Cleveland State Law Review

Volume 4 | Issue 2 Article

1955

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Samuel H. Silbert

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*by Samuel H. Silbert**
Chief Justice, Cuyahoga County Common Pleas Court

Uniformity of Marriage and Divorce Laws.

MARRIAGE AND DIVORCE give rise to our most perplexing legal difficulties. This is partly due to social considerations. A primary cause, however, can be found in the States' Rights Doctrine as a consequence of which there has been constant confusion and a lack of uniformity in our laws. Our various states differ on when people may marry; whom they may marry; the ages at which they may marry; the residence requirements for divorce and the grounds for divorce. Thus, despite the Full Faith and Credit Clause in the United States Constitution, the decrees obtained in one state are not necessarily recognized by the courts in other states.

In this connection, this writer recalls the first time he met the late Newton D. Baker. Mr. Baker was then the writer's instructor on the subject of domestic relations. Mr. Baker delivered only one lecture on that important phase of marriage and divorce laws. The rest of the course was devoted to conversation that was highly interesting but far removed from domestic relations. The year was 1904 and the reason for meandering far afield from the subject of the course was not an attempt to evade further mental labors, but simply because there was not much more to be said about the subject at that time.

The field has since broadened widely and, in fact, thousands of weighty volumes have been written upon it. But little has been clarified. We have 48 states and the District of Columbia; we have 49 different marriage and divorce codes.

Uniformity of our marriage and divorce laws is something that is much to be desired. Under the present crazy-quilt system, a man and woman may be lawfully married according to the laws of one state and, paradoxically, be bigamists in the view of a

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* Chief Justice Silbert, who has achieved national eminence as an authority on Domestic Relations, has been in public office continuously since he was appointed a police prosecutor in 1911. He became a municipal judge in 1915, was elected to the Common Pleas bench here in 1922 and, after consistent re-election, became chief justice by unanimous assent in 1954. He is a trustee of Cleveland-Marshall Law School where he has taught for many years and from where he holds the degrees LL.B. (cum laude), LL.M. and LL.D. He has written this article in a general way purposely so that he may draw generously from his richly varied personal background in the subject.

sister state. The ramifications of this incredible situation may, and often do, extend far beyond the lives and fortunes of the parties themselves. It touches children, casting unfair doubts upon their legitimacy, and it throws property and inheritance rights into chaos and confusion that has kept many an attorney—and judge—awake far into the night burning the midnight oil while his own wife has taken to considering the advantages of divorce laws.

Very few legislators will quarrel with the need for uniformity in domestic relations laws. Yet, the achievement of this desired uniformity is quite another matter. In other fields of law, especially commercial law, great strides have been made in devising codes acceptable to all, or nearly all, states. Although not yet accomplished, some progress is being made toward the acceptance of a uniform code of evidence. However, the standardization of domestic relations laws presents peculiar problems. These rest, primarily, in the varying, and often conflicting, religious and social makeup of the different states. In some states there is evidently such a strong social bias against divorce that the legislatures have had no choice but to severely limit the grounds and lengthen residence requirements for divorce. At the other extreme, there are states in which the laws are so liberally drawn that those seeking divorce flock to them in huge numbers, and there is little doubt that the number would be even greater were it not for economic considerations.

It is reasonable to assume that the policymakers of both types of states would endorse uniformity of marriage and divorce laws. The question is: whose laws shall be the ones adopted?

At one time it appeared that Article IV, Section 1 of the United States Constitution, the Full Faith and Credit Clause, would to some extent partially relieve the present situation so that each state would be required to recognize the validity of a decree of divorce rendered by a sister state. However, in an historic opinion written within the past ten years by the United States Supreme Court, the Full Faith and Credit Clause was held not to bar a state from re-examining the "domicile" of a plaintiff spouse who wins an ex parte decree of divorce in a sister state, service upon the defendant spouse having been obtained by publication alone.[1] Of course, if an appearance is made by the defendant spouse and the issue of domicile is tried, or an opportunity to try it is afforded the defendant, full faith and

[1] Williams vs. North Carolina, 325 U. S. 226, 65 S. Ct. 1092 (1945).

credit forecloses the sister state from failing to recognize the decree.[2]

There appear to be only two solutions to this problem: either an amendment to the Federal Constitution making the matter of domestic relations uniform throughout the union (a highly improbable event in the foreseeable future), or a gradual trend toward uniformity of social attitudes among the myriad religious, social, economic and political groups in the United States (equally improbable for some time to come). In any event, the problem is an acute one deserving of the earnest study of lawyers, judges, legal scholars, sociologists, and all other persons interested in this vital matter that is heavy with legal and social implications.

Education for Marriage.

I was teaching at the Cleveland Law School one evening some years ago and I made the assertion that society had erected certain barriers against divorce, and I mentioned them: children, religion, economic security and, lastly, fear of what the neighbors might say. And then I asserted that if it were not for these barriers we might very likely have many more divorces than we have today.

I did not think I had said anything particularly unusual or startling, but I chanced to pick up a newspaper the next day and, to my amazement, I saw this headline:

JUDGE SILBERT SAYS THAT LOVE AFTER MARRIAGE IS THE BUNK

I was horrified at this misconstruction of my statement and tried to get it corrected. Despite my efforts, however, the article was run that way through all editions that day. Many who read it criticized me with heavy hand for what I was alleged to have said. I thought I would never hear the end of it, but the climax came quite suddenly when one woman, who took the article with an awesome literalness, wrote me this consoling note: "I see where you say that love after marriage is the bunk. I am married 30 years—and ain't it the truth." All comments after that were only anticlimactic.

As I said, society has erected certain barriers against divorce which, among others, include religion, children, economic security, and fear of the opinions of others. Religion today is still our strongest barrier against divorce but, in many instances, that

[2] Sherrer vs. Sherrer, 334 U. S. 343, 68 S. Ct. 1087 (1948).

barrier has been considerably lowered. In addition, we of the legal fraternity have attempted to erect new barriers to slow down hasty, spur-of-the-minute divorce seekers who have been inspired by heated tempers and normal misunderstandings. These new barriers include such devices as delays, an ample "cooling-off period," and interlocutory decrees.

The fact is, however, that the real solution to today's rising divorce problem lies not in the setting up of artificial barriers for those who wish to free themselves of an unhappy situation, but in setting up intelligent marriages so that the participants would be horrified at thought of separation from each other. By the time a husband and wife have resorted to the courts, the marriage has very likely deteriorated beyond repair. Even if the barriers that society has erected do succeed in keeping the parties from getting a divorce, the chances for a happy marriage have been sharply diminished. The continued existence of the marriage with one or both spouses leading, in Thoreau's phrase, lives of quiet desperation, is hardly a complete answer. It is like painting a healthy complexion on the outside while the vital heart inside shrivels up and dies.

What our society really needs is greater education for marriage. It should start at home and be pursued through the schools. I do not merely refer to learning; the development of character is highly essential. Hence, I feel, the home and the Church must join the schools in developing and stressing this highly essential pre-requisite.

The husband and wife should possess interests in common as far as is possible. By this I refer to a common background and a mutuality of interests. If the husband, for example, is interested primarily in sports while the wife is a Shakespearean scholar, I would suggest that such a marriage stands on very shaky ground for that reason alone. In my opinion, mixed marriages should be discouraged for the same reason. They may prove hurtful to both partners and, quite often, this hurt is passed down to offspring who must try to lead normal lives in a society that, too often, is not very understanding. In many instances, too, the marriage itself unfortunately will fall by its own weight.

I feel, too, that there should in all instances be a test as to physical fitness for marriage on the part of both partners. This test should be given honestly by a competent physician.

The spectacle of certain Squires chasing after a couple about to be married in an endeavor to get their business and the fee

for marrying them is a revolting one. Surprisingly, it is still being practiced in many localities throughout the country. This sort of procedure, which tends to degrade marriage, in my opinion, should never be tolerated by a civilized community. There should be greater solemnity and dignity to the marriage ceremony. In the first place, there should be a seasonable delay as was seen in the publishing of banns. Then, the marriage should be performed in a church with friends and relatives present and lending their approval.

Greater consideration must be given to the marital relationship. Marriage is not merely a contract—it carries far greater responsibilities. A world-famous sage recently remarked: "It is not merely a contract, but a covenant—a spiritual covenant for life." Yet we are all too lax. We do not even care if the parties are of age, fully responsible, physically and mentally competent, and equipped for the relationship.

Psychological tests should be required to see if the parties are mentally equipped and ready for marriage. Morons and imbeciles are easily detectable today and should never be allowed to take on the complex burdens of a marriage relationship and to fill the rolls of public welfare agencies with their offspring who turn out to be continuing problems to society as a whole.

When we consider the emotional aspects of the marriage relationship, it should be remembered that there is a decided and distinguishable difference between affection and the deeper emotion of sound love. Quite often, young people, reared on a rich diet of romantic movies and magazines, understandably mistake a mere yearning or affection for real love.

When these youngsters begin talking and sighing about their newly discovered wonders of love and romance, we adults—their parents and guides—tend to become overwhelmed and mushy on the subject. Maybe it is because of an imagined void in our own lives, but we soon become ready to swoon for the young people when they get enthusiastic about their alleged feelings. We allow them to rush and elope pell mell and encourage them to do things impulsively, so long as the magic name of Romance is used. This lack of premeditation, this ill-considered impulse, is responsible for much unhappiness and confusion that is reflected in a reiteration of such mistakes when a later generation seeks its own natural happiness under the guidance of its own elopement-confused parents.

We should have a compulsory waiting period between the engagement and marriage to ascertain if the love is true love and if it will really jell into a successful marriage. We should have long engagements; we should encourage the young people to know each other's family. We should remember this positive fact: the girl a man marries is her mother plus her own environment. One really marries not his wife alone, but her entire family. This is true for both parties in the marriage.

Marriage as a Contract.

The law has never regarded marriage as a mere civil contract. A basic difference is obvious. The parties to the ordinary civil contract may rescind it by agreement. The sanction of a court is unnecessary. Yet parties to the marriage contract may not rescind it at will. At least not in theory. The reason is evident: there is an invisible third party to every marriage contract—society. And society, with the court as its agent, must approve the dissolution of a marriage. Surely, it has an obligation to assist in the consummation of a successful marriage at its outset.

Alimony.

I have touched briefly on the complications in the love and romance problems. It must be remembered, however, that often apparently respectable people marry for a variety of other considerations that are somewhat more mundane than those mentioned above. For example, there are the countless thousands who marry for security, for a home, or for a wide variety of other economic reasons. And they remain married for exactly those reasons.

I recall being the judge in the case of a young woman who had married a very fine young man who ably held a responsible job. Then, after her charming primping during the courtship, she relaxed. She wouldn't cook, she wouldn't keep house, and she would not sleep with her husband. All she wanted was to be supported in a style to which she had never been accustomed. The young man took this situation for as long as he could and, when he finally gave up and walked out, she sued only for alimony. He, in the meantime, cross-petitioned for a divorce. I gave him the divorce; and I certainly gave her no alimony.

Then, of course, there are men who marry only to be waited upon and refuse to assume any responsibility whatsoever. They are equally at fault.

Marriage means more than merely having two persons of opposite sexes joined together. They must each make a contribution. She must enrich the marriage with love and affection, and he must be devoted and make every effort to support her, economically as well as spiritually.

Gold diggers, no matter what poses of dignity they may assume in achieving their goal, degrade the marital relationship. They want only to be supported. They are the kind who give nothing and who want all they can get out of the marriage. Often they institute alienation of affection suits against third parties, or they bring breach of promise actions against those whom they allege had promised and failed to marry them. They claim they have broken hearts which can be mended only by payments to salve an itching palm.

I have always believed alimony works both ways. In the case of *Wright vs. Wright,* Cuyahoga County Common Pleas No. 590432, I had no hesitation in allowing alimony and attorney fees to the husband in a marital situation where the wife was wealthy and the husband was not. The evidence had also disclosed that the wife had abandoned him and their two adopted children.

When alimony becomes a racket, it should be curbed. Even in these times of inflated economy, it is hard to reconcile the Tommy Manville and Bobo Rockefeller awards with simple justice.

Aggression.

It has often been said that the State or society is a third party to the marriage. That is true, and that is why we seek to prevent collusion. We demand that the parties come to court with "clean hands" and prove one is free from fault, while the other is at fault in certain specified ways.

Unfortunate though it may be, however, collusion is practiced extensively in all our courts. At times, the husband sits mutely in the back of the courtroom while his wife is getting her divorce before the judge for the husband's reported "aggressions."

The story of our difficulty in this regard can be seen from the case of Mrs. D. She had been abandoned by her husband about ten years before seeking her divorce. Yet, she was pregnant, and the man responsible for this wanted to marry her and give a name to their unborn child. What was best for the public welfare in this situation? And what was the court to say under the circumstances? Was the woman free from fault? Did she have "clean hands"?

Yet there must be an "aggressor" and an "aggrieved" in every divorce. We still follow the "sin" idea which we inherited from the Ecclesiastical Courts of England. But can every act between the parties be considered? Marriage is a series of incidents. When is an aggression a pure aggression? Often the aggrieved becomes an aggressor in retaliation or in defense. How can we keep track of who really started what? How can we avoid contested divorces? And in these cases how is it possible to separate the wheat from the chaff and say one always is, and the other never is, an aggressor.

The best way to determine if grounds for divorce exist, in my opinion, is to determine whether or not the parties to the marriage are compatible or incompatible.

An internationally known spiritual leader who has also gained an enviably wide repute as a practical man of the world, wisely speaks of husband and wife as one. At one time this was completely true under the Common Law. And the husband was the one. But, since the wife has become fully emancipated, this is no longer the legal situation. Thus, while the couple is no longer bound into one with legal twine, a new kind of oneness must come into being that requires greater moral strength by the marriage partners than they had to put forth when the cause was made simple by law. The new oneness must now be achieved through a co-operation by the individual partners that is essential in marriage. So impressed is the clergyman with the need for co-operation that he feels it has as important a role in marriage as has competition in the law of evolution.

The Modern Status of Women.

Adjustments in marriage play a highly essential role for a successful union of two persons who were completely independent individuals before the ceremony, especially today when women are more self sufficient than ever before. The general population has changed from Victorians to Cosmopolitans; we have changed from ruralites to urbanites; from agriculturists to industrialists. Woman has made even more changes in her status. She is fully emancipated; she works and votes. She possesses most of the world's wealth; she outlives her husband as a rule. She is free, independent, and wields great influence and power. The day when she cringed before her male master is pretty much gone.

But this development, desirable though it may be in a great many aspects, carries with it its own burden of problems for the

couple where the role of each partner is not as clearly defined as it once was and, by the same token, brings more problems to the divorce court. For example, I recently had before me the divorce case of a woman who was working. She had two grown children by former marriages. The husband also had two children by a previous wife, and they had one additional child born of their union. He had a car, she had her own car, and two of their four grown children had their own cars. That family lived in a dismal little alley and had their four autos cluttering up the neighborhood. But that man claimed he could not pay the alimony which had been imposed on him by the court because bill collectors were hounding him and he had to make installment payments on their various cars. It was brought out in court that it had never occurred to either of them that possibly they should sell a car or two.

Statistics show that we have twenty million women who are working outside the home today. In some cases, this outside work is a necessity. Yet in many cases the women do not need to work. They work because they want to augment what is already a comfortable income. The latter type has cars and property and they want good times. They hire baby sitters to take over their natural responsibilities and they rush around doing things that in the final analysis add up to nothing when compared with what they have missed. They press their husbands for more and more of the tawdry material things in life to the point of inducing ulcers in the men and a desire to escape from this financial millstone hung around their necks.

I favor the woman working only if necessary. If they are ambitious to have a home and she needs a job to help out, it is perfectly all right. Today, though, any number of women do not need to work. They want to gad about. They are free, but they are too immature to handle the responsibility that goes with their new status. They are bored or have too much free time on their hands when they do not work. They do not have the aptitude of their mothers in finding a multitude of tasks that require the special care that only a woman can give. They are wives, but not homemakers. They must assume more tasks and duties which are properly theirs and not try to pass them off on to someone else. At present, they get the benefits but too often do not assume the problems that make marriage a healthy challenge. Sometimes they seem all too willing to trade the real values of marriage for mere material things.

Among the questions which constantly face a domestic rela-

tions judge are these: Are women more humane than men? Can they achieve more than men have achieved if given a chance? Is it true that man has sold out too cheaply? Has he, by concentrating too much on material achievements, lost what is best in him? Is it possible women can do better? Perhaps we need more feminism and less masculinity in the world? These questions often make the domestic relations knot a hard one to unravel.

The reader may recall that when women sought the right to vote, they asserted they would change things. They won their battle, but things have not changed. Like men, women are often indifferent, do not vote, and too often follow the line of least resistance.

The Endurance of Marriage.

Despite all these problems, that sometimes look quite hopeless, marriage, in my opinion, will not be destroyed. It will endure. The family is a basic social unit and is necessary in our present style of civilization for the preservation of the human race. And, just as long as that holds true, marriage will be maintained.

But what can be done to improve the complexities of the situation barely outlined in this article? The public, unfortunately, is indifferent. Qualified leadership is needed. What are we as judges, lawyers and prospective lawyers doing to help the situation? We could help to eliminate the gold digger in alimony, the common law marriage that is often harmful, the breach of promise action. We could make marriage more solemn and sacred, but even we are indifferent.

I repeat, we could put marriage on a more solemn and sacred basis by remembering its status, and by treating it as a covenant and not as a mere contract. We could impose necessary restrictions, establish conciliation branches and allow ample cooling-off periods. We could do much to prevent children from becoming mere legal problems.

Problem of Attorney Fees.

An exceedingly important point that I should like to stress for the bar is the highly important question of attorney fees in divorces. It is a question loaded with problems. When I came to the bar, we used to try cases for as little as $25. Today the costs amount to far more. I know lawyers who take divorce cases on a contingent fee, apparently feeling that they are entitled to

share in the recovery. Others do it on a quantum meruit basis. Some work on a per diem basis even when the traffic will not bear it. Some lawyers even insist that the parties cannot be reconciled until they have been paid. A newspaper reporter I know tells of an incident where a despondent young man came wandering into his office to say that he and his wife had patched up their differences, but that his lawyer refused to withdraw the divorce petition until he had been paid. This is not intended as criticism but merely to show that they have the opportunity to do good, an opportunity which they should take advantage of in the interest of justice. Lawyers, known for being conservative, should get out of their rut of precedence and take the reins for improvements. What is fitting and proper under these circumstances?

These are some questions that we, as officers of the court and as sane human beings, must consider and decide. I personally feel that some day lawyers will get a larger fee for reconciling people than for divorcing them, and I have urged that we adopt such a humane viewpoint. The lawyer who reconciles a couple deserves a larger fee than one who divorces them from the point of view of society, the children, and the couple itself.

Above all, we must not forget the sanctity of marriage. This was the ruling I made in the case of *Jelm vs. Jelm,*[3] which upset a judicial precedent of nearly 100 years' standing and has been widely quoted throughout the nation in courts and classrooms. In this case, brought by the wife at the end of a judicial term after the husband had been lulled into the belief that the case had been dropped, I invalidated a decree of divorce in the *following* court term—an action which had never been done before—because of the fantastic fraud practiced by the wife upon both her husband and the court. To sustain this ruling, the Supreme Court of Ohio overruled a decision nearly a century old, *Parish vs. Parish.*[4] The wife contended that a divorce decree granted at a previous term was too sacrosanct to be vacated. We held the marriage that the decree purported to end was even more sacrosanct.

Therefore, in conclusion, it would seem to me incumbent upon the court and all members of the bar to realize fully the importance of the marital status which they are asked to dissolve, the varied and complex social and legal ramifications it covers, and then look to their own moral as well as legal understanding before tearing it asunder.

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[3] 155 Ohio St. 226, 44 O. O. 246 (1951).
[4] 9 Ohio St. 534 (1859).