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Domestic Relations -- Basis of the Award of Alimony Pendente Lite in North Carolina

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While the Court's statement was perhaps intended to provide the Court some escape from holding against the shipowner in every injury case remotely connected with either the ship or its personnel, it remains open to some doubt how far the holding in *Mitchell* will be taken to impose its newly found duty of the shipowner to provide a seaworthy ship *at all times*. To use another example, a ship at sea encounters a severe storm the force of which weakens the mast, thereby rendering the ship unseaworthy. Subsequently while the ship is limping into port where she can be repaired, the mast topples, striking and injuring a seaman. If the shipowner incurs liability in such a case, it is difficult to see how his duty to provide the requisite seaworthy ship can be fulfilled while his ship is yet at sea and beyond the reach of harbor repair facilities.

The dissent in *Mitchell* took the view that the Court's decision virtually made the shipowner an insurer of the seaman, whereas the doctrine of unseaworthiness originated in both English and American courts as a means of protecting marine cargo insurance carriers from undue risks.

It is submitted that the dissenting opinion is the sounder, for it recognizes that the doctrine of unseaworthiness was called into existence for one reason—the encouragement of marine insurance. It also recognizes that the doctrine has undergone its expansion since that time through some dubious judicial precedent. And with the decision in the principal case it is seen that perhaps the last vestige of the historical doctrine of unseaworthiness has been cast off—that element which required the shipowner to make his ship safe for the impending voyage while the ship is yet in port. The shipowner is now liable without fault before,[29] during,[30] and after[31] the voyage to a seaman (or one doing a seaman's work) injured aboard his ship.

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Domestic Relations—Basis of the Award of Alimony Pendente Lite in North Carolina.

Alimony pendente lite may be awarded to any married woman upon her application to the court with notice to her husband during any proceeding for absolute divorce, divorce from bed and board, or alimony without divorce.[1] She may receive the award whether she be the plaintiff or the defendant in the principal action.[2] If the wife is

[29] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
[30] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).
[31] Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

[1] N.C. GEN. STAT. § 50-15 (1950); N.C. GEN. STAT. § 50-16 (Supp. 1959).
[2] Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953); Medlin v. Medlin, 175 N.C. 529, 95 S.E. 857 (1918); Webber v. Webber, 79 N.C. 572 (1878).

merely defending the action brought by her husband and asking for no affirmative relief, she may receive alimony pendente lite "upon a proper showing."[3] In order for the wife to be eligible for the award when she is seeking an absolute divorce, divorce from bed and board, or alimony without divorce, she must set forth sufficient facts (1) to entitle her to a divorce, either absolute or from bed and board,[4] and (2) to establish that she does not have adequate means of support during the trial.[5] Having found these facts in her favor, the court may then order her husband to pay her "such alimony during the pendency of the suit as appears to [it] ... just and proper, having regard to the circumstances of the parties."[6]

The amount of the award is within the sound discretion of the court, and there will be no reversal on appeal unless there is a gross abuse of discretion.[7] There are, however, two factors that weigh upon the exercise of the trial court's discretion—one the provision of a statute and the other a judicial decision. G.S. § 50-14 provides that alimony awarded upon divorce from bed and board shall not exceed one-third of the net income of the party against whom the judgment is rendered.

[3] Johnson v. Johnson, 237 N.C. 383, 75 S.E.2d 109 (1953); the court does not say what will constitute a "proper showing." Briggs v. Briggs, 215 N.C. 78, 1 S.E.2d 118 (1939), and Holloway v. Holloway, 214 N.C. 662, 200 S.E. 436 (1939), indicate that the trial court need merely find that the wife's denial is filed in good faith and that she is without adequate means of support.

[4] The court need not determine the type divorce to which she would be entitled. Little v. Little, 63 N.C. 22 (1868).

[5] It would appear that where the wife has ample means for her support she will not be granted alimony pendente lite. Oliver v. Oliver, 219 N.C. 299, 13 S.E.2d 549 (1941). *But see* Mercer v. Mercer, 253 N.C. 164, 116 S.E.2d 443 (1960), where an award of $1000 plus $500 a month to a wife who had a separate estate of $47,500 and an income of $6400 was sustained. The husband's estate was valued at several hundred thousand dollars. (These figures were before the trial court but are not in the report.) The court stated that under G.S. § 50-16 "the fact that she has a separate estate of her own does not necessarily defeat her right to [alimony pendente lite] ...." *Id.* at 170, 116 S.E.2d at 448. *Accord*: Rowland v. Rowland, 253 N.C. 328, 116 S.E.2d 795 (1960). When the court at the pendente lite stage examines the quality of the support due the wife according to the means of the husband, as would be done in a permanent alimony situation, rather than looking to her *needs* in excess of the amount she alone can provide, it would appear that the literal meaning of G.S. § 50-15 is being ignored. G.S. § 50-15 requires that before an award of alimony pendente lite be given the wife the trial court must find that "she has not sufficient means whereon to subsist during the prosecution of the suit." But in *Rowland* and *Mercer* the awards were made under G.S. § 50-16. That statute has no explicit requirement of such a finding and only requires that the award be reasonable subsistence having regard to the circumstances of both parties. Apparently G.S. § 50-15 and G.S. § 50-16 are not to be construed in pari materia.

[6] N.C. GEN. STAT. § 50-15 (1950) N.C. GEN. STAT. § 50-16 (Supp. 1959) uses substantially the same language and the court has not drawn a distinction (except as suggested in note 5, *supra*). Under G.S. § 50-16 adultery on the part of the wife bars all relief except counsel fees, whereas this result is questionable under G.S. § 50-15. Bolin v. Bolin, 242 N.C. 642, 89 S.E.2d 303 (1955) (G.S. § 50-15); Williams v. Williams, 230 N.C. 660, 55 S.E.2d 195 (1949) (G.S. § 50-16); Lawrence v Lawrence, 226 N.C. 221, 37 S.E.2d 496 (1946) (G.S. § 50-15).

[7] Hennis v. Hennis, 180 N.C. 606, 105 S.E. 274 (1920).

While at least one case has indicated that this one-third limitation is not binding upon the trial court on the question of alimony pendente lite,[8] our court has also said that due regard must be given to this expression of legislative intent.[9] Further, *Davidson v. Davidson*[10] holds that the award shall not exceed the net income that "is or should be derived"[11] from the estate or labor of the party ordered to pay alimony pendente lite.

In determining the amount of the award, a significant problem is that of the husband's ability to pay; this factor has been the subject of two recent cases before the North Carolina Supreme Court.[12]

In *Conrad v. Conrad*[13] plaintiff wife, who was seeking alimony without divorce, moved for alimony pendente lite. The substance of the evidence concerning the husband's ability to pay was that as an insurance salesman his net income during prior years had been $10,756.16 in 1956, $15,357.94 in 1957, $8,477 in 1958 and $3,916.43 for the first eight months of 1959. Defendant husband explained his decline in income by a reduction in commissions paid by one of his largest accounts and an unfavorable ruling by the local insurance board. It was not contended that the defendant had assets other than his income capacity.[14] The trial court found that the defendant was capable of earning $16,000 a year and awarded the wife $600 a month alimony pendente lite and $1,000 counsel fees. The Supreme Court reversed. The court stated that the award is to be based on current earnings, not upon earnings for some prior year, and that before an award may be based upon earning capacity the trial court should find that the husband was failing to exercise his capacity to earn because of a disregard of his marital obligation to provide a resonable support for his wife.

To support its requirement of a finding that the husband has disregarded his support obligations the court cited *Davidson v. Davidson*.[15] In the *Davidson* case the trial court had awarded alimony pendente lite which exceeded the net income of the defendant. Although the court conceded that the award may be based on the income capacity

[8] Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922).
[9] Kiser. v. Kiser, 203 N.C. 428, 166 S.E. 304 (1932); Davidson v. Davidson, 189 N.C. 625, 127 S.E. 682 (1925).
[10] 189 N.C. 625, 127 S.E. 682 (1925).
[11] *Id.* at 628, 127 S.E. at 683.
[12] Conrad v. Conrad, 252 N.C. 412, 113 S.E. 2d 912 (1960); Sguros v. Sguros, 252 N.C. 408, 114 S.E.2d 79 (1960).
[13] 252 N.C. 412, 113 S.E. 2d 912 (1960).
[14] *Cf.* Muse v. Muse, 84 N.C. 35 (1879), where an award of three dollars a month based on income capacity alone was sustained, there being no evidence of any other asset belonging to the husband.
[15] 189 N.C. 625, 127 S.E. 682 (1925).

of the husband,[16] it reversed the trial court and the case was remanded for additional evidence concerning the value of the husband's "entire estate, and the net annual income that is or should be derived from his estate or labor."[17] The court further stated that the ultimate object of the proceedings was to award such alimony pendente lite as was "just and proper having regard to the circumstances of the parties."[18] If there was any doubt after *Davidson* as to whether the "circumstances of the parties" provision required a finding that the husband had disregarded his support obligations in order to sustain an award based on the husband's earning capacity instead of his present earnings, there should certainly be none after *Conrad*.

The husband's ability to pay arose in a different context in *Sguros v. Sguros*,[19] the second of these two recent cases. Plaintiff wife was seeking alimony without divorce and moved for alimony pendente lite. Defendant husband had a Ph.D. degree in bacteriology and at the time the action was instituted was employed as a tobacco research technician at an annual salary of $10,740. He had an additional income from a Naval Reserve unit of about $1,000 a year. He had, however, resigned from these positions and accepted a professorship at a salary of $8,000 a year. He filed an affidavit stating that the opportunities for advancement in his field were greater as a university teacher than as a research technician. There was no finding that there was any other reason for his change of positions. The trial court awarded alimony pendente lite based on an annual income of $11,800. On appeal the supreme court said, "Under the circumstances here disclosed, we hold he had the right, so long as he acted in good faith, to accept the professorship at Miami even though at a reduction in salary. The court should have fixed the monthly payments on the basis of a salary of $8,000."[20]

The requirement that the husband must act in good faith in changing jobs could present a difficult question for the trial court to decide.[21]

[16] "The allowance may be based on the husband's earnings, or his earning capacity, although he is not possessed of money or property." Davidson v. Davidson, 189 N.C. 625, 628, 127 S.E. 682, 683 (1925), quoting *Corpus Juris*.

[17] 189 N.C. at 627, 127 S.E. at 683.

[18] *Id.* at 628, 127 S.E. at 683.

[19] 252 N.C. 408, 114 S.E.2d 79 (1960).

[20] *Id.* at 411, 114 S.E.2d at 82.

[21] If, for example, the husband were a baseball player who had for a long time been considering entering the sporting goods business and retiring from active sports and if he refused an offer of $100,000 for another year's play and entered business for $25,000 a year during the pendency of divorce proceedings, nothing else appearing, Sguros would require that the court award alimony based on the $25,000 job. When, however, the husband's decision to change jobs occurs apparently concurrently with the divorce proceedings, then it is open to question whether the same result would follow. *Conrad* and *Sguros* are not clear as to whether there is a presumption of good faith on the part of the husband. The problem of the husband's earning capacity, his good faith, etc., also arises in connection with the modification of permanent alimony decrees. See generally, Annot., 18 A.L.R.2d 10 (1951).

In *Sguros* the husband's change in jobs was presented in the most favorable light. He was a professional man seeking advancement and entering a highly respected new career. The appellate record indicates that the issue of good faith was not strongly contested.[22] There was no evidence offered to dispute his motive. But in future cases the question might arise whether the change in jobs would have been made had domestic harmony continued. If it were shown that the husband would not have changed jobs but for the discord, then perhaps an award based upon earning capacity would be sustained.

It is submitted that *Conrad* and *Sguros* are consistent and reasonable. Both require that the intent of the husband be examined before an award of alimony pendente lite may be based upon the husband's earning capacity.[23] In both the basic issue is the same, *i.e.,* Is the husband by changing jobs and reducing his income primarily motivated by a desire to avoid his support obligations? If this issue is answered affirmatively, the wife may be awarded alimony pendente lite based upon the husband's earning capacity; otherwise the award must be based upon his present earnings. This appears to be a reasonable result, for the husband should not be absolutely prohibited from changing jobs. And, at the same time, the wife's right to support should not be infringed when the husband does change jobs primarily for the purpose of reducing his income and thereby the amount of support.[24]

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Evidence—Inadmissibility of State-Seized Evidence in Federal Criminal Prosecutions—Silver Platter Doctrine.

In *Elkins v. United States*[1] defendants were indicted in a United States district court in Oregon for violating and for conspiracy to violate the Federal Communications Act. Before trial the defendants moved to suppress as evidence several recordings and a recording machine which had been seized by state officers and turned over to federal officials. The state officers had seized the evidence during a search

[22] See Brief for Appellee, p. 21.

[23] "The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband is *honestly engaged* in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Sguros v. Sguros, ante,* 408. To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband was failing to exercise his capacity to earn *because of a disregard* of his marital obligation to provide reasonable support for his wife...." Conrad v. Conrad, 252 N.C. 412, 418, 113 S.E.2d 912, 916 (1960). (Emphasis added.)

[24] The same reasoning applies where a reduction in the husband's income has occurred without a change in jobs.

[1] 364 U.S. 206 (1960).