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Domestic Relations—Effect of Community Property Laws on Interpretation of "Gross Income" in North Carolina Alimony Without Divorce Award

In the recent case of *Kinross-Wright v. Kinross-Wright*,[1] the North Carolina Supreme Court was asked to interpret for the first time the term "gross income" as used in an alimony judgment. Plaintiff, a resident of North Carolina, had been granted an alimony without divorce award[2] to be paid by defendant, at that time a resident of Texas. The award provided that defendant was to pay $350 or 30% of his gross income, whichever was greater, to plaintiff each month for the support and maintenance of herself and their two children. Defendant was ordered to forward to plaintiff an authenticated copy of his federal income tax return for each taxable year thereafter. It was further provided that if defendant's gross income *"as shown on said tax return"*[3] exceeded the sum of $14,000, a sum equal to 30% of the excess over $14,000 divided by 12 was to be added to each monthly payment due plaintiff and children for the next twelve months. Two months after the alimony award, plaintiff was granted an absolute divorce on grounds of two years separation, without prejudice to the prior alimony award.[4] Almost immediately thereafter, defendant remarried and continued to live in Texas with his second wife. Defendant later filed a petition for modification and clarification of the alimony judgment. Plaintiff then filed a petition alleging that defendant's gross income had exceeded $14,000 and that he had failed to pay her 30% of the excess as ordered. Defendant contended that the term "gross income" as used in the alimony judgment did not include income which, under the Texas community property laws,[5] was the income and property of his second wife. It was this dispute, *inter alia,* which the North Carolina court was asked to decide.

[1] 248 N.C. 1, 102 S.E.2d 469 (1958).
[2] See N.C. GEN. STAT. § 50-16 (Supp. 1957).
[3] 248 N.C. at 3, 102 S.E.2d at 470. (Emphasis added.)
[4] N.C. GEN. STAT. § 50-11 (Supp. 1957), which provides in effect that a prior alimony award will be terminated by a subsequent absolute divorce obtained by the wife on the ground of separation for the statutory period (two years), was not applicable here since the alimony award was obtained in 1953 and the amendment did not become effective until January 1, 1956. See Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867 (1955); Rayfield v. Rayfield, 242 N.C. 691, 89 S.E.2d 399 (1955).
[5] TEX. CONST. ANN. art. 16 § 15; TEX. REV. CIV. STAT. ANN. arts. 4613-14, 4619 (1951).
"The community property system has lived since the days of the rude tribes of Germany when the wives who shared the fighting were thought to be worthy of a share in the spoils. When Germanic Goths conquered and occupied Spain they carried the concept of community property with them to that nation, and one of the Gothic rulers of Spain, by statute, made community of matrimonial gains the general law of Spain. Spain, in turn, introduced the community property to the new world, and by this manner it became part of the law of Texas." TEX. CONST. ANN. art. 16, § 15, Interpretive Commentary at 102.

It is well settled under Texas law that a married person's legal gross income consists of only one-half of the total amount which he produces.[6] However, the North Carolina Supreme Court refused to give this meaning to the term "gross income," and instead concluded that the term as used in the alimony judgment meant gross income as interpreted under the North Carolina law. In reaching this conclusion, the court relied entirely on two cases from other jurisdictions—*Alexander v. Alexander*,[7] and *Arthur v. Arthur*.[8] These involved the construction of the terms "gross income" and "gross earnings," respectively, as used in separation agreements.[9]

In *Alexander*, the defendant was required by a separation agreement, approved by a divorce decree, to furnish a true and certified copy of his federal income tax return, and "if, as shown thereby *or otherwise established*, the defendant should have gross income [in excess of a specified amount] from whatever source derived [then the defendant was to pay a percentage of the excess to the plaintiff] . . . ."[10] The agreement had been executed in Missouri, a non-community property jurisdiction. Defendant thereafter remarried, moved to Texas, and then claimed that his gross income should be reduced by one-half in computing the amount due under the contract. It was held, under the particular circumstances, that the Texas law could not be invoked so as to reduce the payments.

In *Arthur*, the California court was called upon to interpret a separation contract, executed in New York, which provided that the defendant was to pay a certain percentage of his "gross earnings" to the plaintiff. Defendant later remarried and moved to the community property state of California.[11] It was apparent that the contract had not been executed in contemplation of defendant's future marriage, much less in contemplation of the possibility that defendant might subsequently move to a community property jurisdiction.[12] Further, no criterion

[6] The community property system is specifically recognized in the Texas Constitution and is set out in detail in the statutes of that state. These statutes clearly provide that any earnings of either husband or wife become community income, and that the wife's interest is equal to the husband's. Her interest in the community is properly characterized as a present vested interest equal and equivalent to that of her husband; one-half of the community income is therefore income of the wife. See TEX. CONST. ANN. art. 16 § 15; TEX. REV. CIV. STAT. ANN. arts. 4613-14, 4619 (1951). See also Hopkins v. Bacon, 282 U.S. 122 (1930); Wright v. Hays' Adm'r, 10 Tex. 130 (1848).

[7] 64 F. Supp. 123 (1945), *aff'd*, 158 F.2d 429 (1946), *cert. denied*, 330 U.S. 845 (1947).

[8] 147 Cal. App. 2d 252, 305 P.2d 171 (Dist. Ct. App. 1956).

[9] These are apparently the only reported cases in the United States which even remotely involve the *Kinross-Wright* situation.

[10] 64 F. Supp. at 125. (Emphasis added.)

[11] "In Louisiana, Texas, California, Arizona, Idaho, New Mexico, Nevada, and Washington, what is known as the 'community system of matrimonial gains' prevails." TIFFANY, REAL PROPERTY § 294 (new abr. ed. 1940).

[12] 147 Cal. App. 2d at—, 305 P.2d at 174.

was set forth in the contract whereby the meaning of "gross earnings" might be ascertained. With these factors in mind, the court held that "the word 'earnings' is used to indicate the amount produced, not that part only which may vest in defendant by virtue of the community property law."[13]

There are important distinctions between the *Alexander* and *Arthur* cases and the *Kinross-Wright* case. In the principal case, the judgment of the lower court expressly stated that the plaintiff's right to any increase in the amount of alimony being paid to her was to be determined by the amount of defendant's gross income "as shown on said tax return for the preceding year." There was nothing in the judgment which indicated that defendant's gross income was to be determined solely under North Carolina law. That the court meant defendant's gross income as shown on his tax return, whether it be determined under the laws of North Carolina, Texas, or some other state to which defendant might become subject, is the only interpretation to which the clear and simple language used by the lower court lends itself.

It is true that in the *Alexander* case the defendant was required to furnish plaintiff a copy of his tax return; however, the contract there clearly did not limit the amount of gross income to that amount as shown on the tax return. On the contrary, it was expressly provided that gross income might be "otherwise established." Under this broad language, together with the surrounding circumstances, the federal court was justified in ruling as it did.

Further, both the *Alexander* and *Arthur* cases involved contracts made and intended to be executed in states which did not have a community property system, and by parties, all of whom were residents of such states at that time. In neither case was it contemplated that the defendant would remarry and subsequently move to a community property state. In the principal case, however, defendant was already residing in Texas and had become subject to its community property laws at the time the final alimony judgment was rendered.[14] The record further indicates that the *Kinross-Wright* alimony suit was brought by plaintiff in contemplation of a subsequent absolute divorce from de-

[13] *Ibid.* In reaching this conclusion, the court stated: "[S]o far as plaintiff is concerned, his contracting a marriage with another woman thereafter and his removal to the State of California where such other woman had a vested interest in half of his earnings as community property are no different in effect than his execution of an assignment of one-half of such earnings to some finance company in consideration of a loan." *Ibid.*

[14] The original summons was issued February 13, 1952, at which time both plaintiff and defendant were residents of North Carolina. On March 5, 1952, an interlocutory order for subsistence and counsel fees was entered. In January of 1953, defendant moved his residence from North Carolina to Texas; therefore, when the cause came on for final hearing on September 3, 1953, and the final alimony decree was entered, defendant had been a legal resident of Texas for approximately nine months.

fendant; and that their marital difficulties had arisen from defendant's prolonged association with the woman whom he married within a month after the date of the absolute divorce. Thus, the parties must have known at the time of the alimony award that defendant intended to remarry and reside in Texas with his second wife after the absolute divorce was granted. It appears, then, that all parties must have contemplated that defendant's gross income as shown on his tax return would be determined under the Texas law rather than the North Carolina law, so long as defendant filed his income tax return as a resident of that state.

A careful reading of the *Alexander* and *Arthur* cases reveals that the court in each case reached its decision by applying the general rules of construction applicable to written instruments. The *Alexander* case plainly states: "[T]he question posed turns upon an interpretation of the phrase 'gross income' as the parties understood and used that term when they executed the contract."[15] In the principal case, the court was construing a judgment; but the rules of construction of written instruments also apply to the construction of judgments.[16] A judgment must be construed in the light of the situation of the court,[17] what the court had before it,[18] and the accompanying circumstances.[19]

If the North Carolina court had given effect to the apparent intention of the parties, based upon the surrounding circumstances, and to the plain language of the judgment, the term "gross income" might well have been construed in accordance with the operation of the Texas community property law. However, the court makes no mention of intention of the parties, and in following the holdings of the *Alexander* and *Arthur* cases states: "The reasoning in these two cases . . . appears to be sound, and may well be applied with approval to the factual situation in the instant case."[20] It is not certain whether the basis of the present decision is (1) that the court found the actual intent of the parties to be that North Carolina law was to control, notwithstanding

[15] 158 F.2d at 430.

[16] Decker v. Tyree, 204 Ky. 302, 264 S.W. 726 (1924); Perman Oil Co. v. Smith, 129 Tex. 413, 107 S.W.2d 564 (1937).

[17] Rinaldo v. Board of Medical Examiners, 123 Cal. App. 712, 12 P.2d 32 (Dist. Ct. App. 1932); *cf.* Bank of Union v. Redwine, 171 N.C. 559, 88 S.E. 878 (1916).

[18] Toms v. Holmes, 294 Ky. 233, 171 S.W.2d 245 (1943). The court's province is to construe contracts, not to make contracts for the parties, and neither court nor jury may disregard contracts expressed in plain terms and unambiguous language. See Belk's Dep't Store v. George Washington Fire Ins. Co., 208 N.C. 267, 180 S.E. 63 (1935); King v. Davis, 190 N.C. 737, 130 S.E. 707 (1925).

[19] Christiano v. Christiano, 131 Conn. 589, 41 A.2d 779 (1945). In construing a writing in order to determine the true intent of the parties, the following should be considered: the subject matter, the situation of the parties, and the circumstances at the time when the writing was executed. See Bank of Union v. Redwine, 171 N.C. 559, 88 S.E. 878 (1916).

[20] 248 N.C. at 12, 102 S.E.2d at 477.

the *apparent* intention of the parties, or (2) that, as a matter of public policy, where it is not otherwise clearly expressed to the contrary, an alimony award will not be diminished by the defendant's subsequent remarriage in a community property state.

It is submitted that the decision seems sound from the standpoint of public policy. Since the prime purpose of an alimony award is to provide support for a defendant's wronged wife and family, he should not, by the simple expedient of remarrying in a state where community property laws obtain, be allowed thereby to divest his first wife and family of a large part of their support.

Many variations of the *Kinross-Wright* situation might arise in the future. If the *Kinross-Wright* decision be considered as a judicial expression of public policy, it seems likely that the North Carolina court, in interpreting the term "gross income" in separation contracts or alimony judgments, will continue to disregard the community property laws of other states, absent a specific provision to the contrary.

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Husband and Wife—Tenancy by the Entirety—Surviving Spouse's Right to Contribution on Paying Debt Secured by Mortgage on Entireties Property

H and W hold a house and lot as tenants by the entireties.[1] The property has a market value of $20,000. Part of this value is due to recent improvements on the property, for which H and W jointly executed notes and a mortgage. H dies when there is still $8,000 owing. W succeeds to the entire fee and petitions H's executors for $4,000, claiming that amount as H's share of the joint debt. Under these facts, the Supreme Court of Delaware recently held in *In re Keil's Estate*,[2] that the claim should be allowed.

The recovery was allowed on the principle of equitable contribution. The rationale of the principle is that where parties are under a common burden or liability, one joint debtor who pays the whole debt, or more than his share, is entitled, in equity, to contribution from his co-obligors.[3]

[1] "'Estates by the entireties are creatures of the common law created by legal fiction and based wholly on the common-law doctrine that husband and wife are one, and, therefore there is but one estate, and in contemplation of law, but one person owning the whole. . . . By reason of their legal unity by marriage, the husband and wife together take the whole estate as one person. Neither has a separate estate or interest in the land, but each has the whole estate. Upon the death of one the entire estate and interest belongs to the other, not by virtue of survivorship, but by virtue of the title that vested under the original limitation.'" Woolard v. Smith, 244 N.C. 489, 493, 94 S.E.2d 466, 469 (1956), quoting 4 THOMPSON, REAL PROPERTY § 1803 (perm. ed. 1940).

[2] —Del.—, 145 A.2d 563 (1958).

[3] 13 AM. JUR., *Contribution* § 3 (1938).