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Domestic Relations - Legitimacy of Offspring - Presumption of Marriage Subsequent to Meretricious Relationship

Herbert Hoffman

site to holding public office was unconstitutional.[40] In view of these decisions, the Court's silence regarding constitutionality can *only* be interpreted as a contemporary mandate directing lower courts not to become involved with the constitutionality of section 6(j). Yet, the doctrine that "neither [state nor federal government] can aid these religions based on a belief in the existence of God as against . . . religions founded on different beliefs,"[41] when applied to section 6(j), implicates the unconstitutionality of the conscientious objector provision.[42]

The repetitious silence of the *Stolberg* court, in light of the fact that it too had the constitutional issue directly before it,[43] indicates a strict adherence to the Supreme Court's reaffirmation of the judicial attitude to recognize the "time honored principle of construing a statute not only to escape unconstitutionality but to avoid grave and doubtful constitutional questions."[44]

In conclusion, it can be said of the *Stolberg* case that it is a vehicle by which lawyer, jurist and litigant may evaluate current, judicial temperament in regard to the granting of the conscientious objector exemption. Inasmuch as it is a first reaction to the Supreme Court mandate of effects of its compliance with that edict are not conclusive. However, in view of recent case holdings, contemporary social climate, and the unwillingness of the Supreme Court to declare the constitutional issue regarding section 6(j) ripe for decision, it is most probable that the adherence demonstrated by *Stolberg* is indeed the initiation of a modern trend of conformity to the holding of the Supreme Court in the *Seeger* case.

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[40] *Ibid.* [41] *Id.* at 492.

[42] The doctrine has been successfully applied in School District of Abington Township, Pa. v. Schempp, 374 U.S. 230 (1963); Sherbert v. Verner, 374 U.S. 398 (1963); Boling v. Sharpe, 347 U.S. 497 (1954); Zorach v. Caluson, 343 U.S. 306 (1952). See also, Conklin, *supra* note 15.

[43] Brief for Appellant, p. 4, United States v. Stolberg, *supra* note 2. Petitioner argued that section 6(j) is repugnant to both the first and fifth amendments of the Constitution.

[44] United States v. Jakobson, *supra* note 8 at 415.

DOMESTIC RELATIONS–LEGITIMACY OF OFFSPRING–PRESUMPTION OF MARRIAGE SUBSEQUENT TO MERETRICIOUS RELATIONSHIP

The plaintiff's husband died intestate survived by the plaintiff and two children of a former marriage. Sixteen days prior to his marriage to the plaintiff, the decedent had executed a trust agreement leaving his entire estate to his children. The plaintiff commenced an action to set aside the

trust agreement as a fraud on her marital rights, and to seek the full share of the decedent's estate based upon her contention that the children were illegitimate,[1] and thus not entitled to share in the distribution[2] thereof. The trial court found that the decedent did not defraud the plaintiff of her marital rights and the children were the legitimate issue of the decedent. The Illinois Appellate Court reversed in part by setting aside the trust agreement, but held the children to be legitimate and fully entitled to their intestate shares. The court stated that written evidence or documentary proof was not necessary to prove the validity of the prior marriage since the parties' statements that they were a married couple with cohabitation permitted a reasonable presumption that they were married. *Stathos v. LaSalle National Bank*, 62 Ill. App. 2d 398, 210 N.E.2d 828 (1965).

The plaintiff's claim of illegitimacy was predicated upon her contention that no presumption of legitimacy attaches to children who are the product of a relationship of meretricious origin in the absence of proof that such relationship has been superseded by an actual marriage. The court rejected the plaintiff's contentions and held that proof of cohabitation and reputation[3] is sufficient to sustain a marriage where the legitimacy of children is at issue. In analyzing this problem, this note will examine two basic factors in the court's decision. It will consider the weight which courts have given the presumption of legitimacy in sustaining marriages of an illicit origin and secondly, the amount of proof which will rebut the presumption of a continuance of an illicit relationship.

Basic to any discussion of the subject is the understanding that marriage is a civil contract[4] by which man and woman agree to take each other for

[1] The evidence showed that at the time the eldest child was conceived, the decedent was cohabitating with the child's mother but was still married to his first wife. An illicit relationship is one in which one of the parties has a spouse by a former marriage, living and undivorced. Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1894).

[2] ILL. REV. STAT. ch. 3, § 11 (1965): "First, when there is a surviving spouse and also a descendant of the decedent: one-third of the personal estate and one-third of each parcel of real estate to the surviving spouse and the remaining two-thirds to the decedent's descendants per stirpes, . . . Third, when there is a surviving spouse but no descendant of the decedent: the entire estate to the surviving spouse. . . ."

[3] Reputation imports recognition by the public that two people do appear in fact as having the legal status of husband and wife. See Graham v. Graham, 130 Colo. 225, 274 P.2d 605 (1954).

[4] "It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts as a civil contract, . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities." Maynard v. Hill, 125 U.S. 190, 210 (1888).

husband and wife during their joint lives, unless terminated by law.[5] A common-law marriage is one entered into by mutual agreement and requires no ceremony.[6] The requisites are an actual and present agreement to enter into a matrimonial relation followed by cohabitation.[7] To prove a common-law marriage, it is not necessary to prove the contract itself, but it is sufficient if the facts of the case are such as to warrant the inference that such a contract has taken place.[8] An agreement of marriage *per verba de preasenti*, followed by cohabitation is strengthened by the fact that both parties had the capacity to marry and that no illicit relation had existed between the parties.[9]

Prior to 1905, common-law marriages were recognized in Illinois,[10] but they were subsequently declared null and void.[11] Today, the common-law marriage is recognized in only a minority of jurisdictions.[12] The reasons given by the majority of states for prohibiting common-law marriages is founded upon the many abuses arising from such. Their effect on public morality, private property rights, and the legitimacy of children called for their invalidation.[13]

In view of the importance of marriage as a social institution and the benefits accruing therefrom, it is favored by public policy and the law.[14] It follows that a marriage will, if possible, be upheld as valid, and the validity will be presumed unless disproved.[15] The fact that a man and a woman have openly cohabited as husband and wife for a considerable length of time may give rise to a presumption that they had previously entered into an actual marriage, although there is no documentary evidence or direct

[5] Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668 (1934).

[6] McKenna v. McKenna, 180 Ill. 577, 54 N.E. 641 (1899).

[7] Rittgers v. U.S., 154 F.2d 768 (8th Cir. 1946); Herald v. Moker, 257 Ill. 27, 100 N.E. 277 (1912); Hutchinson v. Hutchinson, 196 Ill. 432, 63 N.E. 1023 (1902); *In re* Mandel's Estate, 108 N.Y.S.2d 922 (1949); Dibble v. Dibble, 88 Ohio App. 490, 100 N.E.2d 451 (1950).

[8] Davis v. Tickell, 230 Ill. App. 285 (1923).

[9] Heymann v. Heymann, 218 Ill. 636, 75 N.E. 1079 (1905).

[10] Young v. Young, 213 Ill. App. 402 (1918).

[11] ILL. REV. STAT. ch. 89, § 4 (1965).

[12] Those states still allowing common-law marriages include: Alabama, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas.

[13] Dacunzo v. Edgye, 19 N.J. 443, 117 A.2d 508 (1955); Lesher v. Lesher, 159 Ill. App. 432 (1911).

[14] Sanders v. Sanders, 52 Ariz. 156, 79 P.2d 523 (1938).

[15] Matthes v. Matthes, 198 Ill. App. 515 (1916). *Accord*, Reed v. Reed, 202 Ga. 508, 43 S.E.2d 539 (1947); Springer v. Springer, 75 N.Y.S.2d 471 (1947); Tyson v. Weatherly, 214 S.C. 336, 52 S.E.2d 410 (1949).

testimony to that effect.[16] The strength of the presumption increases with the birth of children, and the fact that the legitimacy of a child may be involved is a factor in sustaining the marriage.[17] How strongly courts feel in the matter of legitimacy is illustrated in the words of the Illinois Supreme Court:

> The law presumes that every child in a christian country is prima facie the offspring of a lawful . . . union of the parents, . . . The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy, and in the absence of evidence to the contrary, a child . . . is therefore a legitimate child. The presumption and charity of the law are in his favor and those who wish to bastardize him must make out the fact by clear and irrefragible proof.[18]

Thus, in the normal case, when children claim to be the legitimate heirs in a questionable marriage, the presumption of legitimacy and a valid marriage are in their favor and the burden of proof is upon the party seeking to disprove the marriage.[19]

It should be recognized, however, that these presumptions are rebuttable rather than conclusive.[20] If intercourse between the parties was illicit in its inception because of their failure or disability to enter into marriage by ceremony or by agreement, it is presumed to continue so;[21] and the mere factor of cohabitation will not give rise to the presumption of marriage.[22] If a relationship illicit in its inception is shown, it becomes incumbent upon the party claiming rights under the marriage to prove the validity of that marriage.[23]

The Illinois Supreme Court has had several opportunities to consider this

[16] A marriage may be presumed from cohabitation and reputation, Myatt v. Myatt, 44 Ill. 473 (1867); *In re* Lamond's Estate, 68 N.Y.S.2d 690 (1947); Highland v. Highland, 159 Pa. Super, 633, 49 A.2d 529 (1946).

[17] *In re* Rosenberger's Estate, 362 Pa. 153, 65 A.2d 377 (1949); Tarleton v. Thompson, 125 S.C. 182, 118 S.E. 421 (1923); Texas Emp. Ins. Ass'n. v. Elder, 155 Tex. 27, 282 S.W.2d 371 (1955).

[18] Orthwein v. Thomas, 127 Ill. 554, 562, 21 N.E. 430, 432 (1889). See also, Arndt v. Arndt, 336 Ill. App. 65, 82 N.E.2d 908 (1948); Raymond v. Lowe, 327 Ill. App. 614, 65 N.E.2d 35 (1946).

[19] *In re* Kritsch's Estate, 342 Ill. App. 452, 96 N.E.2d 846 (1951).

[20] Marks v. Marks, 108 Ill. App. 371 (1903); De Rosay v. De Rosay, 162 Pa. Super. 333, 57 A.2d 685 (1948); Jordan v. Mohan, 15 N.J. Super. 513, 83 A.2d 614 (1951); *In re* O'Neil's Estate, 64 N.Y.S.2d 714 (1946).

[21] Gorden v. Gorden, 283 Ill. 182, 119 N.E. 312 (1918); Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951); Pierce v. Pierce, 355 Pa. 175, 49 A.2d 346 (1946).

[22] *Supra* note 20. See also Bellinger v. Devine, 269 Ill. 72, 109 N.E. 666 (1915).

[23] Hendrich v. Anderson, 191 F.2d 242 (10th Cir. 1951); Gorden v. Gorden, 283 Ill. 182, 119 N.E. 312 (1918); *In re* Dittman's Estate, 124 Ind. App. 198, 115 N.E.2d 125 (1953).

question since common-law marriages were abolished by statute.[24] In *Illinois Steel Co. v. Industrial Commission*,[25] where cohabitation was begun in 1901, the plaintiff petitioned for compensation from the decedent's death on behalf of an applicant who claimed that she was the decedent's wife. Though the legitimacy of children was not in question, the court held that cohabitation illicit in its inception will be presumed to continue so, reasoning that a party asserting the marriage has the burden of proof to show not only that the illegal relation has terminated, but also that it was terminated through a mutual agreement by the parties.

In *Gorden v. Gorden*,[26] where both parties to a meretricious relationship begun prior to the abolition of common-law marriages had since died, the plaintiff sought to set aside the will of his deceased father contending that he was the only son and heir of the decedent. Even though legitimacy was in issue, the court said:

> The presumption of marriage arising from cohabitation and repute is rebuttable; and, where it is shown that the cohabitation began meretriciously, the burden is upon the person claiming the marriage to show it, independently of the presumption.[27]

Thus, the Illinois cases have held that a relation illicit in its inception will be presumed to continue to be illicit, and the burden of proving a subsequent change to marital status rests upon the party asserting it.[28] This change, however, is not shown by a reputation of marriage, since marital representations are the ordinary means for concealing an improper relationship.[29] Therefore, without documentary proof or testimony of a subsequent actual marriage, marriage will not be presumed valid from continued cohabitation and reputation of the relationship which was of an illicit origin.

Turning now to the case, at bar,[30] it is clear that the *Stathos* case is distinguished from the holdings discussed above. In all previous cases, the Illinois courts were asked to sustain marriages begun prior to the abolition of common-law marriages in Illinois. The illicit relationship in each case was begun prior to 1905. In the present case, the meretricious relationship between the decedent and his alleged wife began in 1945, long after common-law marriage had been abolished in Illinois. The evidence in this

[24] *Supra* notes 10 and 11.

[25] 290 Ill. 594, 125 N.E. 252 (1919).

[26] 283 Ill. 182, 119 N.E. 312 (1918).

[27] *Id.* at 194, 119 N.E. at 317.

[28] As to a meretricious relationship with its origin in 1898, see Sebree v. Sebree, 293 Ill. 228, 127 N.E. 392 (1920).

[29] In Stearns v. Stearns, 376 Ill. 283, 33 N.E.2d 481 (1941), the relationship had its illicit origin in 1882. See also Cartwright v. McGown, 121 Ill. 388, 12 N.E. 737 (1887).

[30] Stathos v. LaSalle National Bank, 62 Ill. App. 2d 398, 210 N.E.2d 828 (1965).

case already shows that the relationship between the decedent and the defendant's mother had an illicit origin.[31] Under the holdings previously cited, it was undisputed that during the era of common-law marriages, positive proofs were required to take an original meretricious union and demonstrate it had achieved such fruition as to remove any stigma which had originally attached. In the instant case, though no such evidence was introduced, the fact that the legitimacy of children was in issue seems to have induced the Illinois Appellate Court into holding cohabitation and reputation to be sufficient.

The presumption of the legitimacy of children is one of the strongest presumptions known to the law.[32] Basically, the law's refusal to bastardize children may be attributed to three factors: the stigma of illegitimacy which causes environmental changes that have physical and psychological effects on an individual; a hesitancy to exonerate the husband because the child might become a financial burden upon the state; and a reluctance to disturb what has been termed to be sacred integrity of the family unit.[33]

It is understandable then, that when courts are asked to determine the validity of a marriage which arose out of a relationship which was illicit at its inception, they properly consider that refusal to recognize such a marriage would in effect bastardize the children. Thus, the factor of legitimacy is a primary consideration of the court in ruling upon the validity of a marriage, whether it be of the common-law or ceremonial variety. This was certainly controlling in the case of *In re Rosenberger's Estate*,[34] wherein the court was duly impressed with the fact that failure to recognize the common-law marriage of the decedent would result in the bastardization of a child. In the *Succession of Gaines*,[35] the court was confronted with contradictory testimony of whether or not a ceremonial marriage had taken place. In sustaining the marriage, the court reiterated the strength of the presumptions in favor of marriage and the legitimacy of children.[36]

The fact that the presumption of legitimacy was a controlling factor in the case at bar is questionable. In sustaining the children's legitimacy, the court said:

[31] *Supra* note 1.

[32] Bowers v. Bailey, 237 Iowa 295, 21 N.W.2d 773 (1946); *In re* Rowe's Estate, 172 Or. 293, 141 P.2d 832 (1943); Dirion v. Brewer, 20 Ohio App. 298. 151 N.E. 818 (1925); *In re* Stanton, 123 N.Y.S. 458 (1910); People v. Powers, 340 Ill. App. 201, 91 N.E.2d 637 (1950); Commonwealth v. Moska, 107 Pa. Super. 72, 162 A. 343 (1932).

[33] 35 So. CAL. L. REV. 437 (1962). In Illinois an illegitimate child may be legitimized if his parents later marry and he is acknowledged by the father as his child. ILL. REV. STAT. ch. 3, § 12 (1965).

[34] *In re* Rosenberger's Estate, *supra* note 17.

[35] 227 La. 318, 79 So.2d 322 (1955).

[36] *Id.* at 323, 79 So.2d. at 324

The appellant argues that the proof shows that the relationship of the children's parents began illicitly and states that this overcomes the presumption of legitimacy of children. She urges on this court a rule which would require the children to produce some documentary proof of a wedding or a witness thereto in order to establish their legitimacy. . . . No one knows where the marriage took place, and it would be impossible for the appellees to check the records of every person authorized to perform marriages in the Midwest. While the appellee's proof is not the most convincing, we feel that when a man and woman say they are married and live together as man and wife until death parts them, there is a reasonable presumption that they in fact are married.[37]

While documentary proof or testimony was necessary to overcome the presumption of a continuation of an illicit relationship begun in the common-law era, the Illinois Appellate Court has held that it may be overcome by proof of cohabitation and reputation, even though proof of such is not the most convincing. This holding, however, is limited to the factual situation where both parties to the alleged marriage are deceased.[38] In relaxing the standards previously imposed, the court was clearly influenced by the presumption of validity of a ceremonial marriage, as opposed to a common-law marriage, and the strong presumption of the legitimacy of children.

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[37] *Supra* note 30 at 407, 210 N.E.2d at 832.

[38] *Id.* at 408, 210 N.E.2d at 833. "If one of the parties to this marriage were still alive, we might hold differently and rule that some documentary evidence would be necessary. In such case, it would be reasonable to assume that a party to a marriage would remember where the ceremony took place. . . ."

EVIDENCE–EXPERT WITNESS–USE OF AUTHORITATIVE TREATISES ON CROSS-EXAMINATION

Plaintiff entered defendant's hospital for treatment of a broken leg and was treated by a doctor who, with the assistance of hospital personnel, placed plaintiff's leg in a cast. Subsequently, the leg became infected, requiring partial amputation, and plaintiff brought suit, alleging improper care and treatment on the part of the doctor and the hospital. At trial, defendant's expert medical witnesses stated on direct examination that their opinions were based on their general experience and training. Plaintiff's counsel was permitted, over defendant's objection, to cross-examine them as to relevant extracts from standard authorities. The appellate court[1] affirmed the judgment for plaintiff and held that the strict reliance rule[2] espoused by earlier Illinois cases be expanded to allow the use on

[1] Darling v. Charleston Community Memorial Hospital, 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964).

[2] "The law is well settled in this State that scientific books may not be admitted in evidence before a jury, and that such books cannot be read from to contradict an expert