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Habitual Drunkenness Affecting Family Relations

*James J. McGarry**

THE GROWING SOCIAL PROBLEM of habitual intemperance frequently becomes the source of litigation in a court of Domestic Relations. The broken family seeking a solution of social, physical, and economic dangers created by an excessive use of alcohol by one of its members, turns to law for a remedy. The answer all too often is found in the divorce statutes.

Habitual drunkenness is not, in the absence of a statute, a ground for divorce.[1] Even if not recognized by statute, it is sometimes shown as evidence in connection with other offenses such as cruelty.

The state, in granting a divorce, believes that its own welfare will be promoted and therefore declines to accept the position of the medical field which identifies drunkenness as an illness. It may be that the granting of a divorce as a matter of public policy could not be supported if drunkenness were accepted as an illness rather than moral fault.[2]

No universally accepted definition of habitual drunkenness exists among the various states which allow a divorce based on this ground. Generally, however, the courts will consider whether the habit has become fixed or irresistible, what effect the intoxicants have upon the user, the frequency of intoxication, and duration and the continuity of the habit.

In an often quoted decision, the Oregon Court in defining habitual drunkenness stated:

> The man is reduced to that pitiable condition in which he either makes no vigorous effort to resist and overcome the habit, or his will has become so enfeebled by indulgence that resistance is impossible. There is generated in him by frequent and excessive indulgence a fixed habit of drunkenness which he is liable to exhibit at any time when the opportunity is afforded. He is an habitual drunkard in the habit of getting drunk although he may not always be so. When a man has reached such a state of demoralization that his inebriety has become habitual, its effect upon his char-

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1 17 Am. Jur. *Divorce and Separation* § 150.

2 Annot., 29 A. L. R. 2d 926 (1953).

acter and conduct is to disqualify him from properly attending to his business, and, if he be married to render his presence in the marriage relation disgusting and intolerable, especially if he is an habitual gross drunkard.[3]

It is insufficient merely to show that one drinks or has become drunk on several occasions.[4] It must be shown that the person charged is one who habitually and frequently becomes drunk and he may be classified as habitually intemperate even if his sober hours exceed his drunken hours.[5]

Interference with Business

The ability of a person to work or to attend to his business is often a determining factor in deciding if the habitual intemperance is within the statute which allows a divorce on the ground of drunkenness.

A California court[6] held that "A fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business . . ." is the habitual intemperance recognized by the divorce statute.

So while inability to work can be an ingredient, it is not always necessary that the intemperance be so extensive as to disable a person from attending to his business[7] or to incapacitate him from performing the duties of his profession or occupation.[8] It is possible for one to be intemperate and not let his work suffer.

But if the effects of alcohol render a person incompetent to conduct his own affairs, the court may appoint a guardian either of his person, or his property, or of both.[9] The guardianship serves as a protection where the person lacks the capacity to prudently manage his affairs and property without risk to his own interests and to those of his family.[10] In this way the court can insure that the drunkard's family is adequately provided for.

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[3] McBee v. McBee, 22 Or. 329, 29 P. 887, 29 Am. St. Rep. 613 (1892).

[4] Todd v. Todd, 56 So. 2d 441, 29 A. L. R. 2d 920 (1951).

[5] Wilson v. Wilson, 128 Ark. 110, 193 S. W. 504 (1917).

[6] Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91 (1862).

[7] Richards v. Richards, 19 Ill. App. 465 (1886).

[8] Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56 (1911).

[9] Anderson v. State, 96 P. 2d 281, 54 Ariz. 387, 126 A. L. R. 501 (1939).

[10] Stevenson v. Stevenson, 13 Ky. Op. 1012.

As a general rule, unless a statute so provides, the court cannot empower a guardian of a drunkard to dispose of his real estate except when necessary to pay his obligations or for the maintenance of himself or his family.

Effect upon Family

The disturbing effects of habitual intemperance upon the family relationship has been recognized by the courts. An Illinois court said:

> The reason why the law makes habitual drunkenness a ground for divorce is not alone because it disqualifies the husband or wife from attending to business, but in part, if not mainly, because it renders the persons addicted thereto unfit for the duties of the marital relation and disqualifies such person from properly rearing and caring for the children born of the marriage.[11]

In Connecticut[12] the reason for use of the habitual intemperance test as a ground for divorce was held not to be for the purpose of promoting temperance or reforming the offender ". . . but to preserve the peace, comfort, safety, happiness, and prosperity of the non-offending party, and of the family of which they are together the members and parents."

Some courts are so stringent and zealous in protecting the marriage relationship that if the habitual intemperance complained of is not so great as to have created ". . . want or suffering in the family," [13] divorce will be denied notwithstanding evidence of other effects resulting from over indulgence.

A parent may be deprived of his natural right to custody of his children by his misconduct. If such misconduct is dissipation produced by the use of intoxicants which make him utterly unfit to have custody, or if through neglect he fails to provide for his children, a court will feel justified in refusing him custody.[14] In a custody action the court will always regard the welfare of the child as paramount and decide the issue in the best interests of the child. The fact that a parent through his misconduct has been deprived of the custody of his minor child does not relieve him of his legal duty to support the child.

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[11] Richards v. Richards, *supra* note 7, at 469.

[12] Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, at 35 (1896).

[13] *Id.*, at 36.

[14] Lally v. Fitz Henry, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681 (1892).

Defenses

Condonation as a defense in a divorce action is applicable to the non-continuing offenses and is not usually considered to be applicable where the cause of action relates to offenses of a continuing nature which cannot be condoned such as permanent impotency or an incurable disease.

A resumption of the marital relationship, once the right to divorce for habitual drunkenness has become complete, is condonation and nullifies the right to divorce, if the offender has reformed. If the habit is resumed or continues despite promises to the contrary, the person who previously condoned may break off the marital relation and establish his right to divorce.[15] Generally, therefore, condonation is dependent upon the subsequent conduct of the offender and a recurrence of the offense ". . . amounts to revocation of the condonation . . ." [16] and revives prior acts as grounds for divorce.

The "clean hands" doctrine of equity was applied in *Todd v. Todd*[17] where a husband, claiming a divorce on the ground of habitual intemperance, bought for and gave to his wife most of the liquor she consumed, took her to parties where alcohol was prevalent and ". . . otherwise encouraged her to drink and kept her eternally in a liquor environment." A complainant who thus encourages one to be intemperate has no right in equity to a divorce on that ground.

From the foregoing, it is not meant that one must exert his influence to restrain the drinking habits of his spouse, or even that one may not at times acquiesce in or participate in social drinking.[18] This would not of necessity preclude a divorce on the grounds of the other's habitual imtemperance.

Most jurisdictions are in accord that the habitual drunkenness must be formed after marriage in order to grant a divorce on the ground.[19] Even where statutory provisions do not so require, divorce still may not be granted if the other spouse was aware that the condition existed before the marriage. To employ premarital knowledge of habitual intoxication as a defense, the

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[15] Lewis v. Lewis, 75 Iowa 200, 39 N. W. 271 (1888); Cope v. Cope, 103 Mo. App. 77 S. W. 92 (1903).

[16] Wilms v. Wilms, 22 Ohio L. Abs. 128, at 130 (Ohio App. 1936).

[17] Todd v. Todd, *supra* note 4, at 443.

[18] Frye v. Frye, 245 Iowa 563, 63 N. W. 2d 242 (1954).

[19] Annot., 15 A. L. R. 2d 677 (1951).

defendant has the burden of proving that he in fact had the habit before marriage and that his spouse was aware of it. The defense is not available where there is a failure to prove these points.[20]

Conclusion

Most jurisdictions recognize habitual drunkenness either as an independent ground for divorce or consider it as a factor in determining some other wrong. An examination of the cited cases indicates that the drunkenness complained of must produce some adverse effect upon the family, either of a mental, physical, or economic nature.

In an effort to protect the interests of those exposed to habitual intemperance, the courts will not hesitate to appoint a guardian or, where minor children are concerned, deprive the drunkard of custody, if necessary. On the other hand, the courts, in guarding the marital institution, will not permit a divorce where the complainant has condoned the actions of the defendant, connived to bring about the ground for dissolution of the marriage, or where there is premarital knowledge of the intemperance.

With the divorce rate increasing rapidly, reliance upon drunkenness as a ground for divorce will increase proportionally. In the future the rules regarding habitual drunkenness should therefore be subject to more vigorous application by the courts.

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[20] 17 Am Jur. *Divorce and Separation* § 158.