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Divorce: Suit by Guardian for Insane Ward

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however, arise in regard to a valid divorce obtained in a sister state, in order to grant the wife relief under the aforementioned statutes the Florida Court will have to overrule *Keener v. Keener*,[19] holding that a prerequisite to invoking Section 65.04(8) is a finding of invalidity of the foreign decree.

In holding that the wife can litigate the issue of alimony after her husband obtains a valid divorce in an ex parte proceeding based upon constructive service, the Florida Court has made a logical extension of the *Estin* case.[20] It is submitted that this view will in all probability be given the stamp of approval by the United States Supreme Court when it is confronted with a situation of this type, notwithstanding the distinction between comity and full faith and credit.

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DIVORCE: SUIT BY GUARDIAN FOR INSANE WARD

Scott v. Scott, 45 So.2d 878 (Fla. 1950)

Plaintiff husband, an insane ward, instituted suit for divorce through his guardian. The circuit court certified to the Supreme Court of Florida the question[1] of whether an insane spouse could obtain a divorce by a suit brought by his guardian. HELD, an action for divorce cannot be instituted and maintained by a guardian on behalf of a ward duly adjudged mentally incompetent prior to insti-

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allowance to be made to her, . . . but no alimony shall be granted to an adulterous wife." The logical inconsistency in recognizing a foreign divorce decree as valid and yet suggesting that the wife "sue for divorce" and thereby obtain alimony can perhaps be explained on the ground that the Florida Legislature has failed to foresee "divisible divorce" and to provide a much-needed statutory remedy whereby she can seek alimony.

[19]152 Fla. 13, 11 So.2d 180 (1942) (Husband secured ex parte divorce in North Carolina; later he and his divorced wife each moved to Florida, where she sued him for divorce and alimony without questioning validity of foreign decree; suit here held barred if foreign decree valid). The chancellor certifying the question under R. PRAC. SUP. CT. FLA. 38 was Hobson, Circ. J., and the opinion of the Supreme Court was written by Terrell, J., Brown, C. J., dissenting.

[20]Estin v. Estin, 334 U.S. 541 (1948).

[1]R. PRAC. SUP. CT. FLA. 38.

tution of suit. Cause remanded for entry of appropriate order.

The ruling on this question, heretofore without precedent in Florida, is squarely aligned with the majority view in the United States.[2] Most jurisdictions regard a suit for divorce as so strictly personal and volitional a matter that no one other than the injured spouse can maintain it.[3] Coupled with this view, which Florida recognizes, is the doctrine of condonation, that is, that there exists no offense capable of dissolving marriage automatically; and consequently the injured spouse has the right to forgive any marital offense by merely abstaining from legal action.[4] The dissolution of a marriage requires the consent of the aggrieved party; and a legally binding consent cannot be given when this party is insane.[5] Other jurisdictions deny the guardian's right to sue on the theory that in divorce proceedings the insane spouse alone can take the requisite oath that the allegations in the complaint are true.[6] In this connection it should be noted that the problem herein discussed is not the one presented when the aggrieved party is the sane spouse. Insanity is not among the many grounds for divorce in Florida.[7] An analogy is found in annulment, however; an insane person is incapable of

[2]Cohen v. Cohen, 73 Cal. App.2d 330, 166 P.2d 622 (1946); Sternberg v. Sternberg, 203 Ga. 298, 46 S.E.2d 349 (1948); Worthy v. Worthy, 36 Ga. 45, 91 Am. Dec. 758 (1867); Bradford v. Abend, 89 Ill. 78, 31 Am. Rep. 67 (1878); Mohler v. Shank, 93 Iowa 273, 61 N.W. 981 (1895); Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885); Johnson v. Johnson, 294 Ky. 77, 170 S.W.2d 889 (1943); Stevens v. Stevens, 266 Mich. 446, 254 N.W. 162 (1934); Higginbotham v. Higginbotham, 146 S.W.2d 856 (Mo. App. 1940); Moorman v. Kob, 291 N.Y. 181, 51 N.E.2d 921 (1943), *reversing* 264 App. Div. 209, 35 N.Y.S.2d 1, and *answering questions certified* in 264 App. Div. 873, 35 N.Y.S.2d 734 and 264 App. Div. 957, 37 N.Y.S.2d 440 (2d Dep't 1942); Jack v. Jack, 75 N.E.2d 484 (Ohio App. 1947); Dillion v. Dillion, 274 S.W. 217 (Tex. Civ. App. 1925); Heine v. Witt, 251 Wis. 157, 28 N.W.2d 248 (1947). *Contra*: Parnell v. Parnell, 2 Hagg. Cons. 169, 161 Eng. Rep. 704 (1814); *cf.* Campbell v. Campbell, 242 Ala. 141, 5 So.2d 401 (1941); Cohn v. Carlisle, 310 Mass. 126, 37 N.E.2d 260 (1941).

[3]Worthy v. Worthy, 36 Ga. 45, 91 Am. Dec. 758 (1867); Bradford v. Abend, 89 Ill. 78, 31 Am. Rep. 67 (1878); Mohler v. Shank, 93 Iowa 273, 61 N.W. 981 (1895); Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885).

[4]Scott v. Scott, 45 So.2d 878 (Fla. 1950).

[5]Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561 (1885); Dillion v. Dillion, 274 S.W. 217 (Tex. Civ. App. 1925).

[6]Mohler v. Shank, 93 Iowa 273, 61 N.W. 981 (1895); Higginbotham v. Higginbotham, 146 S.W.2d 856 (Mo. App. 1940).

[7]FLA. STAT. §65.04 (1949); *cf.* Hayes v. Hayes, 86 Fla. 350, 98 So. 66 (1923).

consenting to marriage, and a union so contracted can be annulled ab initio provided the insanity existed at the time of marriage.[8]

Only two states permit a guardian to maintain a suit for divorce on behalf of his ward.[9] Massachusetts does so specifically by statute.[10] The Supreme Court of Alabama reasons by a process of statutory construction that the guardian can institute suit,[11] inasmuch as a guardian is authorized to conduct general suits in equity on behalf of his ward[12] and the literal terms of the divorce statute require such a proceeding to be conducted exactly as are other suits in equity.[13] Florida, as well as most other states, has refused to follow this line of reasoning, taking the position that the Legislature should specifically grant the guardian this authority if it wishes him to have it.[14]

By the majority view, therefore, the right of the guardian to choose between divorce and condonation differs from all other types of choices, the basis of distinction being the highly personal and volitional nature of marriage and its termination. While consent or intervention of the guardian, acting under general powers, suffices to dissolve any other contractual relationship of the insane ward, the marriage contract is indissoluble.

Strict construction of guardianship powers rests upon a number of considerations, among which is the possibility that the marital partner of the insane spouse might accomplish indirectly what cannot be done directly under our present divorce law:[15] he might obtain a severance of the marital bond by deliberately provoking the guardian to act or by persuading him to act collusively. The attitude reflected in the instant decision is consistent, at least until the Florida law governing divorce proceedings against insane parties

[8]For a detailed analysis of annulment in Florida see Legis., 3 U. OF FLA. L. REV. 339 (1950); *cf.* Bennett v. Bennett, 157 Fla. 627, 26 So.2d 650 (1946).

[9]Campbell v. Campbell, 242 Ala. 141, 5 So.2d 401 (1941); Cohn v. Carlisle, 310 Mass. 126, 37 N.E.2d 260 (1941).

[10]MASS. GEN. LAWS c. 208, §7 (1932).

[11]ALA. CODE ANN. tit. 7, Equity Rule 8 (p. 1047) (1940).

[12]Campbell v. Campbell, 242 Ala. 141, 5 So.2d 401 (1941).

[13]ALA. CODE ANN. tit. 34, §§20, 23 (1940).

[14]Scott v. Scott, 45 So.2d 878 (Fla. 1950); *cf.* Johnson v. Johnson, 294 Ky. 77, 170 S.W.2d 889 (1943); Mohrmann v. Kob, 291 N.Y. 181, 51 N.E.2d 921 (1943), *reversing* 264 App. Div. 209, 35 N.Y.S.2d 1 and *answering questions certified* in 264 App. Div. 873, 35 N.Y.S.2d 734 and 264 App. Div. 957, 37 N.Y.S. 2d 440 (2d Dep't 1942).

[15]See note 7 *supra.*

is changed.

The question confronting the judiciary is, of course, purely one of existing law; but the problem involved cannot be finally resolved by the Legislature without due regard for social consequences as distinct from a process of mechanical reasoning. The Court has enunciated a rule without exception, based solely upon the desirability of preserving the right of condonation to the insane spouse personally. This, of necessity, contemplates a none-too-certain return to sanity in the future. Other rights of the ward might also bear consideration, such as the right to be protected from flagrant imposition by an erring sane spouse, even to the extent of utilizing divorce as a remedy if, in the best judgment of the guardian and the chancellor, this extreme measure is deemed necessary.

A conceptual analysis of the problem from the standpoint of social consequences necessarily evokes several problems of a psychological or sociological nature. What are the probabilities that an indissoluble marriage of this type will bring into the world insane offspring? What is the incidence of recovery in insanity developing at maturity? The clinical psychologist says that no general answer to such a question can be given; any intelligent prediction must be based on detailed data in each case, since what the lawyer glibly terms "insanity" is in reality a condition produced by various distinct combinations of factors, each of which imports a different likelihood of recovery. Again, how often is the sane spouse, being normal, driven to a life of adultery? Is this preferable, when weighed against the practical chances of reunion upon recovery of the insane spouse? How desirable is the lack of productivity caused by isolating one of the spouses in an asylum? These and other divergent aspects of the problem render it all the more difficult to solve by a general rule that will fit all cases; but the problem must nonetheless be faced.

Viewed from the functional nature of the judiciary, the position taken in the instant case is clearly correct until the Legislature sees fit to re-examine the entire problem and effect statutory changes. At such time it may make insanity a ground for divorce or it may choose to specify in the guardianship statute certain conditions under which the chancellor can entertain a divorce petition brought on behalf of an insane ward.

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