

The Pre-Marital Blood Test Law

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CURRENT LEGISLATION

THE PRE-MARITAL BLOOD TEST LAW.—Nationwide attention was being showered upon the effects and prevalence of syphilis in this country.¹ Until a comparatively short time ago, little was being done to eradicate this affliction. The reason was obvious. Too many people regarded syphilis as an unmentionable moral scourge rather than as a threat to the public health and so allowed the disease to rot the very foundations of the physical and mental well-being of our people. This attitude was reflected in the legislatures of the various states. Recently, after learning the true facts about this disease through the publicity given to it by the press, motion picture, radio and preacher, the disposition of the public towards this affliction changed favorably so that an intelligent consideration of the problem became possible.² The legislature, with the support of an enlightened community, was ready to launch its war against syphilis.

On April 12, 1938, the Breitbard-Desmond pre-marital blood test bill became law with the approval of the Governor.³ The Act was to go into effect on July 1, 1938. Previously, the Governor showed his stand on this momentous problem by approving legislation requiring prospective mothers to undergo serological tests to determine the presence of syphilis, in an effort to reduce infant mortality.⁴ In essence, the pre-marital blood test law provides for the examinations and serological tests of applicants for a marriage license to determine the presence or absence of syphilis and also makes a new provision regarding the effectual duration of the marriage license, once issued. The object of the Act is to curb the spread of syphilis.⁵

¹ An estimated five per cent of the population of the United States was afflicted by the disease. According to Dr. Thomas Parran's estimate, an average of one-half million new cases are reported annually. The New York Board of Health figures established the fact that in New York State, in 1937, ten per cent of the 186,267 children born were afflicted with syphilis, innocent victims of the transmission of syphilis from parent to child.

² Dr. Thomas Parran, Surgeon General of the United States Public Health Service, in his address at Skidmore College in Saratoga on June 6, 1938, said, "We are witnessing now a renaissance in public health * * *. The community is beginning to concern itself with the prevention, alleviation and cure of all sickness and disease." In reference to syphilis he said, "It should be possible by national effort such as now is under way to make syphilis a rare disease in this generation." On May 25, 1938, President Roosevelt signed the La Follette-Bulwinkle Law. The bill provides for an expenditure of fifteen million dollars over a period of three years. The money is to be distributed to those agencies which require funds to carry on the fight against syphilis.

³ N. Y. Laws 1938, c. 640.

⁴ N. Y. Laws 1938, c. 133.

⁵ Eight states now require pre-marital blood tests for both parties. They are New Jersey, Rhode Island, Michigan, Wisconsin, Connecticut, Illinois, New Hampshire and New York. Five states, Alabama, North Dakota, Texas, Wyoming and Louisiana, require a physician's certificate from the male only. In eleven other states, only personal affidavits of good health are required.

The bill is divided into six sections which amend Sections 13, 14, 15 and 19 of the Domestic Relations Law. Former Section 13-a of the Domestic Relations Act, commonly referred to as the "Todd Act", is renumbered 13-b and a new Section 13-a is inserted. This recently enacted 13-a is subdivided into seven parts, subsection 1 being the nucleus of the Act, reading as follows:

"13-a. Physician's examinations and serological tests of applicants for a marriage license.

1. Except as herein otherwise provided, no application for a marriage license shall be accepted by the town or city clerk unless accompanied by or unless there shall have been filed with him a statement or statements signed by a duly licensed physician that each applicant has been given such examination, including a standard serological test, as may be necessary for the discovery of syphilis, made on a day specified in the statement, which shall be not more than the twentieth day prior to that on which the license is applied for, and that in the opinion of the physician the person therein named is not infected with syphilis, or if so infected is not in a stage of that disease whereby it may become communicable."

It must be noted that persons having non-communicable syphilis are under no disabilities as far as obtaining a marriage license is concerned. As to those with communicable syphilis, the Act does not present an absolute bar to their marrying. The law provides for many exceptions and by subdivision 2 of Section 13-a, a justice of the Supreme Court or the county judge of the county in which the woman resides or if the woman is between the age of fourteen and sixteen, the judge of the children's court of such county, may make an order, in his discretion, on joint application of both the parties desiring the license, dispensing with the requirements of subdivision 1 of this section as to either or both of the parties, if satisfied that the public health and welfare will not be injuriously affected thereby. It is thus possible to have a deathbed marriage although one or both may be suffering from syphilis in the communicable stage. Another exception to the blood test requirement is made where the woman is pregnant at the time application for a marriage license is made.⁶ In such case, Section 13-a and its related parts, do not apply to either the man or woman. To insure the secrecy of the results of the blood tests, provision is made whereby the laboratory result is transmitted to the

⁶ N. Y. DOM. REL. LAW § 13a, subd. 7. (No provision is made for any medical verification of the applicant's statement as to pregnancy. Unless a definite and universal policy of demanding such authentication is established, a fraudulent statement, to the effect that the woman is pregnant, may be successful as a means of evading the law.)

physician, who in turn is to file the report with the district state officer or with the department of health in cities of a population of 50,000 or more and such record is to be closed to public inspection. A divulging of the confidential information of the report subjects the guilty party to the penalty applicable to a misdemeanor. To avoid confusion and disputes as to what shall constitute a "standard serological test" called for by the Act, it is provided that such test shall be a laboratory test for syphilis approved by the state commissioner of health. Such test may be made by the state department of health or by the City of New York's department of health or by a laboratory approved by such state or city department of health. In order to assure strict compliance with the statute, it is made a misdemeanor for any applicant for a marriage license, any physician or representative of a laboratory to misrepresent any of the facts called for by the statement required of the applicant, the physician's report or the laboratory report. It is also a misdemeanor for any licensing officer to issue a license knowing or having reason to believe that any of the facts have been misrepresented.⁷

Prior to the passage of this Act, under Section 15 of the Domestic Relations Law, the applicant was required to sign and verify a statement before the clerk containing the following clause:

"I have not to my knowledge been infected with any venereal disease, or if I have been so infected within five years I have had a laboratory test within that period which shows that I am now free from infection from any such disease."

Under Section 15 as amended, we find the omission *in toto* of the above clause and in its place is inserted the following statement:

"I have had the examination and laboratory test required by the domestic relations law of persons about to marry, * * * and such test shows no evidence of syphilis * * *; nor am I infected with any other venereal disease, to the best of my knowledge and belief * * *."

New York State, unlike Illinois, Wisconsin and Michigan,⁸ does not include gonorrhoea in its examination requirements. The New York law is aimed primarily at syphilis and this is due, in part, to the practical difficulties of diagnosis offered by gonorrhoea. The applicant,

⁷ N. Y. DOM. REL. LAW § 13a.

⁸ ILL. STAT. (1937) c. 89, § 6a (The Illinois statute, while it contains the requirements for a gonorrhoea test, is not, in other respects, as extensive as the New York statute. The Illinois law was passed on June 23, 1937); WIS. STAT. (1937) c. 245.10 (The gonorrhoea test is to be had only if the physician deems it necessary. The syphilis test is mandatory. The Wisconsin act, in its present form, was passed in 1937); MICH. STATS. ANN. (1937) c. 244, § 25.25 (A microscopic test for gonococci and a laboratory test for syphilis are required plus a general examination for any venereal disease. The Michigan law went into effect on October 29, 1937). We observe that the legislatures have only recently included gonorrhoea in their examination schedule.

however, is still required to sign an affidavit to the effect that he believes himself to be free from any venereal disease. The ineffectiveness of such an affidavit has been proven in the past. The inclusion of gonorrhoea in the examination schedule may be expected in the near future.

Of major importance is the amendment of Section 13 of the Domestic Relations Law by the new Act. By this amendment, the lifespan of the marriage license is reduced from one year to sixty days.⁹ A license applied for prior to the effective date of this Act, July 1, 1938, is not affected by the change. Reducing the period from a year to sixty days compels the applicants to act quickly at the risk of having to undergo another blood test to obtain a new license. By thus shortening the period between the issuance of the license and the marriage ceremony, the risk of infection during this term is greatly diminished and a more effective control of the spread of syphilis is achieved.

In a discussion of the pre-marital blood test law, it becomes necessary to comment briefly on the "Todd Act", enacted on April 30, 1937.¹⁰ The statute provides that "a marriage shall not be solemnized within seventy-two hours from the date and hour of the issuance of the marriage license therefor * * *." The object of the Act was to prevent hasty and ill-considered marriages by impetuous couples. While the law was of great value when enacted, its purpose has been defeated by the pre-marital blood test law which indirectly solves the problem the "Todd Act" attempted to correct. Before one may be eligible for a marriage license he must submit to the medical examination and the serological test and must thereafter await the results of the laboratory blood test. These and other necessary formalities consume about three to four days. To add a three-day waiting period after the issuance of the license is to unnecessarily inconvenience couples desirous of marrying without offering any advantages to compensate for the hindrance caused. Clearly, it is not the policy of the state to discourage marriages. The legislature should act to remove this impediment.

Power of the State to Enact such Laws:

While marriage remains a status founded upon a civil contract,¹¹ it is a relationship in which the state is vitally concerned. The regulation of marriages has been fully recognized as a matter within the exclusive jurisdiction of the legislatures of the states.¹² They may

⁹ The Illinois statute, ILL. STAT. (1937) c. 89, § 6a, has made the license effective for only thirty days after the date of its issuance. Does this shorter period lend itself more favorably to the task of curbing the spread of syphilis?

¹⁰ N. Y. LAWS (1937) c. 294.

¹¹ N. Y. DOM. REL. LAW § 10.

¹² *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723 (1888); *Fearon v. Fearon*, 272 N. Y. 268, 5 N. E. (2d) 815 (1936); *Barrington v. Barrington*, 206 Ala.

thus prescribe who may marry, the procedure essential to a valid marriage, the effects on the property rights of the parties and other such related issues.¹³ The law whereby the state prohibits the marriage of one infected with syphilis is no different than those which prevent incompetents from marrying. Aside from the state's power to regulate marriages, it is well within the police power of a state to enact laws to prevent the spread and introduction of infectious and contagious diseases.¹⁴ Thus, it appears that the legislature has full power to pass laws such as our pre-marital blood test Act. The constitutionality of such statutes has been tested and upheld in those states in which the question arose.¹⁵

Evasion of the Act:

Should two persons, domiciled in this state, leave it for the purpose of marrying in a sister state, intending to return and returning immediately thereafter, in order to evade the pre-marital blood test Act, an issue may arise as to the validity of the marriage status in New York.¹⁶ Generally, we are governed by the cardinal rule of law that the validity of a marriage is to be determined by the laws of the

192, 89 So. 512 (1921); *In re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. 651 (1892).

¹³ *Davidson v. Ream*, 97 Misc. 89, 161 N. Y. Supp. 73 (1916); *Sweigart v. State*, — Ind. —, 12 N. E. (2d) 134 (1938); *Wiley v. Wiley*, 75 Ind. App. 456, 123 N. E. 252 (1919); N. Y. DOM. REL. LAW §§ 5, 11, 13, 50 and 51.

¹⁴ *People v. Fox*, 69 Misc. 400, 127 N. Y. Supp. 484 (1910) (Case was reversed on other grounds); *French v. Davidson*, 143 Cal. 658, 77 Pac. 633 (1904); *Howard v. Howard*, 51 N. C. 235 (1858); *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 966 (1914); FREUND, POLICE POWERS (1904) § 124 ("Legislation forbidding the marriage of persons afflicted with disease should be considered as a matter of principle to be within the police powers of the state."); TIEDEMAN, POLICE POWERS (1886) § 149; COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) c. 16 ("The state has an inalienable right by virtue of the police power, to pass all laws to secure the general health, comfort and prosperity of the state.").

¹⁵ *Gould v. Gould*, 78 Conn. 242, 61 Atl. 604 (1905); *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 966 (1914) (The statute in effect at the time, Laws of 1913, c. 738, required all male persons applying for a marriage license to file a physician's report or certificate to the effect that he was free from any acquired venereal disease. Statute held constitutional as a valid exercise of the state's police power. A discussion of this case is to be found in (1914) 27 HARV. L. REV. 573; (1914) 13 MICH. L. REV. 39).

¹⁶ *Lyannes v. Lyannes*, 171 Wis. 381, 177 N. W. 683 (1920) (Parties herein, prohibited from marrying in Wisconsin by reason of its eugenic marriage law, went to Michigan and were married in that state, in evasion of the Wisconsin law, returning thereafter to Wisconsin. The marriage was held valid in Wisconsin. The court said, "The eugenic marriage law has no extra-territorial effect.").

lex loci.¹⁷ While there are exceptions to the above rule,¹⁸ they are to be strictly applied and the general rule will prevail in most instances. Though the state of the domicile has the power to refuse to give legal effect to a marriage in evasion of its laws,¹⁹ we are to distinguish between the power to do an act and the policy or practice actually adopted or followed when a certain situation arises. A study of the evasion problem makes one conscious of the conflict of decisions to be found on this phase of the law. Those leaning towards the *lex loci* rule cite the *Moore, Thorp* and *Van Voorhis*²⁰ cases while the proponents of the *lex fori* rule cite the *Cunningham* and *Mitchell* cases.²¹ These are typical evasion cases. In the *Cunningham* case, the marriage was entered into in New Jersey by persons domiciled in New York, the female being under the age of consent as fixed by the Domestic Relations Law, Section 7. Stressing the fact that no cohabitation followed the ceremony, the court granted an annulment of the marriage. The *Mitchell* case was similar to the *Cunningham* case. Cognizant of the great weight placed on the absence of cohabitation in the *Cunningham* case, it is fair to assume that the decision might have been otherwise had the marriage been consummated. With this in mind and the fact that the *lex loci* rule makes for stability and uniformity in marriages and is a rule of necessity,²² it would seem that the marriage in evasion of our statute would be valid in New York. While an evasion statute will be effective to expressly

¹⁷ *Van Voorlis v. Brintnall*, 86 N. Y. 18 (1881); *Fisher v. Fisher*, 250 N. Y. 313, 165 N. E. 460 (1929); *Van Wyk v. Realty Traders*, 215 App. Div. 254, 213 N. Y. Supp. 28 (3d Dept. 1926); *In re White*, 129 Misc. 835, 223 N. Y. Supp. 311 (1927); *Matter of Burke's Estate*, 143 Misc. 268, 256 N. Y. Supp. 862 (1932).

¹⁸ *Earle v. Earle*, 141 App. Div. 611, 126 N. Y. Supp. 317 (1st Dept. 1910); *Incuria v. Incuria*, 155 Misc. 755, 280 N. Y. Supp. 716 (1935) ("The validity of a marriage contract is determined by the law of the place where it was contracted and if valid there will be held valid in New York except where marriage is incestuous, polygamous or is prohibited by positive law of New York").

¹⁹ *Cunningham v. Cunningham*, 206 N. Y. 341, 99 N. E. 845 (1912); *Mitchell v. Mitchell*, 63 Misc. 380, 117 N. Y. Supp. 671 (1909); *Norman v. Norman*, 121 Cal. 620, 54 Pac. 143 (1898); *Whippen v. Whippen*, 171 Mass. 560, 51 N. E. 174 (1898); *Meisenhelder v. C. & N. W. Ry.*, 171 Minn. 300, 213 N. W. 32 (1927); STORY, CONFLICT OF LAWS (3d ed. 1846) § 124a.

²⁰ *Van Voorlis v. Brintnall*, 86 N. Y. 18 (1881); *Thorp v. Thorp*, 90 N. Y. 602 (1882); *Moore v. Hegeman*, 92 N. Y. 521 (1883) (In these three cases, the marriages in evasion of the New York law were held valid in New York. In the *Van Voorlis* case, parties were prohibited from marrying in this state. They were married in Connecticut and returned to New York. Marriage held valid in New York, the court stating, "Statute prohibiting such marriage did not expressly prohibit a marriage outside of New York and the law should not be extended by construction. In the absence of express words to that effect, a statute is to have no extra-territorial effect.")

²¹ *Cunningham v. Cunningham*, 206 N. Y. 341, 99 N. E. 845 (1912); *Mitchell v. Mitchell*, 63 Misc. 580, 117 N. Y. Supp. 671 (1909) (The power of the domicile over the citizen was heavily stressed in these decisions. The case is criticized in (1913) 26 HARV. L. REV. 253).

²² See notes 1, 2 and 5, *supra*.

declare the public policy of the state in unmistakable terms and so place such unions in the list of marriages the state will not recognize,²³ in the absence of this type of legislation, the fundamental desire of the state to validate a marriage once created,²⁴ especially if followed by cohabitation,²⁵ will be so strong as to leave no alternative but to give effect to the marriage.

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THE TIME OF FILING CONDITIONAL SALE CONTRACTS.—Following the turn of the century, increased industrial production resulted in widespread installment buying. Nation-wide commercial relationships caused litigation directing attention to the existing disparity of laws¹ governing conditional sales contracts.² In order to settle the confusion and simplify the law, Professor Bogert³ compiled a Uniform Conditional Sale Law⁴ in 1921. It was adopted with changes by New York State in 1922 and incorporated into the Personal Property Law, Sections 61-80g.⁵

²³ States that have enacted such evasion statutes, known as the Uniform Marriage Evasion Act, are Vermont, Wisconsin, Illinois, Louisiana, West Virginia and Massachusetts. An example of this type of legislation follows: "Any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under laws of this state [who] shall go into another state or country and there contract a marriage prohibited and declared void by laws of this state, such marriage shall be null and void for all purposes in this state with the same force and effect as though such prohibited marriage had been entered into in this state."

²⁴ *Lyannes v. Lyannes*, 171 Wis. 381, 177 N. W. 683 (1920). (For facts, see note 1, *supra*. The desire of the court to validate the marriage was so strong as to hold the marriage valid even though there was an evasion statute in force in Wisconsin at the time).

²⁵ *Medway v. Needham*, 16 Mass. 157 (1819) ("The doctrine in favor of marriage so contracted is founded on principles of policy to prevent the great inconvenience and cruelty of bastardizing the issue of such marriage and to avoid the public mischief which result from the loose states in which people so situated would live."); STORY, *CONFLICT OF LAWS* (3d ed. 1846) §§ 123b, 124.

¹ *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729 (1898); *Lane v. Roach's Banda Mexicana Co.*, 78 N. J. Eq. 439, 79 Atl. 365 (1911); *Studebaker Bros. Co. v. Man*, 13 Wyo. 358, 80 Pac. 151 (1905).

² For definition of conditional sale, see N. Y. PER. PROP. LAW § 61; for discussion, see WHITNEY, *SALES* (2d ed. 1934) § 22; WILLISTON, *SALES* (2d ed. 1924) § 324.

³ Cornell University Law School.

⁴ MARIASH, *SALES* (1930) Appendix C.

⁵ N. Y. Laws 1897, c. 418, § 116 was amended by N. Y. Laws 1900, c. 762, § 1, which was repealed as amended by N. Y. Laws 1922, c. 642, §§ 1, 2; see Whitney, *Conditional Vendors and Prior Realty Mortgagees* (1938) 13 ST. JOHN'S L. REV. 1.