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Domestic Relations—Medical Care of Children

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an identical situation in favor of the wife, adopting the legal fiction that the annulment "related back" to the beginning of a marriage and the marriage was considered never to have existed.⁹ Even in that case, however, the legal fiction was modified, since the husband was required to pay only from the time of the annulment rather than throughout the entire second marriage.¹⁰

The Court pointed out that the decision in the *Sleicher* case was the only means of allowing the wife a source of support, since at that time no support could be had from an annulled marriage.¹¹ However, after the *Sleicher* case, the Civil Practice Act was amended to permit a court to grant support in an annulment action.¹²

The fundamental function of alimony is to provide support for a wife not otherwise supported, and in New York alimony automatically ceases upon remarriage;¹³ the subsequent fortunes of the remarriage do not affect this.¹⁴ The purpose of the *Sleicher* holding was only to remedy the one situation in which a wife had no source of support. By the amendment of the Civil Practice Act the legislature itself corrected the defect; thus the Court of Appeals felt that the justification for the *Sleicher* decision had ended. As in all normal cases of remarriage under New York law, the wife must look only to her last husband for support.

The Court recognized the unfortunate repercussions of their decision in the instant case, since the second husband had died while the action was pending, but nevertheless felt that the plaintiff was "no different from any other woman whose source of support has come to an end through death."¹⁵

Medical Care of Children

In a proceeding by the Commissioner of Social Welfare to obtain custody of a twelve year old boy whose father, because of his personal philosophy, refused to allow an operation on the son's hairlip and cleft palate, the Court (reversing the Appellate Division)¹⁶ reinstated the Children's Court decision.¹⁷ Although

9. *Id.* at 366, 167 N.E. at 502.

10. *Id.* at 371, 167 N. E. at 503.

11. See *Jones v. Brinsmade*, 183 N. Y. 258, 76 N. E. 22 (1905).

12. N. Y. CIV. PRAC. ACT § 1140-a.

13. It would seem that New York is in the minority on this point. The majority of courts hold that remarriage is a ground for modification, but does not automatically stop alimony. *Morgan v. Morgan*, 211 Ala. 7, 99 So. 185 (1924). See annot. 64 A. L. R. 1273 (1929).

14. *Nelson v. Nelson*, 282 Mo. 412, 221 S. W. 1066 (1920).

15. 308 N. Y. at 226, 124 N. E. 2d at 295.

16. *In re Seiferth, Jr.*, 285 App. Div. 221, 137 N. Y. S. 2d 35 (4th Dep't 1955)

17. 127 N. Y. S. 2d 63 (1954).

all courts had awarded custody to the Commissioner, the Children's Court wished the Commissioner to acquaint the child with the benefits of the operation,¹⁸ whereas the Appellate Division would have required the operation.

The child in question is now fourteen years old. He believes, as does his father, who opposed the operation, that his hairlip and cleft palate can be cured only by "forces in the universe," and that any surgery would have to be completely undone in order to effect a cure. The Court of Appeals *held*,¹⁹ that under the circumstances the trial court's discretion should be respected, since the trial court had first hand knowledge of the facts and could best be relied on for an equitable decision. The Children's Court has jurisdiction to order such an operation,²⁰ but it believed more harm would result to the child than would be obviated by it because of the boy's mental attitude.²¹

The dissenters in the Court of Appeals believed that the majority was overlooking the main point of the case: that the child *was* (and is) "neglected" according to the law, and the child's wishes are irrelevant. The child's acquiescence in his parent's neglect does not "render it permissible." As did the Appellate Division,²² the dissenters apparently overlook the fact that the statute provides that "the court *in its discretion* . . . may cause any person within its jurisdiction to be examined,"²³ and ". . . a suitable order *may* be made for the treatment . . . of such child . . ." ²⁴ (emphasis supplied).

Religious Upbringing of Children

In an appeal from an order modifying a judgment of separation, eliminating a condition that the child be brought up in the Roman Catholic religion and instead directing the child be permitted to attend the church of his own choice, and further, if he so chose, to transfer from the parochial school he was then attending to a public school, the modification was upheld, *per curiam*; Judges Desmond and Conway dissenting.²⁵

The wife, a Christian Scientist, had entered into an antenuptial agreement to bring up all children in the faith of her husband, a Roman Catholic. In 1949 the

18. Once acquainted with its advantages, the boy may decide for himself to undergo the operation.

19. 309 N. Y. 80, 127 N. E. 2d 820 (1955).

20. N. Y. Children's Court Act § 2 (4), which grants Children's Court jurisdiction of neglected children. A neglected child is defined as one whose parents refuse to provide necessary medical or surgical care.

21. Note 17, *supra*.

22. Note 16, *supra*.

23. N. Y. CHILDREN'S COURT ACT § 24.

24. *Ibid.*

25. *Martin v. Martin*, 308 N. Y. 136, 123 N. E. 2d 812 (1954).