognized unless a statute allows the court to do so, unequivocally. This is maintained on the theory that an award of alimony is final or conclusive as to past due or accrued installments because there are vested or absolute rights

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[2] Wassung v. Wassung, 136 Neb. 440, 286 N.W. 340, (1939).

[3] 27B C.J.S. 190.

in such installments.[4] Therefore, under the majority rule, statutes authorizing the alteration and modification of decrees allowing alimony have no retroactive effect, but their power extends merely to future installments of alimony.[5]

An intermediary rule was established in an Ohio case where the court held, that unpaid and accrued installments may not be modified retroactively without a specific reservation of the power by the court to so do. However, retroactive modification may be allowed according to the peculiar circumstances of the case. Accordingly, if strict enforcement of the rule that no retroactive modification is to be allowed would subsequently be unduly harsh, unconscionable, and against public policy, the court has the right to exercise its discretion in order to do equity.[6]

The minority rule as to accrued alimony is that the installments do not vest but are subject to the control of the court. Thus the court may use its discretion to modify a decree for past due alimony.[7] They do not take on the characteristics of a judgment for the payment of a fixed sum until a court of equity so orders, or until the past due installments are reduced to judgments. Therefore, following the above, the past due installments of alimony are subject to the control of the court, and accordingly the court may modify a decree for alimony or support as to accrued payments.[8]

Upon careful inspection, it becomes apparent that there are pronounced conflicts of authority on several aspects of retroactive annulment or modification of past due installments of alimony. In general, the right of the court to alter provisions of a divorce decree in regard to future payments of alimony is upheld. However there is a marked conflict of authority in several states, including apparently conflicting

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[4] Hallet v. Hallet, 135 N.E. 2d 224, 10 II. App. 2d 513, (1956); Steele v. Steele, 239 P. 2d 63, 108 Ca. 2d 595, (1952).

[5] Parker v. Parker, 226 P. 283, 203 Ca. 787, (1928).

[6] Wolfe v. Wolfe, —Ohio—, 124 N.E. 2d 485, (1954).

[7] *Supra* Note 3 at 192.

[8] Briggs v. Briggs, 65 N.E. 2d 9, 319 Mass. 149, (1946); Conklin v. Conklin, 27 N.W. 2d 275, 233 Minn. 449, (1947); Karlin v. Karlin, 19 N.E. 2d 669, 280 N. Y. 32, (1939).

decisions in the same jurisdictions, as to the courts' right to retroactively modify, cancel, or deny the enforcement of installments of alimony which accrued prior to the filing of the petition for cancellation.[9]

Thus, the rule in some jurisdictions is that installments of alimony become vested when they become due and the court has no power to modify the decree as to them.[10] There is, however, very respectable authority for the contrary view that a court has the power to modify decrees as to past due payments.[11]

Some states hold that a court has the power to modify all or part of arrears which have become due under a decree for alimony or support prior to the filing of a petition to modify.[12] In other jurisdictions, the courts have held that they have no such power even though they may modify the decree with regard to payments which are to come due after the filing of a petition for modification or after the entry of an order thereon.[13] Indeed, the majority rule is that the courts may cancel the arrears of alimony or support which became due and vested after the filing of a motion for the modification of the decree and prior to the entry of the order based upon such a request for relief.[14]

Where the general power to modify a decree for alimony, separate maintenance, or support is said to be inherent in the court and not to depend upon the terms of the statute or a reservation of power in the original decree, it has been held that the court also has the inherent right to modify a decree in arrears.[15] However, some jurisdictions have held that the

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[9] See: 6 A.L.R. 2d 1279.

[10] *Id.* at 1278.

[11] *Id.* at 1279.

[12] Madden v. Madden, 136 N. J. Eq. 132, 40 A. 2d 611, (1945).

[13] Stevens v. Stevens, 88 Cal. App. 2d 654, 199 P. 2d 314, (1948); Finnern v. Brunner, 157 Neb. 281, 92 N.W. 2d 785, (1958).

[14] *Supra* note 8, Briggs v. Briggs.

[15] Winkel v. Winkel, 178 Md. 489, 15 A. 2d 914, (1940); Ex Parte Jeter, 193 S.C. 278, 8 Se. 2d 490, (1940).

inherent power to modify a decree does not permit a retroactive modification which will cancel arrears of alimony.[16]

Where the right to modify a decree for alimony arises from a reservation of power in the original decree, rather than from a statute and the reservation does not refer expressly to overdue payments, it has been held that the court may cancel or reduce arrears.[17] But in some other states under a similar reservation in the original decree the contrary conclusion has been reached.[18]

In a few states a statute provides in effect that the court may modify a decree for alimony, or support and enter any decree which it might originally have entered. Under such a statute the majority view is that the court may cancel arrears of alimony.[19] In many states the only power to amend a decree for alimony, separate maintenance, or support is derived from a statute. This is so in the absence of an acceptable reservation of power in the original decree. In these jurisdictions the right to cancel must be found in the statute, if it is not reserved in the decree, or it does not exist.[20]

A wide variety of provisions have been held out to permit the cancellation of arrears. But there are contrary decisions which are apparent from miscellaneous provisions concerning the modification of a decree for alimony payments.[21] Statutes authorizing a court to set aside, alter, cancel, as well as modify provisions for alimony, separate maintenance, or support, have been held to permit cancellation of arrears.[22]

Virginia follows the majority, holding that there is no modification of accrued alimony installments.[23] Although the

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[16] *Id.*

[17] *Id.*

[18] Plant v. Plant, Mun. Ct. App. D.C., 57 A. 2c 204, (1948).

[19] Watts v. Watts, 314 Mass. 129, 49 N.E. 2d 609, (1943).

[20] Sistaire v. Sistaire, 218 U. S. 1, 54 L. ed. 905, 30 S.Ct. 682, (1910).

[21] Adair v. Superior Court, 44 Ariz. 139, 33 p. 2d 995, (1934).

[22] Frost v. Frost, 189 Misc. 133, 71 N. Y.S. 2d 438, (1947).

[23] Alfred E. Cohen, *Divorce and Alimony in Virginia and West Virginia*, Sec. 94d' (1949).

Virginia courts are given the right to modify future alimony payments they are without the power to alter the amount of alimony which has already accrued.[24] There is no vested property right in alimony that has not accrued, but there is such a property right in alimony which has already accrued. In direct correlation therefore, accrued alimony cannot be revised.[25] Alimony which has accrued is a vested property right, and may be dealt with like any other property right. But with respect to unaccrued alimony, the property right is subject to being altered and cannot be disposed of as it is not a vested property right. The consequence of alimony being a property right is that as a vested property right it cannot be taken away without a fair compensation and following from the above, accrued alimony cannot be modified.[26]

Even if accrued installments of alimony were not vested property rights, the authority to modify them would have to be given in the statutes. And there is no provision in the statutes of Virginia which empowers the court to modify or revise matured installments of alimony.[27]

In the earlier decisions it appears that it was very fashionable to state a clear and distinct majority rule and then an equally clear and distinct minority rule. However, there are now more pronounced conflicts of authority on several aspects of the subjects, including conflicting decisions within the same jurisdictions. There seems to be a growing minority which grants retrospective modification of accrued and vested alimony payments. The injustices of the court's decision in *Rhuehle* v. *Rhuehle* would be eliminated if that court of equity were allowed to do equity and thereby modify accrued and vested alimony installments.

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[24] Cralle v. Cralle, 84 Va. 198, 6 S.E. 12, (1887).

[25] Eaton v. Davis, 176 Va. 330, 10 S.E. 2d 893, (1940).

[26] Allen v. Allen, 166 Va. 303, 186 S.E. 17, (1936).

[27] 6 Michie's Jurisprudence, Divorce and Alimony, Sec. 72.