St. John's Law Review

Volume 25, December 1950, Number 1 Article 28

Amendment to the Penal Law and the Domestic Relations Law Relative to the Right of Life Prisoners on Parole to Marry

St. John's Law Review

AMENDMENT TO THE PENAL LAW AND THE DOMESTIC RELATIONS LAW RELATIVE TO THE RIGHT OF LIFE PRISONERS ON PAROLE TO MARRY.—"Any one who takes the pains to explore the ancient, and in many respects obsolete, learning connected with the doctrine of civil death, in consequence of crime, will find that he has to grope his way along paths marked by obscure, flickering and sometimes misleading lights, and he cannot feel sure that at some point in his course he has not missed the true road." [1] These words written over a half century ago apply with equal force today for in few areas of the law has the employment of a fictional doctrine resulted in the creation of such an anomalous creature: a man both dead and alive at the same time.

In the eyes of the law there are two types of death—natural and civil. Civil death, briefly defined, is the state of a person who, though possessing natural life, has lost all or most of his civil rights and as to these rights is deemed dead.[2] Civil death owes its origin to the ancient common law and, in the strict form that gave it most of the attributes of natural death, was confined to three classes of cases: (1) profession to a religious order, (2) abjuration and (3) banishment from the realm.[3] Civil death also resulted, in a milder form, upon sentence for treason or felony whereby the offender was placed in a state of attainder—a state which encompassed the additional elements of forfeiture and corruption of blood.[4]

The strict civil death known to the common law has never existed in New York and by statute the property attributes of attainder have been abolished.[5] However, two aspects of attainder, civil death [6] and limited forfeiture for fugitive traitors,[7] are specif-

---

[1] Andrews, J., in Avery v. Everett, 110 N. Y. 317, 333, 18 N. E. 148, 155 (1888).

[2] *In re* Donnelly's Estate, 125 Cal. 417, 58 Pac. 61 (1899).

[3] "The civil death commenced, if any man was banished or abjured the realm by the process of the common law, or entered into religion; . . . in which cases he was absolutely dead in law, and his next heir should have his estate." 1 Bl. Comm. 132. "The strict civil death seems to have been confined to the cases of persons professed, or abjured or banished the realm; and I do not find that it was ever carried further by the common law." Platner v. Sherwood, 6 Johns. Ch. 118, 129 (N. Y. 1822).

[4] Avery v. Everett, 110 N. Y. 317, 18 N. E. 148 (1888).

[5] N. Y. PENAL LAW § 512 provides: "A conviction of a person for any crime does not work a forfeiture of any property, real or personal, or of any right or interest therein. All forfeitures to the people of the state, in the nature of deodands, or in case of suicide, or where a person flees from justice are abolished."

[6] N. Y. PENAL LAW § 511.

[7] N. Y. CODE CRIM. PROC. §§ 814, 818, provide that where a person is guilty of treason, by plea or verdict, and cannot be found, judgment of outlawry may be rendered against him. Section 819 provides: "The defendant is thereupon deemed civilly dead, and forfeits to the people of this state during his lifetime, and no longer, all freehold estate in real property, of which he was seized in his own right, at the time of committing the treason, or at any time thereafter, and all his personal property." There have been no cases under these sections.

ically continued in the Penal Law. The modified version of civil death extant today may be found in Section 511 of the Penal Law which provides: "A person sentenced to imprisonment for life is thereafter deemed civilly dead." [8] It may be seen from the simplicity of this provision that the problem of determining the exact nature of civil death is left wholly to the courts; nowhere in the statutory scheme is the doctrine defined or explained. The enigma posed by this vestigial statute, *i.e.*, how much of the convict is civilly dead and how much civilly alive,[9] is always one of degree.

The paradox that a man may be physically alive yet civilly dead has its most startling effect on the marital status of one sentenced to life imprisonment. Life imprisonment in itself is grounds for neither divorce nor annulment.[10] Yet Section 6(2) of the Domestic Relations Law [11] permits the spouse of one sentenced to life imprisonment to validly marry and Section 341(4) of the Penal Law [12] provides that such a spouse shall not be guilty of bigamy. In *Glielmi v. Glielmi* [13] the court said, by way of dicta, that a marriage by the wife while her husband was serving a life sentence was a voidable marriage that could be set aside upon action by any of the three parties after the lifer was pardoned.[14] *Gargan v. Scully*,[15] decided two years later, arrived at the conclusion that such a marriage was neither void nor voidable but was valid in all respects. However, the court felt that the sentence of life imprisonment, in and of itself, did not dissolve the prior marriage but rather that such marriage would continue until the innocent spouse *elected* to terminate it.[16] This theory of the life prisoner's marriage continuing until an election by the innocent spouse was adopted by the lower courts of New York [17] and

---

[8] A person sentenced to death is also deemed to be civilly dead. Jones v. Jones, 249 App. Div. 470, 292 N. Y. Supp. 705 (3d Dep't 1937), *aff'd without opinion*, 274 N. Y. 574, 10 N. E. 2d 558 (1937). For a criticism of the *Jones* case for giving extraterritorial effect to Penal Law § 511, *see* Panko v. Endicott Johnson Corp., 24 F. Supp. 678 (N. D. N. Y. 1938).

[9] N. Y. PENAL LAW § 512-a provides: "A convict sentenced to imprisonment is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not sentenced or convicted."

[10] Matter of Lindewall, 287 N. Y. 347, 39 N. E. 2d 907 (1942).

[11] Laws of N. Y. 1915, c. 266.

[12] Laws of N. Y. 1915, c. 364.

[13] 72 Misc. 511, 131 N. Y. Supp. 373 (Sup. Ct. 1911).

[14] *Id.* at 512, 131 N. Y. Supp. at 374.

[15] 82 Misc. 667, 144 N. Y. Supp. 205 (Sup. Ct. 1913).

[16] ". . . if he be civilly dead, that *ipso facto* dissolves the marital relation if the innocent spouse so elects. . . ." *Id.* at 670, 144 N. Y. Supp. at 207.

[17] "If the decedent had seen fit to marry another, she could have done so. However, she did not choose to take advantage of the provisions of the Domestic Relations Law and, consequently, her marriage to the appellant continued in full force and effect." Matter of Lindewall, 259 App. Div. 196, 197, 18 N. Y. S. 2d 281, 283 (1st Dep't 1940), *rev'd*, 287 N. Y. 347, 39 N. E. 2d 907 (1942); Jones v. Jones, 249 App. Div. 470, 292 N. Y. Supp. 705 (3d Dep't 1937), *aff'd*, 274 N. Y. 574, 10 N. E. 2d 558 (1937); Brookman v. Brookman, 161 Misc. 741, 292 N. Y. Supp. 918 (Sup. Ct. 1937).

continued to be the law until the decision of the Court of Appeals in *Matter of Lindewall*.[18] Here the court, in determining the question whether a life prisoner could qualify as a surviving spouse under Section 83 of the Decedent Estate Law,[19] repudiated the theory of election formulated by the lower courts and held that it was the *sentence* of life imprisonment which *ipso facto* terminated the marriage. The court did not hold that the marriage was terminated for *all purposes* by such sentence but rather that it was terminated ". . . to the extent of liberating the husband or wife of the one sentenced and the property of such husband or wife from all the property obligations and restrictions arising from the relation . . . ." [20] Sections 320 and 322 of the Correction Law [21] impliedly assume the continued existence of the marriage despite civil death and even at common law the civil death of one party did not automatically dissolve the marriage.[22]

The result of the *Lindewall* case to the effect that the marriage of one civilly dead is automatically dissolved for one purpose and yet may subsist for other purposes certainly cannot be hailed as clarifying the effect of civil death on the marital status. Especially is this so when one considers the effect of Section 58 of the Domestic Relations Law [23] which provides that a pardon shall not *restore* a life prisoner to the rights of a previous marriage. In the cases wherein Section 58 was applied the innocent spouse of the life prisoner had either married again or had demonstrated, in some other manner, that she wished to terminate the marriage.[24] Thus the application of Section 58 was relatively simple: the pardon had no effect on the

---

[18] See note 10 *supra*.

[19] Laws of N. Y. 1930, c. 174.

[20] 287 N. Y. 347, 357, 39 N. E. 2d 907, 912 (1942).

[21] N. Y. CORRECTION LAW §§ 320, 322, provide, in substance, that the spouse of one sentenced to life imprisonment may apply for the appointment of a committee of such person's estate and the court may then direct payment of the principal and income, from the convict's property, for the support of such persons as the convict would be legally liable to support had there been no conviction. Section 325 provides that upon pardon the prisoner shall have his property transferred back to him.

[22] ". . . the matrimonial contract continued. . . ." Platner v. Sherwood, 6 Johns. Ch. 118, 131 (N. Y. 1822).

[23] N. Y. DOM. REL. LAW § 58 provides: "A pardon granted to a person sentenced to imprisonment for life within this state does not restore that person to the rights of a previous marriage or to the guardianship of a child, the issue of such a marriage."

[24] Glielmi v. Glielmi, 72 Misc. 511, 131 N. Y. Supp. 373 (Sup. Ct. 1911) (innocent spouse remarried); Gargan v. Scully, 82 Misc. 667, 144 N. Y. Supp. 205 (Sup. Ct. 1913) (court granted plaintiff's motion for mandamus compelling deputy city clerk to issue to plaintiff a marriage license); Jones v. Jones, 249 App. Div. 470, 292 N. Y. Supp. 705 (3d Dep't 1937) (innocent spouse remarried); Bond v. Bond, 162 Misc. 449, 295 N. Y. Supp. 24 (Sup. Ct. 1937) (innocent spouse remarried); Brookman v. Brookman, 161 Misc. 741, 292 N. Y. Supp. 918 (Sup. Ct. 1937) (innocent spouse obtained a declaratory judgment stating that she was no longer the wife of the life prisoner and permitting her to resume her maiden name).

wife's remarriage. But consider the effect of a pardon in the case where the wife has not remarried and has no intention of terminating the marriage. In such a case, under the theory of election, a possible interpretation was that the pardoned prisoner was still validly married. It might be said that the innocent spouse had lost the right to terminate the marriage once the life prisoner is pardoned. This result could be rationalized on the basis that a pardon removes the prisoner from the operation of the civil death statute [25] and that therefore there is no statutory authority for the wife to dissolve the marriage. Section 58 uses the words ". . . does not restore . . . to the rights of a previous marriage . . ." thereby implying that it only applies to the case where the life prisoner's marriage has been previously terminated. Under the election theory the marriage subsisted as long as the wife did not elect to remarry and it would seem, therefore, that if the marriage was not terminated prior to a pardon it could not be terminated after pardon. However, the *Lindewall* case, with its repudiation of the election theory and its holding that the marriage is *ipso facto* dissolved forecloses any such construction as outlined above. The present state of the law is far from clear but it is probable that the innocent spouse may terminate the marriage at any time before or after the lifer is pardoned.[26]

Although no cases have arisen on the exact point, it was the opinion of the Attorney General [27] that a parolee originally sentenced to life imprisonment could not legally contract a valid marriage in New York. Parole does not restore the prisoner to his civil rights since his sentence is regarded as subsisting for the maximum term.[28]

---

[25] The general effect of a pardon is to acquit the offender of all forfeitures annexed to the offense for which he obtained the pardon. *In re* Court of Pardons, 97 N. J. Eq. 555, 129 Atl. 624 (1925). "The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications." Williston, *Does a Pardon Blot Out Guilt*, 28 HARV. L. REV. 647, 653 (1915).

[26] "All of the exceptions and provisions for liberation are in favor of the innocent spouse only, and it should be borne in mind that although the innocent spouse is thus freed from marital obligation, the life prisoner, even though pardoned, is still bound unless the innocent spouse elects to remarry." OPS. ATT'Y GEN. 92, 93 (1947). To this extent the election theory is probably still law.

A pardoned lifer may validly contract a marriage provided he informs his bride of his previous conviction and, under those circumstances, such a marriage will not be subject to termination by the innocent spouse. *Ibid.*

[27] "It is my opinion that a parolee originally sentenced to life imprisonment cannot legally contract a valid marriage in this State, so long as the sentence is in full force and effect. Should he attempt to do so, the statutes would be immediately self-executing and the marriage would be terminated forthwith so far as concerns the woman whom he attempted to marry." *Ibid.*

[28] Brookman v. Brookman, 161 Misc. 741, 292 N. Y. Supp. 918 (Sup. Ct. 1937). In the *Brookman* case the court said that the mere fact that the lifer might be paroled or pardoned in a few years does not prevent the innocent spouse from terminating the marriage. But see 48 STATE DEP'T REP. 112

Therefore, a parolee comes directly under the operation of Section 511 of the Penal Law and may be considered as civilly dead as if he were confined within prison walls. Section 6 of the Domestic Relations Law providing that:

> A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either: . . . 2. Such former husband or wife has been finally sentenced to imprisonment for life . . .

cannot be interpreted to relate only to marriages contracted *before* the final sentence of life imprisonment. Since a parolee is regarded as still serving his life sentence he comes under the statutory definition of one finally sentenced to imprisonment for life. Thus, by the inter-relation of Section 6 of the Domestic Relations Law and Section 511 of the Penal Law an anomalous situation was created wherein a parolee who married while on parole was placed in the same position as a life prisoner whose marriage occurred prior to the life sentence. In either event the marriage could be terminated by the innocent spouse with equal impunity. Since parole has become the rule rather than the exception under modern indeterminate sentences, the problem created by the operation of Section 511 of the Penal Law and Section 6 of the Domestic Relations Law was not at all an academic one.

In order to remove the doubt existing under these statutory provisions, the Legislature, on the recommendation of the Law Revision Commission,[29] enacted an amendment to Section 511 of the Penal Law effective March 22, 1950.[30] Conformity amendments were made to Section 6 of the Domestic Relations Law and Section 341 of the Penal Law.[31] The amended Section 511,[32] permitting a

---

(N. Y. 1933), where the Attorney General was of the opinion that the innocent spouse of one sentenced to imprisonment for the definite term of 50 years may not remarry.

[29] 1950 LEG. DOC. No. 65(K), 1950 REPORT, N. Y. LAW REVISION COMMISSION.

[30] Laws of N. Y. 1950, c. 144. "A person sentenced to imprisonment for life is thereafter deemed civilly dead; *provided, that such a person may marry while on parole if otherwise capable of contracting a valid marriage. A marriage contracted pursuant to this section without the prior written approval of the board of parole shall be a ground for revocation of the parole.*" (Amendment in italics.)

[31] Laws of N. Y. 1950, c. 144. "A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either: . . .

2. Such former husband or wife has been finally sentenced to imprisonment for life; *this exception shall not apply if the marriage with such former husband or wife was contracted pursuant to the provisions of section five hundred eleven of the penal law. . . .*" (Amendment in italics.) An identical amendment was made to Section 341(4) of the Penal Law.

[32] N. Y. PENAL LAW § 511 was also amended by Laws of N. Y. 1950, c. 525, to provide: "This section shall not apply to a person sentenced to imprisonment for an indeterminate term, having a minimum of one day and a maximum of his natural life."

parolee, with the prior written approval of the parole board, to contract a valid marriage, ends much of the confusion and uncertainty existing in this phase of the law of civil death. However, it is to be noted that the amendment by its terms only applies to a marriage contracted while the life prisoner is on parole. Civil death with its maze of incongruities still haunts that person married prior to being sentenced to life imprisonment.[33] The amendment has no effect on the marriage of such person, notwithstanding a subsequent parole or pardon.[34]

A question arises under this amendment as to what effect a revocation of the parole might have on a marriage contracted under the amended section. Apparently a person whose parole has been revoked should be in no better position, in regard to his marital status, than one who married prior to becoming a life prisoner. Then, too, a question may arise as to the effect of Section 58 of the Domestic Relations Law on a parolee's marriage. It would appear that since the new amendment relieves a parolee from the consequences of civil death, at least so far as his marriage is concerned,[35] it should also make Section 58 inapplicable. Except in the case of the pardoned lifer who married prior to the sentence of life imprisonment,[36] Section 58 should apply only where one of the parties is civilly dead. The amended Section 511 of the Penal Law declares that, for purposes of contracting a valid marriage, a parolee is no longer civilly dead.

There is little doubt that the present change in the law is in the best interests of society.[37] However, it is questionable whether the creation of exceptions to the doctrine of civil death has met the real problem. Since so many anomalies may arise under Section 511 of the Penal Law and since there is no apparent reason for the retention of this doctrine, it is submitted that Section 511 and its related statutes should be repealed. In order that the innocent spouse may be protected, life imprisonment should be made grounds for either divorce or annulment.

---

[33] Matter of Lindewall, 287 N. Y. 347, 39 N. E. 2d 907 (1942).

[34] See note 26 *supra*.

[35] The amendment does not relieve the parolee from any other effects of civil death. For a general discussion of the consequences of civil death following a sentence to life imprisonment, see Note, 139 A. L. R. 1308 (1942); Legis., 50 HARV. L. REV. 968 (1937).

[36] See note 26 *supra*.

[37] A survey by the Department of Justice of 85,000 parole case histories demonstrates that married parolees are more law abiding than single ones. 4 U. S. ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, 342-352 (1939). See THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE COMMITTEE ON STATE LEGISLATION, BULLETIN No. 2, 143 (1950), approving the amendment.