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Amendment to Domestic Relations Law Relative to Dissolution of Marriage for Incurable Insanity

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The issue was squarely presented to the court in *Matter of Talbot v. Board of Education of City of New York.*[11] In that case the court held that, where seven members comprised the Board of Education, and of the seven only four were present at a meeting, one of the four not voting, the striking out of certain specific items from the budget on the votes of the remaining three present was invalid as contravening Section 41 of the General Construction Law. *Greene v. Goodwin Sand & Gravel Co.*[12] is also a case in point. There the defendant, a gravel company, applied to the Highway Commissioners for discontinuance of 2,000 feet of a highway. By a majority vote the commissioners declared the highway abandoned. Application was then made to the Town Board, whose consent was necessary to authorize the action. This board consisted of six members, two of whom declined to participate while a third was away. Only three were qualified to vote, one less than a majority. The court held that, inasmuch as the required number of persons necessary to make a quorum had not participated at the meeting, the consent was ineffectual for binding action. This phrase has also been removed from the new statute as the new definition is complete without it.

While it is true that courts have almost uniformly handed down decisions which were apparently consistent with the legislative intent, as indicated by the cases cited, so that the present amendment is generally a codification of the previous interpretation of the statute, the fact remained that the statute itself should be easily susceptible of but one interpretation both by lawyers and by those public officials who are wanting in legal training and who are often called upon to construe this section. It is submitted that the new Section 41 attains this objective. The words "quorum" and "majority" are simply defined and easily understood. It would seem that the amended section has effectively dissipated the clouds of uncertainty and ambiguity which formerly enveloped the statute and has removed the last vestiges of doubt as to legislative intent occasioned by the loose and cumbersome phraseology of the old statute, thus reducing the necessity for much future litigation.

ISADOR LIDDIE.

AMENDMENT TO DOMESTIC RELATIONS LAW RELATIVE TO DISSOLUTION OF MARRIAGE FOR INCURABLE INSANITY.—At common law a marriage with a lunatic was void, not merely voidable.[1] The rationale of this rule was that an insane person was not capable of

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[11] 171 Misc. 974, 14 N. Y. S. 2d 340 (Sup. Ct. 1939).

[12] 72 Misc. 192, 129 N. Y. Supp. 709 (Sup. Ct. 1910).

[1] 1 BL. COMM. 438; Wightman v. Wightman, 4 Johns. Ch. 343 (N. Y. 1820); Winslow v. Troy, 97 Me. 130, 53 Atl. 1008 (1902); Floyd County v. Wolfe, 138 Iowa 749, 117 N. W. 32 (1908).

understanding the meaning and nature of the marriage contract and was therefore incapable of entering into such a contract. Furthermore, since the marriage was deemed void, it was not necessary to establish the nullity by a court decree, although the Chancellor could grant such decree for the "peace and conscience" of the parties.[2] Because the basis of such an action was the mere judicial declaration of nullity, such action could be brought by either the sane or insane spouse.[3] In New York, however, by statute, a marriage with an insane person has been made voidable, and not absolutely void.[4] Section 1137 of the Civil Practice Act has set forth the requirements necessary to the bringing of an action for annulment on the ground of insanity, the section prior to amendment specifying that such action might be maintained by the lunatic or a relative who had an interest to avoid the marriage.[5] Under this section the question often arose whether the privilege of avoidance was reciprocal. Several lower court cases held that since at common law in New York, independent of statute, equity had power to declare such marriage void at the request of the sane spouse, the right should be read into the statute.[6] Other cases denied this right.[7] The question was finally settled in the Court of Appeals in the case of *Hoadley v. Hoadley*[8] wherein it was determined that the sane spouse could not bring such an action. The court stated that the statutory right to avoid the marriage existed for the protection of the disabled party, and that the legislature had set forth a statutory list of those who may sue in such case, the sane spouse not being included. In that case the plaintiff claimed that this interpretation would result in hardship to a sane party who did not know of the insanity of his spouse at the time of marriage. Judge Cardozo, in his opinion, answered this contention as follows: "Much is said about hardship. Not all of it is of such a nature as to be heeded by the law. The theory of annulment on the ground of insanity is not that the sane spouse has made a bad bargain in getting an insane partner. The theory is that the insane partner to the union has manifested a consent that is unreal for lack of a contracting mind. The hardship might be as great in many of its phases if insanity supervened a month after marriage or a year. It might be as great if the diseased condition were one of body, and not of mind. The law turns a deaf ear to these and like

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[2] Wightman v. Wightman, 4 Johns. Ch. 343 (N. Y. 1820); Winslow v. Troy, 97 Me. 130, 53 Atl. 1008 (1902).

[3] Floyd County v. Wolfe, 138 Iowa 749, 117 N. W. 32 (1908); Marvis v. Marvis, 216 App. Div. 291, 215 N. Y. Supp. 43 (2d Dep't 1926).

[4] N. Y. DOM. REL. LAW § 7.

[5] N. Y. CODE CIV. PROC. § 1747.

[6] Marvis v. Marvis, 216 App. Div. 291, 215 N. Y. Supp. 43 (2d Dep't 1926); Whitney v. Whitney, 121 Misc. 485, 201 N. Y. Supp. 227 (Sup. Ct. 1923).

[7] Reed v. Reed, 195 App. Div. 531, 186 N. Y. Supp. 897 (3d Dep't 1921); Smith v. Smith, 112 Misc. 371, 184 N. Y. Supp. 134 (Sup. Ct. 1920).

[8] 244 N. Y. 424, 155 N. E. 728 (1927).

regrets." [9] In spite of this language, and because of the basic injustice in denying a sane spouse a right of action in such case, the legislature, in the following year, enacted an amendment [10] so that now the action may be brought by either party.

So far we have dealt solely with the situation where one party was insane at the time of the marriage. But what of the situation where both parties were sane at the time of marriage, but one later became insane? There could be no annulment under such circumstances, even at the instance of the insane spouse.[11] The marriage was valid when contracted. There was no lack of consent at the time. Yet the hardship existed in such a case just as much as in the cases previously discussed. It was for this reason that Section 7(5) of the Domestic Relations Law was originally enacted.[12] This

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[9] Hoadley v. Hoadley, 244 N. Y. 424, 436, 155 N. E. 728, 732 (1927).

[10] Laws of N. Y. 1928, c. 83, amending N. Y. Civ. Prac. Act § 1137.

[11] Banker v. Banker, 63 N. Y. 409 (1875); Forman v. Forman, 24 N. Y. Supp. 917 (Super. Ct. 1893).

[12] Laws of N. Y. 1928, c. 589, amended by Laws of N. Y. 1945, c. 686, and Laws of N. Y. 1948, c. 362. The section now reads: "A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto: . . .

"5. Has been incurably insane for a period of five years or more; provided, however, that in an action to annul a marriage on such grounds,

"(a) If the marriage be annulled on the ground of the insanity of the wife, the court, before rendering judgment, must exact security, to be approved by a judge of the court, for her suitable care and recording of the instrument creating such security in the office of the clerk of the county in which the action is brought and the filing of *two* certified *copies* thereof with the department of mental hygiene at its Albany office.

"(b) Judgment annulling a marriage on such ground shall not be rendered until, in addition to any other proofs in the case, a thorough examination of the alleged insane party shall have been made by three physicians who are recognized authorities on mental disease, to be appointed by the court, all of whom shall have agreed that such party is incurably insane and shall have so reported to the court. *In such action, the testimony of a physician attached to a state hospital in the department of mental hygiene as to information which he acquired in attending a patient in a professional capacity at such hospital, shall be taken before a referee appointed by a judge of the court in which such action is pending; provided, however, that any judge of such court at any time in his discretion, notwithstanding such deposition, may order that a subpoena issue for the attendance and examination of such physician upon the trial of the action. In such case a copy of the order shall be served together with the subpoena.*

"(c) Except as provided in paragraph (d), when the person alleged to be incurably insane is confined in a state hospital for the insane, one, and one only, of the physicians so appointed shall be a member of the resident staff of such hospital designated by the superintendent thereof. If the alleged incurably insane person is not confined in a state hospital for the insane, one of the examining physicians named in pursuance to this section shall be the superintendent of a state hospital for the insane.

"(d) When the plaintiff has been permitted to bring such action or prosecute the same as a poor person, pursuant to the provisions of the civil practice act, the court shall appoint three physicians who are qualified examiners as

statute provides for a dissolution of the marriage at the instance of the sane spouse where the other spouse has been incurably insane for five years. Although the statute refers to such an action as an "annulment," yet it is really in the nature of a divorce, as the dissolution is based on a cause accruing subsequent to the contraction of a valid marriage.[13] This statute has been referred to in one case as a "drastic change" in the law.[14] Formerly marriages were dissolved only because there was no valid contract in the inception, or because of wrongful conduct of one of the parties. A dissolution on the ground of insanity is therefore in derogation of the prior law, and should be strictly construed.[15] And because the parties to such an action are not on an equal level, the one being insane, the legislature and the courts in carrying out the legislative intent have carefully outlined the procedure to be followed in such a case in order to protect the incompetent party. Therefore the courts generally require the appointment of a special guardian[16] who is given a high degree of responsibility in guarding the rights of such a defendant. He must ascertain the nearest relatives and advise them of the pending action. He must avail himself of every possible opportunity to get information, and this includes visiting the mental patient, talking to doctors, and studying hospital records. He must also pass on the sufficiency of the bond which is required to be posted by the plaintiff husband for the care of his insane wife for her life.[17]

As a further safeguard, "At the trial the plaintiff is required to offer the most comprehensive and convincing testimony in support of the allegations of his complaint. In no other civil action known to the law is so high a degree of proof required as in a case of this character."[18] There must be such proof of incurable insanity not only at the time of trial, but also for five years preceding. In order

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defined by section nineteen of the mental hygiene law, in the employment of the department of mental hygiene. Such qualified examiners shall make the examination of the alleged insane party and file with the court a verified report of their findings and conclusions without cost to such plaintiff. Such report shall be received in evidence upon the trial of the action without the personal appearance or testimony of such examiners. If the court shall deem it necessary that the testimony of any of such examiners be taken, the court may order the taking of such testimony by deposition only. The qualified examiners so appointed by the court may be members of the resident medical staff of any state hospital, whether or not the alleged insane person is being confined there." (Matter in italics added Laws of N. Y. 1948, c. 362.)

[13] Stevens v. People's Bank of Hamburg, N. Y., 246 App. Div. 481, 284 N. Y. Supp. 929 (4th Dep't 1936); Kuphal v. Kuphal, 177 Misc. 255, 29 N. Y. S. 2d 868 (Sup. Ct. 1941); Ambruster v. Ambruster, 170 Misc. 387, 8 N. Y. S. 2d 821 (Sup. Ct. 1938).

[14] Rostacher v. Rostacher, 172 Misc. 86, 14 N. Y. S. 2d 431 (Sup. Ct. 1939).

[15] *Ibid.*

[16] N. Y. CIV. PRAC. ACT § 208.

[17] Rostacher v. Rostacher, 172 Misc. 86, 14 N. Y. S. 2d 431 (Sup. Ct. 1939).

[18] Rostacher v. Rostacher, 172 Misc. 86, 89, 14 N. Y. S. 2d 431, 435 (Sup. Ct. 1939).

to establish insanity, the statute requires [19] that the court designate three physicians to examine the patient, one and only one of these being a resident member of the medical staff of a state hospital, all of whom must agree that the patient is incurably insane. Prior to the amendment here under discussion, two of these physicians were required to attend the trial and give testimony, one of these required witnesses being the doctor from the state hospital. This subsection has been recently amended [20] to permit testimony of such physician attached to a state hospital to be taken by deposition before a referee appointed by the judge, although the judge, in his discretion, may order that a subpoena issue for the attendance and examination of such physician at the trial.

The revision of this section is primarily for the benefit and convenience of the members of the medical profession. It also benefits the plaintiff of moderate means who does not come within the classification of a "poor person." Such "poor person" is not required to have his medical witnesses appear in person or testify at the trial.[21] Prior to the revision, however, the ordinary plaintiff had to undergo considerable expense in some cases to bring the physician-witness before the court. This could effect a considerable hardship on both physician and plaintiff where the alleged insane person was confined in an institution in a remote corner of the state, or even more so when confined out of the state, because of the "continuing right in a husband both to fix and shift the matrimonial domicile [of an incompetent] and the legal principle that the domicile of a mental incompetent must be fixed by some other properly qualified person exercising control over such incompetent." [22]

The convenience of deposition afforded to the plaintiff and physician does not mean that the legislature has relaxed in its requirement of proof of incurable insanity for it is still within the discretion of the judge of the court to require the physician to appear personally at the trial. Thus, in the final analysis, whether the testimony is personal or by deposition, the decision rests with the judge whether or not to open the door of freedom for the sane spouse. Even though the legislature has widened that door of freedom, a firm supervision of the legislative intent by the judiciary will act as a safety-chain to prevent its becoming a revolving door of exploitation of our mental unfortunates.

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[19] N. Y. DOM. REL. LAW § 7(5) (b).

[20] Laws of N. Y. 1948, c. 362, effective July 1, 1948.

[21] N. Y. DOM. REL. LAW § 7(5) (d). This subsection was added by Laws of N. Y. 1945, c. 686.

[22] Kuphal v. Kuphal, 177 Misc. 255, 259, 29 N. Y. S. 2d 868, 873 (Sup. Ct. 1941).