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When There Is No License, Is There a Marriage?

A State-by-State Comparison

Part One of a Two-Part Article

By Martin E. Friedlander

You know the drill: In an initial interview of a divorcing client, there is a list of routine, background-information questions to be asked. Of course, these include the question, "Have you ever been married before?" Subsequent follow-up questions would include the number of prior marriages and how they ended.

So, consider this situation: In the midst of a matrimonial proceeding, an undisclosed fact comes to light — the client was previously religiously married and obtained a religious divorce, but never obtained a marriage license or civil divorce. The client assumed that the first marriage was not recognized by the state because the parties did not obtain a marriage license. Having obtained a religious divorce, she then assumed she could move on without restriction. (*Editor's Note*: For more on religious divorce, *see* Mark Momjian: "'Getting' It Done Through Social Media and Other Forms of Protest," *The Matrimonial Strategist*, August 2015, available at http://bit.ly/1HA4tmg.)

It is not often that a matrimonial practitioner faces a case involving a void marriage, but it does happen. What are the laws as they apply to parties who were previously married in a religious ceremony without a marriage license, but then failed to obtain a civil divorce before marrying again? Do maintenance, counsel fees and equitable distribution considerations apply? And how do different states handle these questions?

New York

In our above scenario, the first marriage, although not registered with the state, would be recognized in New York under Domestic Relations Law (DRL) Section 25. The relevant portion of DRL § 25 provides that, "Nothing in this article

continued on page 2

'Forensic Clairvoyance'

By Jeffrey P. Wittmann

Attorneys take a variety of approaches to client preparation in advance of a child custody evaluation, ranging from a "hands-off" stance (sending their parent litigant off to the assessment with no guidelines about how to handle the process) to hours of guidance — what to be careful about, what materials to offer the evaluator, etc. When preparation is provided, a rational and understandable assumption often held by both litigants and the lawyers that represent them is that there will be a chance during the assessment to respond to all central allegations made by the other parent. Sadly, such trust in the fairness of the evaluation process is, in some cases, quite misplaced, and can lead to unfortunate outcomes.

Peer reviews of the custody evaluations of other mental health professionals have revealed a worrisome approach to assessment, represented by the following case example: The mother in a custody matter describes for the evaluator an alleged pattern of threats, intimidation and episodic violence on the part of her husband over the past three years. She states that some of the frightening behavior happened in front of the couple's child. The evaluator also hears from the husband that the mother had, on occasion, thrown things at him when she was angry, and that their child watched this. Neither party is asked about the allegations made by the other, and no information confirming violence is gleaned from the

continued on page 5

In This Issue

Religious Marriage... 1

'Forensic Clairvoyance' 1

Alienation Dynamics............... 3

PERIODICALS

Religious Marriage

continued from page 1

contained shall be construed to render void by reason of failure to procure a marriage license any marriage solemnized between persons of full age." Consequently, the client was still legally married to her first husband, and the relatively routine matrimonial action needed to be converted to an action to declare a void marriage.

In New York, an action to declare the nullity of a void marriage is treated the same as an action for a divorce, in accordance with DRL § 236 (b)(2). (The DRL § 236 (b)(2) states, "the provisions of this part (part B) shall be applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage ... commenced on and after the effective date of this part (Oct. 13, 2010).")

Equitable Distribution

The parties in a void marriage are entitled to equitable distribution of their assets under New York Law. The courts have weighed in on this issue, including the Appellate Division, Second Department, which, in *Brandt v. Brandt*, 149 A.D.2d 646 (2nd Dept. 1989) held that equitable distribution is available in an action for a declaration of the nullity of a void marriage. Furthermore, DRL § 236 (b)(5)(a) states, "Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage ... shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment."

Maintenance

Surprisingly, maintenance can be awarded to a spouse in an action to declare a void marriage. DRL § 236 Part A. DRL § 236 A (1) states that, "in any action or proceeding brought (1) during the lifetime of both parties to the marriage to annul a marriage or declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, the court may direct either spouse to provide suitably for the support of the other as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of each spouse to be self-supporting, the circumstances of the case and of the respective parties. Maintenance is to be awarded as if it was the standard divorce case including *pendente lite* maintenance as it relates to equitable distribution of the parties." In fact, the Appellate Division, Third Department, in *Campbell v. Thomas*, 73 A.D.3d 103 (2nd Dept. 2010), determined that the legislature had chosen, without regard to whether the marriage is void or voidable, to attach to annulled marriages sufficient validity and significance to support an award of alimony, now known as maintenance, to serve the same as any valid marriage would, as the foundation of a continuing duty to support the less-monied spouse after the marriage is terminated.

Counsel Fees

Under DRL § 237 (a), a party may be awarded counsel fees in an action to declare the nullity of a void marriage. DRL § 237 (a) states that in any action or proceeding brought "(1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce ... the Court may direct either spouse ... to pay counsel fees ... to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the Court's

continued on page 7

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Religious Marriage

continued from page 2

discretion, justice requires, having regard to the circumstances of the case and of the respective parties." In fact, DRL § 237 (a) specifically creates a rebuttable presumption that counsel fees will be awarded to the less monied spouse in all of the above circumstances, whether it be an action for divorce, separation, annulment or to declare a marriage void.

Settlement Agreements

Are there any differences between an action to declare a marriage void and one for divorce that must be considered in drafting settlement agreements other than noting the type of action it is? Not according to DRL § 236 (b)(3), which governs the issue. It is enforced in the same manner in actions to declare the nullity of a void marriage as it is in an action for divorce, so a settlement agreement in this matter encompasses all issues as if it is a standard matrimonial action.

Recent New York Case Puts Law Into Question

As this article was being researched, Justice Matthew Cooper's decision of *Devorah H v. Steven S.*, 2015 NY slip op 2522, (decided on July 2, 2015), was published. In that case, a marriage conducted in a Rabbi's study with purportedly two witnesses was not deemed a valid marriage under DRL § 25. The case calls for the repeal of this law. The decision centered on the lack of ceremony, the ripping up of the Ketubah (marriage contract) and the fact that the parties represented themselves as single on their tax returns and in obtaining government assistance. While *Devorah* can be distinguished from other cases — such as where the parties had more extensive ceremonies and held themselves out as a married couple — the issue becomes whether these factors should necessarily be scrutinized. This will be a case to watch should it be appealed.

CONNECTICUT

Connecticut Statute Section 46B-24(a) states, "No persons may be joined in marriage in this State until both have … been issued a license by registrar." Conn. Gen. Stat. § 466-24(a). Furthermore, the Connecticut general Statute Section 46B-60 states that, "In connection with any petition for annulment under this Chapter, the Superior Court may make such order … concerning alimony as it might make in an action for dissolution of marriage." Conn. Gen. stat. § 466-60. And the statute goes on to state that "[t]he issue of void or voidable marriage shall be deemed legitimate." *Id.* The applicable statute and case law provide that even though the marriage is technically void because it was entered into without a marriage license, alimony (maintenance) may be awarded.

On the issue of award of attorney fees, the statute continues in Section 62a: "In any proceeding seeking relief under ... this chapter ... the Court may order either spouse or ... parent to pay the reasonable attorney's fees of the other in accordance of their respective financial abilities." Conn. Gen. Stat. § 466-62(a). Interestingly, the cases of *Hames v. Hames*, 163 Conn 588 (1972), as well as *Carabetta v. Carabetta*, 182 Conn. 344 (1980), point out that it is not Connecticut policy to treat as void a marriage entered into in good faith by at least one of the parties, followed by cohabitation. Another case, *Hassan v. Hassan*, 2001 Conn. Super. Lexis 2959 at 16 (2001), noted that, "[a]lthough the statute prohibits the celebration of a marriage without a license, the penalty section does not declare the marriage void. It merely imposes a penalty on the officiant." Accordingly, if a religious marriage is entered into in good faith by at least one of the parties, counsel fees and maintenance may be awarded.

… a religious marriage ceremony, followed by a couple living together, is sufficient to create a valid marriage, requiring dissolution, if one party believed in good faith that the marriage was legitimate.

The question becomes: What does the term "entering the marriage in good faith" mean?

The court in *State v. Nosik*, 245 Conn. 196 (1998), considered a religious marriage void because it was done in bad faith. The court quoted *Carabetta* while determining whether the good-faith doctrine would apply, and concluded: "Thus … we decided not to invalidate legally imperfect marriages if the parties had: 1) participated in a religious rite with the good faith intention of entering into a valid legal marriage; and 2) shared and manifested a good faith belief that they were, in fact, legally married." *State v. Nosik*, 245 Conn. at 202. The result of *Nasik* is that as long as a religious marriage, without a marriage license, is done with good faith, it is considered a valid marriage. Thus, if parties marry through a religious marriage alone knowing it is not legal, that marriage is invalid and Connecticut courts will not award maintenance, counsel fees and equitable distribution.

Under Connecticut law, there are therefore two possibilities: 1) The case will fall under the state's statutes providing that a void marriage will be deemed legitimate by a court and, therefore, alimony (maintenance) and attorneys' fees may still be awarded; or 2) The case may be subject to the ruling of *Hassan*, that the marriage is deemed valid. Under *Hassan*, there seems to be no distinction between whether there was good faith or not. The court in *Hassan* stated, the "[c]eremony established enough of a status of marriage between the parties as to require a Court to disestablish it." *Hassan v. Hassan*, 2001 Conn. Super. Lexis 2959 at 30.

continued on page 8

Religious Marriage

continued from page 7

Therefore, a religious marriage ceremony, followed by a couple living together, is sufficient to create a valid marriage, requiring dissolution, if one party believed in good faith that the marriage was legitimate. One would surmise that the same rule would apply if the case involved one who did not obtain a civil divorce based on a prior marriage. Thus, knowledge of both parties that they are not complying with the law will deem their marriage a nullity without any of the benefits of a marriage.

CALIFORNIA

California's statute concerning marriage licenses provides under Section 359(d) of the California Family Code that "The person solemnizing the marriage shall complete the solemnization sections on the marriage license." Thus, a religious marriage alone, under California law, would be deemed void.

As it relates to the issue of maintenance and counsel fee, the statute provides "The Court may, during … proceeding for a nullity of marriage, order a party to pay for the support of the other party in the same manner as if the marriage had not be void … if the party for whose benefit the order is made is found to be the putative spouse." Cal. Fam. Code § 2254. Thus, even though the marriage ceremony is not valid, spousal support on a void marriage may be granted, provided that at least one of the spouses is a good faith putative spouse. In regard to counsel fees, the statutes states, "The Court may grant attorney fees … in proceedings to have the marriage adjudged void … in which the party applying for attorney's fees and costs is found to be innocent of fraud or wrongdoing in inducing or entering the marriage." Cal. Fam. Code § 2255.

As long as the party did not knowingly enter into the marriage knowing it was against the law, it appears that the statute allows for the order of attorney fees and maintenance. The terms "innocent" and "fraud," and their definitions, will be subject to debate and interpretation.

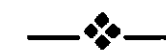
In the case of *Estate of DePasse*, 97 Cal.App., 4th 92 (2002), a woman on her deathbed decided to marry. Because of the short notice, there was no chance to obtain a marriage license. A hospital chaplain performed the marriage. The court then quoted Cal. Fam. Code §§ 300 and 306, among other statutes, to determine that a marriage requires a marriage license to be deemed valid; therefore, the marriage in *Estate of DePassee* was void. The court further explained that since the husband was aware of the license requirement but elected to go forward without a license due to the lack of time, the good-faith exception to allow the marriage to be treated as valid did not apply, and the husband was not deemed a putative spouse.

[In California,] "The good-faith inquiry is a subjective one that focuses on the actual state of mind of the alleged putative spouse."

"The good-faith inquiry, is a subjective one, that focuses on the actual state of mind of the alleged putative spouse." *Ceja v. Rudolph & Sletten, Inc.*, 56 Cal. 4th 113, 1128 (2013). To explore the good-faith exception further, let's look at the case of *Tejeda in re Marriage of Tejeda*, 179 Cal. App. 4th 973 (Cal. App. 6th District 2009). There, a husband and a wife were in a void marriage for close to 30 years while holding themselves out as a married couple. The court ruled that the codification of putative spouse "was not intended to narrow the application of the doctrine … to void or voidable marriage. Instead, the Legislature contemplated the continued production of innocent parties who believe they were validly married." *Id.* at 980. Additionally, "Once either party is a putative spouse, the union is a putative marriage." The court concluded in *Tejeda* that, "([t]he mandate of the Section 2251 must be applied … when the Court makes the… findings that "(1) the marriage is void or voidable, and (2) at least one party to the union maintain a good faith belief of the validity of the marriage." *Id.* at 985.

In California, spousal support and attorney fees will apply in most cases of void marriage, but if both parties knowingly enter into a marriage that is invalid under applicable law, relief is not to be provided. Thus, in the case where a civil divorce was not obtained and if both parties are aware of the required laws of marriage, they cannot seek relief of maintenance, counsel fees, and equitable distribution in California.

In Part Two of this article, we will look at how several other jurisdictions handle the question: When there is a religious marriage but no marriage license, is there a marriage to dissolve and, if so, under what legal standards?



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