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Domestic Relations - The Effect of Mental Incompetence in Divorce Proceedings - Crittenden v. Crittenden, 210 Va. 76, 168 S.E. 2d 115 (1969)

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certain,[31] it would seem likely that it will not be the final determination in the expansion of section 16(b).

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Domestic Relations—THE EFFECT OF MENTAL INCOMPETENCE IN DIVORCE PROCEEDINGS. *Crittenden v. Crittenden*, 210 Va. 76, 168 S.E.2d 115 (1969).

For more than two years Henry Crittenden had been separated from his wife as a result of her commitment for mental incompetence.[1] This separation was the grounds for which a Chancery court decree awarded Mr. Crittenden a divorce *a vinculo matrimonii*.[2] Evelyn Crittenden and her committee appealed.[3]

In reversing the chancery court, the Supreme Court of Appeals of Virginia held that for separation to be a ground for divorce under section 20-91(9) of the Virginia Code, the parties must be sufficiently competent to be cognizant of the separation.[4] One separated from his spouse as a result of commitment for mental incompetence is not, as a matter of law, capable of being conscious that a separation has occurred.[5]

In the absence of statute, the fact that a husband and wife live separate and apart, regardless of the length of time, is not a ground for divorce.[6] Approximately one half of the jurisdictions in the United

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shall occur within 6 months after any change in this beneficial ownership of such securities prior to such date. The statement on Form 4 shall be filed within 10 days after the end of the month in which the reported change in beneficial ownership occurs.

By this new rule, *Feder* type transactions are reportable under 16(a) and, therefore, subject by *statute* to section 16(b).

31. A petition for certiorari to the Supreme Court has been filed. 37 U.S.L.W. 3452 (U.S. May 16, 1969) (No. 1404, 1968-69 Term; renumbered No. 125, 1969-70 Term).

1. Crittenden v. Crittenden, 210 Va. 76, 168 S.E.2d 115 (1969). Evelyn Crittenden had been committed to Eastern State Hospital, Williamsburg, Virginia, on May 19, 1950, and was still confined at the time of this decision. *Id.* at 77, 168 S.E.2d at 115.

2. VA. CODE ANN. § 20-91(9) (Cumulative Supp. 1968):

> A Divorce from the bond of matrimony may be decreed:
>
> . . . .
>
> (9) On the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for two years. A plea of res adjudicata or of recrimination with respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground.

3. 210 Va. at 77, 168 S.E.2d at 116.

4. *Id.* at 78, 168 S.E.2d at 116.

5. *Id.*

6. *E.g.*, McDougall v. McDougall, 5 Wash. 802, 803, 32 P. 749, 750 (1893).

States, however, have statutes which recognize separation as a distinct ground for divorce.[7] The rationale for providing separation as a ground is that when the parties have lived apart for a long period of time, without any intention of reconciliation, it is in the best interests of the parties and society that the marriage be dissolved.[8] The leading Virginia case of *Canavos v. Canavos*, in accepting this rationale, held that the ground of separation is available to either spouse, regardless of fault.[9] The holding in *Canavos* is supported by a majority of courts,[10] but a minority view holds that a person cannot be granted a divorce for a ground which is solely the result of his own wrong.[11]

The effect of insanity upon the ground of separation has lead to a variance of opinion. The view supported by most states is that the parties

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7. ALA. CODE tit. 34, § 22(1) (Supp. 1967); ARIZ. REV. STAT. ANN. § 25-312(7) (1956); ARK. STAT. ANN. § 34-1202(7) (1962); COLO. REV. STAT. ch. 46-1-1(j) (1963); DEL. CODE ANN. tit. 13, § 1522(ll) (Supp. 1968); D.C. CODE ANN. § 16-904(a) (1961); IDAHO CODE ANN. § 32-610 (1963); KY. REV. STAT. ANN. § 403.020(H) (1963); LA. STAT. ANN. § 9:301 (1950); MD. CODE ANN. art. 16, § 24 (1966); MINN. STAT. ANN. § 518.06(8) (1969); NEV. REV. STAT. tit. 10, § 125.010(9) (1957); N.H. REV. STAT. ANN. ch. 458:7 (X-XI) (1968); N.C. GEN. STAT. § 50-6 (1966); N.D. REV. CODE tit. 14, § 14-06-05 (1943); R.I. GEN. LAWS ANN. § 15-5-3 (1956); TEX. REV. CIVIL STAT. art. 4629(4) (Supp. 1968); UTAH CODE ANN. tit. 30-3-1(8) (1953); VT. STAT. ANN. tit. 15, § 551(7) (1958); VA. CODE ANN. § 20-91(9) (Cumulative Supp. 1968); WASH. REV. CODE ANN. tit. 26, § 26.08.020(9) (Supp. 1968); W. VA. CODE ANN. ch. 48, § 48-2-4(7) (Supp. 1969); WIS. STAT. ANN. § 247.07(7) (1957); WYO. STAT. ANN. tit. 20, § 20-47 (1957). *See generally* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 52 (1966); 18 WASH. & LEE L. REV. 157 (1961).

8. *See, e.g.*, Barrington v. Barrington, 206 Ala. 192, 193, 89 So. 512, 513 (1921); Rozboril v. Rozboril, 60 Ariz. 247, 249, 135 P.2d 221, 223 (1943); Finnegan v. Finnegan, 76 Idaho 500, 503, 285 P.2d 488, 491 (1955); Otis v. Bahan, 209 La. 1082, 1084, 26 So. 2d 146, 148 (1946); George v. George, 56 Nev. 12, 13, 41 P.2d 1059, 1060 (1935); Dawson v. Dawson, 62 Wyo. 519, 521, 177 P.2d 200, 202 (1947); Jegendorf v. Jegendorf, 61 Wyo. 277, 279, 157 P. 2d 280, 282 (1945). *See* F. KEEZER, MARRIAGE & DIVORCE 455 (3d ed. 1946).

9. 205 Va. 744, 747, 139 S.E.2d 825, 827 (1965).

10. *E.g.*, Parks v. Parks, 116 F.2d 556, 557 (D.C. Cir. 1940); Barrington v. Barrington, 206 Ala. 192, 193, 89 So. 512, 513 (1921); Rozboril v. Rozboril, 60 Ariz. 247, 249, 135 P.2d 221, 223 (1943); Young v. Young, 207 Ark. 36, 38, 178 S.W.2d 994, 997 (1944); Wilson v. Wilson, 81 Idaho 375, 377, 341 P.2d 894, 896 (1959); Colston v. Colston, 297 Ky. 250, 251, 179 S.W.2d 893, 894 (1944); Roy v. Florane, 239 La. 749, 752, 119 So.2d 849, 852 (1960); Matysek v. Matysek, 212 Md. 44, 128 A.2d 627 (1957); Pearson v. Pearson, 77 Nev. 76, 77, 359 P.2d 386, 387 (1961); Fields v. Fields, 399 S.W.2d 958, 959 (Tex. Civ. App. 1966). *See* Annot., 14 A.L.R.3d 502 (1967).

11. *E.g.*, Pierce v. Pierce, 120 Wash. 411, 413, 208 P. 49, 51 (1922). Also, under a statute requiring that the separation be by mutual agreement, a divorce would not be granted where the separation was caused by the fault of one party against the will of the other. Willcox v. Willcox, 209 A.2d 166, 168 (Del. Sup. Ct. 1965); Powless v. Powless, 269 Wis. 552, 553, 69 N.W.2d 753, 754 (1955).

must have been separated for the statutory period while they were mentally competent.[12] The fact that an insane spouse is incapable of a voluntary act of separation[13] and that the courts will refrain from indirectly making insanity a part of this ground for divorce provide the basis for this view.[14] The opposing view reasons that the right to divorce accrues immediately upon separation and is perfected upon the expiration of the required time period, notwithstanding that the other spouse was insane during that time.[15]

In most jurisdictions insanity is generally a defense to a divorce action on any ground,[16] and *Crittenden*, following the prevailing view, establishes that separation as a result of insanity is *not* a valid ground for divorce in Virginia as well. Thus, a sane spouse may, as in *Crittenden*, be faced with the inability to legally terminate a marriage. To remedy this problem, many states have provided by statute that insanity is a ground for divorce.[17] Until Virginia and other states without such statutes

12. *E.g.*, Wilder v. Wilder, 207 Ark. 414, 181 S.W.2d 17 (1944); Messick v. Messick, 177 Ky. 337, 197 S.W. 792 (1917); Clark v. Clark, 215 La. 835, 41 So. 2d 734 (1949); Moody v. Moody, 253 N.C. 752, 117 S.E.2d 724 (1961); Camire v. Camire, 43 R.I. 489, 113 A. 748 (1921); Daugherty v. Daugherty, 198 S.W. 985 (Tex. Civ. App. 1917). *See generally* Annot., 19 A.L.R. 2d 144 (1951).

13. *E.g.*, Wilder v. Wilder, 207 Ark. 414, 417, 181 S.W.2d 17, 20 (1944). *See also* VA. CODE ANN. § 20-93 (1960) which provides that insanity occurring after the commencement of desertion or abandonment is no defense, and the ground for divorce is complete at the expiration of one year. *See* Pollard v. Pollard, 204 Va. 316, 132 S.E.2d 715 (1963). The policy of this statute is to some extent at variance with the *Crittenden* case since there is no voluntary desertion during the entire period.

14. *E.g.*, Wilder v. Wilder, 207 Ark. 414, 417, 181 S.W.2d 17, 20 (1944).

15. *E.g.*, Knabe v. Berman, 234 Ala. 433, 175 So. 354 (1937); Vincent v. LeDoux, 146 La. 144, 83 So. 439 (1918). *But see* Galiano v. Monteleone, 178 La. 567, 152 So. 126 (1933) and Leveque v. Borns, 174 La. 919, 142 So. 126 (1932) disapproving of the holding in Vincent v. LeDoux.

16. The following cases discuss various grounds for divorce which are subject to the defense of insanity. Box v. Box, 253 Ala. 297, 45 So. 2d 157 (1950) (voluntary abandonment); Vaughn v. Vaughn, 223 Ga. 298, 154 S.E.2d 592 (1967) (cruel treatment); Carlson v. Carlson, 308 Ill. App. 675, 32 N.E.2d 365 (1941) (extreme cruelty); Pile v. Pile, 94 Ky. 308, 22 S.W. 215 (1893) (desertion); Hadley v. Hadley, 144 Me. 127, 65 A.2d 8 (1949) (cruelty and abusive treatment); Niedergerke v. Niedergerke, 271 S.W.2d 204 (Mo. App. 1954) (indignities); Bailey v. Bailey, 115 N.J.Eq. 565, 171 A. 797 (1934) (adultery). *See generally* 18 WASH. & LEE L. REV. 321 (1961); Annot., 19 A.L.R.2d 144 (1951).

17. Approximately thirty states have statutes which provide for insanity as a ground for divorce. *E.g.*, DEL. CODE ANN. tit. 13, § 1522(10) (Supp. 1968); KY. REV. STAT. ANN. § 403.020 (K) (1963); MD. CODE ANN. art. 16, § 26 (1966); N.C. GEN. STAT. §50-5(6) (1966); W.VA. CODE ANN. ch. 48, § 48-2-4(8) (Supp. 1969). For a more comprehensive list of the statutes, *see* 18 WASH. & LEE L. REV. 321, 326 n.29 (1961).

recognize the need for insanity as a ground for divorce, the situation of the sane spouse, as in *Crittenden*, undoubtedly will recur.

NICHOLAS JOHN DEROMA

Uniform Commercial Code—CASH PAYMENT BY THE PAYOR BANK, *Kirby v. First & Merchants Nat'l Bank*, 210 Va. 88, 168 S.E.2d 273 (1969).

On December 30, 1966 appellant Kirby presented to the appellee payor bank a check in the amount of $2,500 drawn by Neuse Engineering and Dredging Co. payable to and endorsed by appellant.[1] Appellant maintained an account with the appellee and his deposit ticket accompanied the check calling for a deposit in currency of $2,300. That portion of the ticket which provided for the listing of checks deposited was blank. The teller, as requested, handed the appellant $200 in cash and on the appellee's next business day the appellant's account was credited with a deposit of $2,300. An employee of the appellee noted on the back of the check, "cash for dep." [2]

On January 4, 1967, the appellee discovered that the drawer's account contained insufficient funds to cover the check, and an officer of appellee phoned the appellant to advise that the appellee had dishonored the check. Appellant promised to cover the check but did not, and appellee charged appellant's account with $2,500, creating a $543.47 overdraft. The appellee then instituted an action to recover. Appealing from a judgment for the appellee bank, the appellant questioned the bank's right to charge back the check.[3]

The Supreme Court of Appeals of Virginia held that the appellee had no right to charge the appellant's account with the dishonored check. Finding that the $2,500 had been paid in cash, the court concluded that the bank had made final payment and could not sue the appellant on the check, notwithstanding defendant's indorsement and presentment.[4]

Traditionally, payment in cash of an item by the payor bank has constituted final payment and the Uniform Commercial Code has

1. Kirby v. First & Merchants Nat'l Bank, 210 Va. 88, 168 S.E.2d 273 (1969).
2. *Id.* at 88, 168 S.E.2d at 279.
3. *Id.* at 91, 168 S.E.2d at 275.
4. *Id.* at 92, 168 S.E.2d at 276.