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Chapter 8: Domestic Relations and Persons

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CHAPTER 8

Domestic Relations and Persons

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§8.1. **Divorce: Decree nisi.** *Templer v. Templer*[1] is the only case decided during the 1964 SURVEY year of significance in the area of domestic relations. The Supreme Judicial Court restated the effect of a decree nisi in a divorce action and by implication reaffirmed the rule that a second judge has the power to vacate or modify previous interlocutory action of another judge of the same court.

A decree nisi for divorce was granted to the libellant wife on February 14, 1961, by probate judge A. Within six months, on August 14, 1961, the libellee husband filed "objections to the entry of a final decree," on the ground that before the decree nisi became absolute the libellant wife had remarried. A certified copy of the record of the wife's remarriage to a former husband was annexed to the statement of objections. The applicable statute provides:

> Decrees of divorce shall in the first instance be decrees nisi, and shall become absolute after the expiration of six months from the entry thereof, unless the court within said period, for sufficient cause, upon application of any party interested, otherwise orders.[2]

It must be remembered that a decree nisi does not terminate the marriage relationship.[3]

Rule 45 of the Rules of the Probate Courts, entitled "Objections to Decrees Becoming Absolute," provides:

> At any time before the expiration of six months from the granting of a decree of divorce nisi, the libellee, or any other person

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§8.1. [1] 1964 Mass. Adv. Sh. 547, 197 N.E.2d 589.

[2] Under G.L., c. 208, §21, a decree nisi becomes absolute at the expiration of six months when no objections have been filed to such decree becoming absolute. In Eldridge v. Eldridge it was settled that "[i]ndependently of the rule, a decree for divorce may be revoked or denied if against public policy or for any reason inadequate in law." 278 Mass. 309, 312, 180 N.E. 137, 139 (1932).

[3] See Rollins v. Gould, 244 Mass. 270, 196 N.E. 858 (1923), wherein it was held that a decree nisi does not become absolute for six months, and thus does not terminate the relationship of husband and wife, and upon the death of the husband during this period, the wife may share in his estate.

> interested, may file in the Registry of Probate a statement of objections to the decree becoming absolute, which shall set forth specifically the facts on which it is founded and shall be verified by affidavit. . . . The decree shall not become absolute until such objections have been disposed of by the court. If said petition to stay the decree absolute is subsequently dismissed by the court the decree shall become absolute as of six months from the date of the decree nisi.

In accordance with Rule 45, on November 28, 1961, another probate judge (B) endorsed upon the objections filed by the libellee husband "Al'd" [allowed] and signed his name as "Acting Judge of Probate."

On April 20, 1962, the husband filed a petition to vacate the decree nisi, alleging the remarriage and the "allowance" of his objections, and prayed that he be permitted to be heard on the merits of his defense to the libel. The record does not state whether the husband had defended the merits of the libel prior to the entry of the decree nisi. On October 24, 1962, Judge A, who had entered the decree nisi, wrote upon the statement of objections "dismissed by order of court" and allowed the wife's motion to strike the objections and to enter a decree absolute. The husband appealed.

Because of the confusing circumstances involved, the Supreme Judicial Court asked each of the probate judges to submit a report of the material facts found by him. Judge B, in his report, found that the wife had in fact remarried her former husband, and he ruled that "the marriage was illegal and void in that she was still married in this Commonwealth, and further that she was not entitled to have a decree of divorce made absolute." Judge A, in his report, found that there had been a hearing at which counsel for the wife stated that he had requested the hearing because this judge had granted the decree nisi and "had handled the case from the outset." At that time Judge A had in his possession certain letters from the wife in Michigan in which she stated that "she did not know that her divorce was not fully effective when she was remarried." On these facts, it was Judge A's judgment that the decree should become absolute.[4] The report stated that in making the decision he had overlooked the notation made by Judge B on the statement of objections. "This was not done deliberately or intentionally, but was an oversight . . ."

On these highly confused facts, it appeared that Judge A undertook to decide the case upon the mistaken assumption that it had not been previously decided by another judge. The Supreme Judicial Court

[4] See Boltz v. Boltz, 325 Mass. 726, 92 N.E.2d 365 (1950), in which the wife's divorce from her first husband was not absolute; the Court held that she was still his wife until the divorce became absolute, and marriage to a second husband prior to the entry of the decree absolute was invalid; remarriage in good faith still voids the second marriage. In Moors v. Moors, 121 Mass. 232, 233 (1876), the Court stated: "It hardly need be added, that this second marriage furnishes sufficient cause why the conditional divorce should not be made absolute."

stated: "There was no intention to re-examine the ruling of the first judge. . . . The rulings made by the second judge on October 24, 1962, must be set aside as inadvertent and wholly unintentional."[5]

The Supreme Judicial Court, in its decision, restated the effect of a decree nisi. The Court, however, in determining that Judge A had inadvertently ordered the decree absolute, did not find it necessary to decide the issue of whether Judge A could have vacated the ruling of Judge B had he so intended.[6]

It is settled rule in Massachusetts that the judges of Probate Court have equal powers and that one judge may overrule the findings of a fellow judge, provided the findings of the first judge are not the result of a trial on the merits.[7] In view of this rule, Judge A, after a hearing on the merits of the husband's defense to the libel, could have properly overruled Judge B's allowance of the libellee husband's statement of objections.[8] Since the decree nisi is an interlocutory decree, the libel is still pending and, in accordance with Rule 45 of the Rules of the Probate Courts, the libellee husband was entitled as a matter of right to a hearing on the question of whether the decree nisi should become absolute. The wife's remarriage furnishes sufficient cause why the conditional divorce should not be made absolute, and Judge A would have committed reversible error if, after a hearing on the merits of the husband's defense to the libel, he had overruled Judge B's allowance of the libellee husband's objections and entered a decree absolute.[9] A marriage entered into within six months of a decree nisi is void.[10]

The Massachusetts rule, which is in line with the majority view, allows the judge to set aside an interlocutory order whether it be his own or that of another judge.[11] If a court should make a mistake

[5] Templer v. Templer, 1964 Mass. Adv. Sh. 547, 550, 197 N.E.2d 589, 591.

[6] The Court made little mention of the fact that an annulment had been decreed in Michigan on January 12, 1962, between libellant and her third (former) husband. The Court stated that such evidence was not part of the record in the case, and even though the Michigan court had ruled the marriage invalid, this would not alter the fact that an illegal marriage had been entered into.

[7] See Peterson v. Hopson, 306 Mass. 597, 29 N.E.2d 140 (1940).

[8] See Lye v. Lye, 322 Mass. 155, 76 N.E.2d 180 (1948), wherein the Court, upon hearing of objections to a divorce decree becoming absolute, allowed the introduction of evidence bearing upon the merits of the libel for the purpose of determining whether the libellee had a meritorious or substantial defense.

[9] Moors v. Moors, 121 Mass. 232 (1876).

[10] See Fraser v. Fraser, 334 Mass. 4, 133 N.E.2d 236 (1956). See also Moors v. Moors, note 9 *supra*.

[11] In some jurisdictions, particularly in New York and the Second Circuit of the Federal Courts of Appeals, it has been declared that a judge lacks the power to vacate or modify an interlocutory order of another judge. See Annotation, 132 A.L.R. 1 (1941). In an excellent article, The "Law of the Case" in Massachusetts, 9 B.U.L. Rev. 225, 234 (1929), Justice Lummus, who delivered the opinion of the Court in Peterson v. Hopson, 306 Mass. 597, 29 N.E.2d 140 (1940), stated:

"Any rule denying the right of a judge to reverse or vacate the earlier decree of another judge in the same case would in practice run counter to the elementary principle that any action of the court short of final judgment or decree remains

of law, it must have the right to correct it. This is often done in the progress of a jury trial, and there is no reason why the same principle should not apply in equity or probate. Otherwise there would be the useless formality of requiring parties to go to an appellate court to correct the mistake which the lower court knows it has committed. If the correction may not be made by a second judge, any further action in the case would entail a serious waste of time and expense both to the litigants and to the public.

In summary, the case of *Templer v. Templer*[12] actually only restates the interlocutory effect of a decree nisi. General practitioners, however, should be aware that in all actions a second judge may modify or vacate an interlocutory ruling made by another judge of the same court at any time before the interlocutory ruling becomes final.

§8.2. Divorce: Residence requirements. In the law of divorce, domicile and jurisdiction are siamese twins that can never be separated.[1] The residence (domicile) requirement that must be satisfied in order to give the court jurisdiction to hear a libel for divorce was amended during the 1964 SURVEY year.[2] Under the prior law, the courts of this Commonwealth had no jurisdiction to grant a divorce if the parties had never lived together as husband and wife in Massachusetts, unless the libellant had lived here for the last five years preceding the filing of the libel, or the parties were inhabitants of the Commonwealth when married and the libellant had lived in the state for three years.[3] Furthermore, a divorce could be granted for any cause allowed by law, no matter where it had occurred, unless it appeared that the libellant had moved into this Commonwealth for the purpose of obtaining a divorce.[4] Chapter 344 of the Acts of 1964 amended General Laws, Chapter 208, by striking out the former Section 5 and inserting in its place the following section:

> If the libellant has lived in this commonwealth for five years last preceding the filing of the libel, or if both parties were inhabitants of this commonwealth at the time of their marriage and the libellant has lived in this commonwealth for three years last preceding such filing, if the cause occurred without the commonwealth, *or if the libellant is a resident of the commonwealth at the time of the filing of the libel and the cause occurred within the commonwealth,* a divorce may be decreed for

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within the control of the court and is open to revision until final judgment or decree. . . . All the judges have equal power. . . . To create a rule of law which would restrict the exercise of any of those powers to any one judge, is to impair the efficiency of the court."

12 1964 Mass. Adv. Sh. 547, 197 N.E.2d 589.

§8.2. 1 See Bernard v. Bernard, 331 Mass. 455, 120 N.E.2d 187 (1954).

2 G.L., c. 208, §§4, 5.

3 See Hayes v. Hayes, 256 Mass. 97, 98, 152 N.E. 91, 92 (1926).

4 G.L., c. 208, 5.

any cause allowed by law, unless it appears that the libellant has removed into this commonwealth for the purpose of obtaining a divorce.[5]

This italicized clause, if it means what its terms purport, eliminates the three-year residence requirement in the case in which the libellant is a resident of the Commonwealth at the time of the filing of the libel and the cause of divorce occurred within the Commonwealth. The word "resident" as used in the statute is obviously synonymous with domiciliary. It would appear that this is all the amendment does.[6] The legislative draftsman could have written the statute so that its meaning was not clothed in confusing terms.

The present restriction, that when the libellant comes into the state for the purpose of obtaining a divorce the court will not hear the libel, continues in effect. This legislation restates our legislature's policy of discouraging migratory divorces. The Commonwealth provides access to its Probate Courts for the benefit of its own citizens and not to dissolve marriages existing between citizens of other states, merely because one of them has had a domicile in Massachusetts at some time. The three-year residence requirement is still enforced if both parties were inhabitants of the Commonwealth at the time of their marriage and the cause occurred without the Commonwealth. If they have never lived together in this Commonwealth as husband and wife, the court only has jurisdiction if the libellant has lived in this Commonwealth for five years.

§8.3. Adoption: Waiver of consent. One of the most troublesome areas in the law of adoption in recent years has been the problem of consent of certain parties to adoption proceedings.[1] During the 1964 SURVEY year an important change in the adoption law was made by Acts of 1964, Chapter 424, amending General Laws, Chapter 210, Section 3A.

Section 2 of General Laws, Chapter 210, requires that the written consent of the lawful parents, or of the mother, or of the parental substitute be obtained before a decree for adoption will be entered. Section 3 sets forth certain exceptions when the consent of these parties is not required.[2] The prior provisions of Section 3A

[5] Emphasis supplied.

[6] G.L., c. 208, §6B, is not affected by this amendment, and a party filing a libel for divorce must still certify that the parties have been living apart for a period of not less than three months.

§8.3. [1] For a brief analysis of the early legislative amendments to G.L., c. 210, §§2 and 3, see Wasserman, Assent to Adoption, 37 Mass. L.Q. 56 (Aug. 1952).

[2] G.L., c. 210, §3, states in part: ". . . if such person is adjudged . . . hopelessly insane, or is imprisoned . . . under sentence for a term of which more than three years remain unexpired at the date of the petition; or if he has wilfully deserted or neglected to provide proper care and maintenance for such child for one year last preceding the date of the petition . . . ; or if he has suffered such child to be supported for more than one year continuously prior to the petition by an incorporated charitable institution . . . ; or if he has been sentenced to imprison-

allowed the Department of Public Welfare to commence a proceeding in Probate Court to establish whether the consent of any person named in Sections 2 and 3 would be required to a subsequent petition for adoption of a child in the care or custody of the department. The section did not establish any express standards to be followed in determining whether consent was necessary. The uncertainty regarding guideposts was laid to rest by the Supreme Judicial Court in *Consent to Adoption of a Minor.*[3] The Court in that case stated:

> Section 3A neither states nor implies any grounds other than those specified in §3 for finding that "consent is not required." The reference to "the consent of any person named in the previous two sections" indicates the intention to look thereto for the standards for the determination under §3A. Section 3A contains no words appropriate to vest in the probate judge discretion to modify or supplement the express requirements of §§2 and 3.[4]

To circumvent the type of result reached in that case, Section 3A was amended.[5] By the terms of the new provision, in a proceeding brought by the Department of Public Welfare to determine if consent is required:

> Such consent shall not be required if the court finds that the best interests of the child will be served by placement for adoption, and the court shall not in making its determination be limited by the conditions set forth in sections two and three or by any provision of the law, but shall give due regard to the ability, capacity and fitness of the child's parents or guardian and to the plans proposed by the department or other agency initiating such petition.

The most casual reading of the new amendment evokes the observation that the probate judges are given broad power in adoption proceedings. This amendment illustrates quite aptly a shift in em-

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ment for drunkenness upon a third conviction within one year and neglects to provide proper care and maintenance for such child; or if such person has been convicted of being a common night walker or a lewd, wanton and lascivious person, and neglects to provide proper care and maintenance for such child."

[3] 345 Mass. 706, 189 N.E.2d 505 (1963). This was the first opportunity for the Court to construe the procedural aspects of Section 3A. For a discussion of this case see 1963 Ann. Surv. Mass. Law §7.1.

[4] 345 Mass. 706, 707-708, 189 N.E.2d 505, 506 (1963). In this case the findings showed the nonsupport of the child by the respondent (father) for eight months prior to the date of the decree but made no finding as to nonsupport for a year prior to the filing of the petition. These facts tended to support the conclusion of unfitness to have custody but did not show misconduct of the respondent (father) sufficient by Section 3 standards to make inapplicable the required consent imposed by Section 2. As a result, the decree determining that the consent of the father was not required on subsequent petition for adoption was reversed.

[5] Acts of 1964, c. 425.

phasis from the best interests of the parent to those of the child. In *Richards v. Forest,* the Court said: ". . . the first and paramount duty of the court is to consult the welfare of the child. To that governing principle, every other public and private consideration must yield."[6]

It would appear that the protective provisions of Section 2, requiring the consent of certain parties, and the exceptions contained in Section 3 have been diluted further with the amendment of Section 3A. The efforts of the legislature in enacting the many amendments to the adoption consent provisions indicate that it recognizes that adoptions should be permitted when they are for the best interests of the child, and that any obstacle impeding such an adoption should be removed.

§8.4. Proposed legislation: Husband and wife tort actions. Chapter 18 of the Resolves of 1964 provides for an investigation by the Judicial Council concerning the enactment of a law authorizing husbands and wives to sue each other in actions of tort. At present in Massachusetts and a majority of jurisdictions there exists a general disability barring tort actions between husbands and wives. This inability to sue is based upon the common law doctrine of a legal identity of the two. The wife's legal existence during coverture was deemed to be incorporated in that of the husband. At common law an injured spouse received some limited protection from the criminal law, which refused to stand on the identity of the persons except as to crimes involving the right to possession of property. Some intentional torts committed between husband and wife were recognized as grounds for separation or divorce, and equity protected the wife against the tortious conduct of the husband in any separate trust estate she might have.[1] This fiction of marital unity has been disappearing, and the change in attitude is owed in large part to the enactment of Married Women's Property Acts.[2] As a result of these acts, the wife has been able to deal with third persons as if she were a single woman.[3] The courts have generally agreed that they will permit a wife to maintain an action against her husband for any tort against her property interest. Thus she may recover from him for fraud.[4] The Massachusetts legislature in 1963, consistent with this change in attitude, enacted a statute authorizing a husband and wife to contract and to sue each other upon any such contract.[5]

In a minority of jurisdictions the disability to sue in tort has been

[6] 278 Mass. 547, 553, 180 N.E. 508, 511 (1932).

§8.4. [1] See Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1935).

[2] Ibid. In this case it was pointed out that although a married woman in this jurisdiction has been freed from nearly all of the legal conditions arising from the doctrine of common law unity of husband and wife, contracts and actions at law between husband and wife are prohibited.

[3] Hepburn v. Warner, 112 Mass. 271 (1873).

[4] Moreau v. Moreau, 250 Mass. 110, 145 N.E. 43 (1924).

[5] G.L., c. 209, §§2, 6, as amended by Acts of 1963, c. 765, §§1, 2.

removed.[6] Courts adhering to this disability have reasoned that its retention is necessary to preserve the domestic peace,[7] or that its abolition would encourage litigation which (in the case of a suit against a spouse with insurance coverage) might be collusive.[8] New York, in order to prevent collusive suits, enacted a law permitting husband and wife to sue each other in tort[9] but at the same time amended the insurance law to provide:

> No policy shall be deemed to insure against any liability of an insured because . . . of injuries to his or her spouse . . . or his or her property . . . unless express provision relating thereto is specifically included in the policy.[10]

Increased rates for the coverage referred to in the statute seem to be the only actual deterrent to collusion established by the statute.

All arguments in favor of continuing the disability seem specious. The judicial council should adopt the reasoning set forth in *Bogen v. Bogen*, where the court stated:

> Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to "love, cherish and protect" her. We have progressed that far in civilization and justice.[11]

§8.5. Injury to, or abuse of children: Report by physician. Acts of 1964, Chapter 534, amends General Laws, Chapter 119, by adding Sections 39A and 39B. Section 39A requires every licensed physician, intern, or medical officer who professionally examines a child under sixteen years of age and has reasonable cause to believe that the child is suffering from physical injury or abuse inflicted by a parent or other person responsible for its care to report the injury or abuse to the Department of Public Welfare. The impetus for this act was an awareness by local welfare authorities and police departments that many cases of child abuse and injury, short of serious injury, go unreported. Notice of these abuses will enable the proper authorities to take the necessary preventive measures. This is consistent with

6 See Annotation, 43 A.L.R.2d 632 (1955). The list now includes Alabama, Alaska, Arizona, Connecticut, Idaho, Kentucky, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and Wisconsin.

7 Corren v. Corren, 47 So.2d 774 (Fla. 1950); Ritter v. Ritter, 31 Pa. 396 (1858).

8 Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1935). *Contra:* Kalamian v. Kalamian, 107 Conn. 86, 88, 139 Atl. 635, 637 (1927), where the court said: "The fact that the plaintiff is the wife of the defendant does not render this action constructively fraudulent or otherwise illegitimate. Such community of interests, if any, as may be inferable as existing between the defendant and the plaintiff, by reason of their relation as husband and wife, was a consideration affecting their credibility only."

9 N. Y. Domestic Rel. Law §57.

10 N. Y. Insurance Law §167(3).

11 219 N.C. 51, 53, 12 S.E.2d 649, 651 (1941). See also Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938).

the policy of Chapter 139, which was enacted to protect children from harmful effects resulting from the inadequate or destructive behavior of parents or anyone else responsible for their care.[1]

Any information contained in this report of injury, if given in good faith by the physician, will not constitute libel or slander.[2] It is reasonable to assume that doctors and medical officers would hesitate to comply with the statute if they could be subjected to libel and slander suits, meritorious or not, and the attendant adverse publicity. This qualified privilege, conditional upon the exercise of good faith, relieves the doctor from any personal risk involved in complying with the statute. While good faith is not defined, it is obvious that it does not include conduct that is willful or malicious.[3] Massachusetts has other similar medical legislation.[4]

Section 39B requires the Welfare Department, upon receiving the information, to investigate the cause of the injury. If the parent or other person charged with the care of the child did inflict the injury and can not or will not make suitable provision for the care of the child, the agency is given authority to prevent any further injury to, or abuse of the child. Presumably this means a stern warning to the parent, or a court order. If the injury or abuse is serious, the agency has to report its findings to the district attorney of the county in which the injury occurred.

The need for protecting young children against abuse is obvious, and this legislation is certainly needed. The legislature can only be criticized for not going far enough. Why the arbitrary age cut-off point of sixteen years? Is the physician to look the other way if the child is sixteen years and one month? The legislature, in enacting this statute, must have realized that a child under sixteen would not ordinarily complain of such abuse to the Welfare Department or the police. It would seem that the necessity of a physician's report when the child is over sixteen years is just as great as it is when the child is five, ten, or fifteen years and eleven months, as he too may not complain and is still otherwise subject to his parents or guardian. Since the proper authorities as a general rule have no access to the home to investigate possible child abuse, this statute, although unfortunately limited by the sixteen-year cut-off, sensibly provides for obtaining information that would not be otherwise available.

§8.6. Forgery of birth, marriage, or death records. Chapter 310 of the Acts of 1964 amended Chapter 46 of the General Laws by adding Section 30. It provides a fine of up to $500 or imprisonment

§8.5. [1] G.L., c. 119, §1.

[2] Id. §39A.

[3] In an action of libel or slander against a reporting physician, good faith would be a question of fact for the jury.

[4] See G.L., c. 112, §12. Disclosure by a doctor of information relative to venereal disease, if given in good faith, does not constitute libel or slander. See also id. §12A, requiring doctors to report to the police all cases of treatment for gunshot or knife wounds, so that proper investigation may be effected.

of up to six months for any person who makes, alters, or forges, or counterfeits, or assists another to falsely make, alter, forge, or counterfeit a copy of a record of birth, marriage, or death, or whoever forges or without authority uses the signature, facsimile of the signature, or validating signature stamp of a city clerk upon the genuine or falsely made copy of such a record, or whoever uses or attempts to use with intent to defraud or deceive a copy of a record of birth or marriage of a person other than himself. One of the obvious reasons for enacting this provision is to deter youths under twenty-one years of age from procuring liquor by means of false or altered identification.