Chapter 9: Domestic Relations and Persons

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CHAPTER 9

Domestic Relations and Persons

WILLIAM J. GREENLER, JR.

A. MARRIAGE

§9.1. Antenuptial contract in derogation of marriage. An interesting question of public policy was passed on in the case of Kovler v. Vagenheim, where the defendant brothers sought to avoid liability upon an agreement whereby, in consideration of the plaintiff's marrying their sister, who was pregnant, they agreed to indemnify plaintiff for all the sums he might be required to pay "through any judicial proceeding, or threat of judicial proceeding, or for any other reason" for support and maintenance of the woman and any child she might bear. Plaintiff married her, the child was born, and then plaintiff obtained a divorce in which the woman was given custody and an order for support of the child.

The Court rejected contentions that such an agreement was in derogation of marriage and in encouragement of separation and divorce, pointing out that if anything it was in aid of marriage, and only encouraged separation or divorce by whatever trivial effect the easing of the financial burden might indirectly have. The agreement was therefore held enforceable and not against public policy.

The case is one of first impression in Massachusetts but the Court cited as precedent two decisions in other states. Some have found basis for distinguishing these from the Kovler case.

It is interesting to speculate whether this agreement could be construed as one contemplating a future separation or divorce and thus

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The author wishes to acknowledge the assistance of Marie L. Clogher and Maxwell Heiman, members of the Board of Student Editors, in the preparation of §§9.1 and 9.8 of this chapter.

3 Wright v. Wright, 114 Iowa 748, 87 N.W. 709 (1901); Specht v. Richter, 258 Ill. App. 22 (1930).
4 Note, 11 Miami L.Q. 143, 144 (1956).
5 It has been held unnecessary that the antenuptial agreement contain an express mention of divorce where it can be shown by other evidence that this was the specific object of the contract. It may even be shown by parol evidence. Cumming v. Cumming, 127 Va. 16, 102 S.E. 572 (1920).
"a bargain about an event which they are not entitled to anticipate." 6 Most agreements held invalid as attempts to modify the marital relationship are contracts between husband and wife,7 but the public policy, as first enunciated in Maynard v. Hill,8 which the Court seeks to protect might still be endangered whether the spouses are parties to the contract or whether a third party is involved.

§9.2. Application of validating statute to foreign marriage. A significant decision involving the application of G.L., c. 207, §6, which validates bigamous marriages from and after the removal of the impediment if the parties live together in good faith on the part of one, is found in the case of Fraser v. Fraser.1 In that case the third wife brought a bill for a declaratory judgment as to her status, naming the husband and the second wife as respondents.2 The crucial issue was whether the second marriage, which in the beginning was bigamous because it took place before the divorce from the first wife was absolute, was validated under the aforementioned statute. The second wife testified that they went to New Hampshire to be married because the husband said he would have to wait six months in Massachusetts, but that it was all right in New Hampshire; that she believed they had a right to marry in New Hampshire and return to Massachusetts to live. The probate judge found that she acted in good faith, that the marriage was subsequently validated under the statute, and therefore the third marriage (to petitioner) was void.

The Supreme Judicial Court reversed this, holding that the second wife, on her testimony, "must be held to have known" 3 that the husband was incapable of entering a valid marriage in this Commonwealth, therefore the marriage was an attempt to evade the laws of this Commonwealth and invalid under G.L., c. 207, §10. The Court said this is not the "good faith" to which Section 6 applies.

In the Fraser opinion the Court considers and distinguishes the Vital case,4 wherein the woman went to New Hampshire and contracted a marriage within the two-year prohibited period after the man's divorce,5 and it was held that her marriage was later validated under Section 6 because she acted in good faith, not knowing he did not have the right to marry in this Commonwealth. While the distinction may be technically valid, it is far from realistic. In the Vital case the woman knew of the divorce, yet was held not to be on notice as to the

6 Marlborough v. Marlborough [1901], 1 Ch. 165.
8 125 U.S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654 (1888).

2 Hogan v. Hogan, 320 Mass. 658, 70 N.E.2d 821 (1947), establishes that such status is the proper subject of a declaratory judgment.
5 G.L., c. 208, §24.
§9.3 Domestic relations and persons

Law relative to remarriage: in other words, good faith was determined by a purely subjective standard, and recognized according to the woman's actual knowledge and belief although it may have been imprudent or even stupid. In the Fraser case, however, the woman is charged in effect with knowledge of the law applicable to the facts in her possession: and an objective test is used to determine not what she knew, it seems, but what she should have known. As a practical matter it is hard to distinguish the "good faith" of the women involved in the two cases, except to say that a different standard is applied. Yet the distinction is indeed technically valid, and once we concede that as a matter of fact the woman in the Vital case did not know of the prohibition but the woman in Fraser did, then there can be no quarrel with this case.

Justice Counihan wrote a forceful dissent reasoning that the Vital case establishes that Section 6 overrides Section 10 in these circumstances, and that "good faith" means actual honesty of purpose—a subjective test, as mentioned above. He also argues that the present petitioner, having entered the marriage with full knowledge of all the circumstances, should not be allowed to obtain indirectly the relief which the husband could not have obtained directly for himself. This approach seems equitable as it does not allow the husband to avoid his second marriage and to take on a third, thus defeating the general purpose of the marriage statutes to promote the stability of marriage and to protect offspring.

B. Divorce

§9.3. Grounds: Neglect, cruel and abusive treatment. In two cases, Young v. Young1 and Denisi v. Denisi,2 the Court's refusal to grant the relief sought might be interpreted as further evidence of a stiffening attitude on the part of the bench toward divorce.3 In the Young case the Court affirmed a decision of a probate judge denying a libel brought on grounds of cruel and abusive treatment and neglect to provide suitable maintenance. Here the Court stated that the neglect must be done "grossly or wantonly and cruelly."4 Neglect or refusal to provide which does not cause privation, suffering, or hardship falls short of the requirements of the statute.5

The Denisi libel alleged failure to provide and cruel and abusive treatment. The latter charge also was dismissed. The facts found were that the parties separated in 1952. The last blow struck by the libellant had been about ten years before, although he might have pushed libellant mildly in 1952. It was asserted that the real reason libellant left was because he had committed an act of incest upon their daughter.

5 G.L., c. 208, §1.
There was no gross neglect to provide. In a brief decision the Court upheld the dismissal.

Clearly, an act of cruelty committed upon the daughter is not, as such, cruelty upon the wife. Quite conceivably, however, acts committed with or upon another, if done with actual or constructive intent to injure the wife, might constitute mental cruelty upon her.\(^6\) This case does not say otherwise, but merely points out that on the findings of fact here such cruelty was negatived. Caution should be taken, therefore, not to apply the case further than the foregoing warrants.

§9.4. Grounds: Voluntary intoxication. In Jasper v. Jasper\(^1\) the Court had before it a libel for divorce by a husband and a petition for separate support by the wife, tried together. The husband alleged gross and confirmed habits of intoxication caused by the use of drugs.\(^2\) The probate judge dismissed the libel and granted the separate support. In summary, he found that the husband was a domineering husband and father, and frequently humiliated his wife by his attitude. She became nervously ill and depressed, and used sedatives and barbiturates on the advice of her physicians, and may have to continue to do so the rest of her life. The judge found that the wife had not acquired the drug habit by the "voluntary and excessive use" of drugs. The Court in affirming the decision stated: "That finding we construe to mean that in any event she had not contracted the habit."\(^3\)

Taken in this light the case cannot be assailed, since the negative finding of fact removed any question of law. It would be interesting to go one step further and suppose that she had in fact acquired the habit as a consequence of the originally proper use of drugs in pursuance of doctors' prescriptions. This would have squarely posed the question of the meaning of "voluntary": whether the word is used in a technical sense, indicating a free-will act, or whether the word may be susceptible of a looser construction, meaning free from any compulsion or duress. In the latter event it might be held that the acquisition of the habit under such circumstances was not "voluntary," due to the difficulty and hardship of the alternative choice of action. The Jasper case, however, does not pass upon this question. It should not be considered as authority for the broad proposition that the use of drugs upon advice of doctors may never constitute cause for divorce.

§9.5. Certificates of divorce. The certificate of divorce which must be produced in order to obtain a license to remarry no longer need contain the cause of the divorce, under a 1956 amendment of the law.\(^1\)

The certification of a divorce by a probate judge where the usual certificate cannot be obtained now carries a fee of three dollars.\(^2\)

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\(^2\) G.L., c. 208, §1.


§9.7 DOMESTIC RELATIONS AND PERSONS

C. HUSBAND AND WIFE

§9.6. Contract for married woman's services. The case of Cummings v. Brenci involved the validity of a contract made by a married woman to perform household services for another man in such a way as to derogate from her marital duties to her husband.

The plaintiff, a married woman estranged from her husband, sued the estate of a man in whose house she had lived with her minor daughter and acted as his business manager and housekeeper. The defense was in substance that a contract for such services was against public policy because it interfered with her husband's right to her time and services. The Court rejected this contention, stating that under the enabling statutes a married woman is now empowered to contract regarding her own time and services, and the possibility that such a contract might interfere with her marital duties must have been intended by the legislature. No contrary public policy is recognized.

D. PARENT AND CHILD

§9.7. Use of surname of infant child. In Mark v. Kahn the parties had two children. They were divorced, and the wife was given custody and an order for support. The wife was remarried to a man who had three children by a prior marriage. The present action was a bill in equity to enjoin the wife from registering the two children in school under the surname of the stepfather. The probate judge ordered an injunction.

The Supreme Judicial Court first faced the question whether equity could grant relief under the circumstances, and decided that it could: that equity may protect personal as well as property rights by injunction where the usual tests are met, namely, substantial impairment of rights, lack of adequate legal remedy, and practicability of injunctive relief. This seems sound.

The Court then proceeded to consider whether an injunction was proper here, and found that the controlling issue was the best interests of the children; and since the findings were deemed insufficient upon that issue, the case was remanded.

It is somewhat difficult to reconcile the one proposition, that the father has substantial personal rights which will be protected in equity, with the other proposition, that the "crucial and controlling issue" is whether the use of the stepfather's surname is for the best interests of the children. The latter proposition suggests that a right of the children, rather than that of the plaintiff, is involved. If the plaintiff has a personal right of his own, and no conduct of his bars him from seeking relief, it would seem that he should be afforded it.

2 G.L., c. 209, §§2, 4, 6.
The case is of first impression here, and the Court found no cases in other jurisdictions in point.

§9.8. Adoptions: The religious question. The question of the effect of a difference in religious persuasion between a child and prospective adopting parents was once again brought to the attention of the bar of Massachusetts in 1956, but this time in a legislative rather than in a judicial setting.

A bill \(^1\) was proposed in the General Court to amend G.L. c. 210, §5B, which provides that in making orders for adoption the judge, "when practicable," must give custody only to persons of the same religious faith as that of the child. Where dispute exists, the religion of the child is taken to be that of its mother.

Under the proposed amendment the requirement of a placement with parents of the same religious faith as the mother's would be eliminated from the present requirements in any case where the mother consents to a placement with adopting parents of a different faith than hers.

The proposed amendment would appear to have been directly influenced by the decision in the now famous Goldman case,\(^2\) and is also directed toward the kind of situation that arose in the more recent case of Ellis v. McCoy.\(^3\) In the Goldman case, the natural mother of the children, a Catholic, with full knowledge of the fact that the petitioners were members of the Jewish faith, consented to the adoption of her children by them. This consent was never withdrawn. Despite this, and a finding by the probate judge that "the petitioners are well equipped financially and physically to bring up the twins, and that they have treated them as their own children and intend to care for them and educate them to the best of their ability," the probate judge denied the petition, finding that "it was practicable to give custody only to persons of the Catholic faith."\(^4\) The denial of the petition for adoption was affirmed by the Supreme Judicial Court.

It would appear that the effect of the proposed bill would be to allow a decree of adoption in a case such as the Goldman case where the prospective parents are found suitable in every way except for being of a religious persuasion different from that of the child's natural mother.

In the legislative hearings, it was argued by the proponents of the bill that the result of the legislation would be to give effect to the desires of the natural mother of the child concerning its religious upbringing which they assert is not possible under the holding in Goldman, since the ultimate result of that case is to effectively prohibit any adoption across religious lines even where the petitioners have obtained the valid consent of the natural mother. It was also argued that the result in the Ellis case would not be disturbed since the natural mother's consent was never withdrawn.

\(^1\) House No. 1385 (1956).
\(^3\) 332 Mass. 254, 124 N.E.2d 266 (1955).
\(^4\) 331 Mass. at 650, 121 N.E.2d at 845.
mother would still be able to withdraw her consent at any time prior to the decree, and any consent to be effective would have to be made with full knowledge of all of the pertinent facts. In the Ellis case it appeared that the mother did not know of the disparity in religion at the time she consented to the adoption. She was subsequently allowed to withdraw her consent.

At the same hearings, the opponents of the amendment contended that the Goldman case does not stand for the proposition that no adoption across religious lines may be decreed. They argued that the Goldman case left the matter of granting or denying such adoptions within the discretion of the probate judge, that is, if the interests of the child would best be served by allowing an adoption in a case where the religion of the child differed from that of the prospective parents, it was within his power to order such an adoption. It was the position of the amendment's opponents that the effect of the Goldman case was in no way mandatory, but still left the weighing of the religious question within the power of the probate judge's discretion along with the general issue of the suitability of the prospective parents in all other aspects.5

The bill was reported upon favorably by the Joint Committee on Legal Affairs, but was not passed by the legislature. It was, however, reported to the next annual session. Thus it is quite possible that the end of this bill has not yet been seen, and that another chapter may yet be written in the stormy history in this commonwealth of the question of the effect of religious differences in adoption cases.