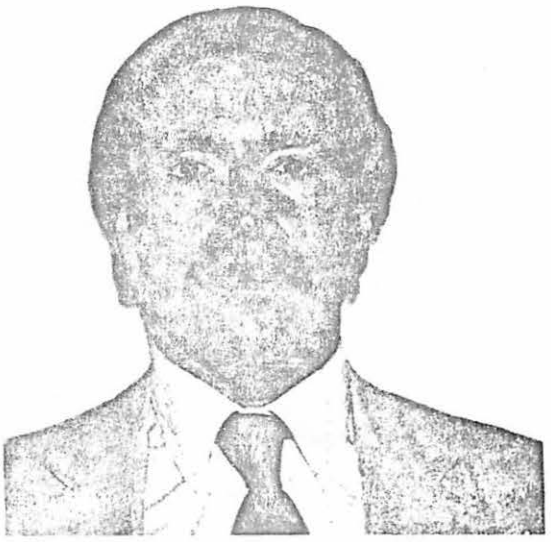
Mass. G.L. c. 208 §37: Can Babylon Prevail?



by Joseph A. Caulfield, Jr.

I. INTRODUCTION

This article concerns itself with the issue of whether the sexual conduct of a divorced wife is, in and of itself, a sufficient change in circumstances to permit a Massachusetts Court to modify its judgment relative to alimony pursuant to a decree absolute. Although the courts of the Commonwealth have skirted this issue in several decisions, they have never squarely addressed it.

II. MASSACHUSETTS DECISIONS

The Court came closest to deciding this issue in *Miller*.[1] This decision involved a husband who filed a complaint for modification seeking to eliminate all alimony obligations pursuant to a decree nisi. The Probate Court found that after the entry of the decree nisi, and before the decree became absolute, the wife openly engaged in a campaign of adulterous behavior for the purpose of intentionally injuring and embarrassing the husband. The Court further found such conduct did, in fact, affect the husband and affected his ability to carry on his business or to acquire new business as he had previously.

The judge of the Probate Court reduced the husband's alimony and the husband appealed, arguing that the law in such instances required that his alimony obligations be terminated.

The Supreme Judicial Court affirmed the lower court's decree holding that the law of the Commonwealth required no such action and that the "judge has discretion concerning the reduction, if any, in alimony obligations which might be appropriate in such circumstances . . . There is no showing that the judge abused his discretion."[2]

Therefore, in this decision the Court considered four factors:

1. The sexual conduct of the wife;
2. The fact that her conduct was engaged in openly and with the intention of embarrassing and injuring the husband and his reputation;
3. The fact that such conduct did in fact affect the husband and caused him to suffer financial loss;
4. The fact that the parties were still married.

Under such circumstances it is within the discretion of a judge to reduce alimony. The decision is silent as to how much weight the Court attributed to each of the above factors in reaching its decision.

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However, in a later case, *Singer*,[3] the Court of Appeals indicated in commenting upon *Miller*[4] that what mattered "was a weighing of the facts of each case, primarily the economic facts."[5]

The court also indicated that the new c. 203 §34[6] "was not intended to place any greater emphasis on fault . . . than before."[7] Thus, the fact that the decree nisi, from which the petitioner appealed in *Miller*[8] was governed by the old c. 204 §34[9] ought not to affect the Court's reasoning. Similarly, the recent amendments to c. 208 §37[10] are not relevant.

There is also a line of decisions in the Commonwealth dealing with the question of whether alimony terminates upon remarriage.

In *Robbins*,[11] the respondent was receiving alimony from the petitioner pursuant to a decree which was silent on the effect of remarriage. The respondent remarried, but then immediately instituted annulment proceedings. A decree annulling the marriage was entered slightly less than four months after her remarriage. The petitioner alleged that the remarriage of the respondent " 'constituted such a substantial change in the circumstances' as would warrant a modification of the decree."[12] A decree entered terminating alimony immediately from which the respondent appealed.

The Supreme Judicial Court, after reviewing decisions of sister states reasoned that "(t)here should be no hard and fast rule one way or the other."[13] Holding that the question is "whether there has been a *real*, as distinct from an *apparent*, change of circumstances" (emphasis supplied), and that here there was no significant change of circumstances, the court reversed the lower court's decree and reinstated alimony.[14]

The *Gerrig*[15] decision arose from a Superior Court action by the wife's trustee to recover alimony payments due under a separation agreement. No reference to the contract was made in the divorce decree, which had become absolute. The agreement provided that the husband shall make support payments "until the remarriage of the wife."[16] The wife remarried and in less than two years the marriage was declared void. The Supreme Judicial Court held that a party to a contract "should be entitled to rely upon the appearance of things."[17] Accordingly, the Court entered judgment for the husband sustaining his exception to the Superior Court rulings.[18]

Glazer[19] involved facts quite similar to *Gerrig*,[20] except in *Glazer* the second marriage was annulled as bigamous. The Supreme Judicial Court held that the obligation in the agreement to support the wife "as long as * * * (she)remains unmarried," was ended by the wife's remarriage despite its subseqeunt annulment.[21]

Surabian[22] involved a situation where a decree, which had become absolute, incorporated by reference the terms of a separation agreement. Under the agreement the wife received alimony, "provided, however, that if the wife remarries such support and maintenance shall forthwith cease and terminate and the husband (libellee) will be under no further obligation to pay any moneys for the support of said wife."[23] The wife remarried and about a year and a half later the marriage was annulled. Facing contempt proceedings for nonpayment, the husband filed a petition for modification. The Probate Court revoked the alimony provision of the decree absolute as of the date of the wife's remarriage. The wife appealed.

The Supreme Judicial Court first determined that the agreement survived the decree absolute, finding an intent that the agreement not be superseded by the decree.[24]

Observing that in *Gerrig*,[25] the wife sought to enforce the support provision of the agreement, the wife in the instant case sought "to escape the consequences of the contract which she freely entered into by proceeding under the divorce decree rather than by suing under the separation agreement."[26]

It further stated that under G.L. c. 208, §34-7, a decree providing for support payments does not rest upon the agreement of the parties, though such is treated by the judge as evidence to aid him in his determination. Therefore, upon review, the judge's intention must be ascertained.[27]

Since the Probate judge was chargeable with knowledge of the construction given the word "remarriage" in *Gerrig*,[28] and did not modify the agreement in any way, it must be assumed that he intended that alimony cease upon the wife's going through the ceremony of marriage with another

man.[29] Accordingly the Supreme Judicial Court affirmed the decree of the Probate Court.

In a footnote to this decision, the Court indicated that due to the changes in the status of women, the Court might, if presented an opportunity, reconsider the rule of *Robbins*[30] and decide that, even in the absence of the intent of the parties and the court, the ceremony of marriage should terminate the wife's alimony.[31]

What principles, germane to the subject of this article, can be deduced from the preceding review of Massachusetts decisions?

From *Singer*[32] and its precursors, the rule in the Commonwealth appears to be to award alimony based on one's need, not one's morals. Regarding the effect of the ceremony of marriage on a wife's alimony, the rule of *Robbins*[33] indicates that the court ought to determine whether there has, in fact, been an *actual* change of circumstances; the rule of *Gerrig*[34] looks to the intent of the parties; *Surabian*[35] looks to the intent of the judge.

Then comes footnote 8 to *Surabian*,[36] indicating that the rule might well become in the Commonwealth that the ceremony of marriage in and of itself, will terminate the wife's alimony. If the Court, given the occasion, may attribute so much weight to a ceremony of remarriage, which proves to be "de facto," rather than "de jure," without going beyond the mere ceremony and examining the substance of the remarriage, how may the court be expected to rule when confronted with cohabitation alone, or something else?

III. COMMON LAW

It is useful at this point to examine the Common Law in this area.

Generally speaking, English matrimonial law derived from Roman law. As the patriarchal laws of Rome were gradually replaced with edicts and rescripts, marriage began to be viewed in many respects as a private contract. However, the considerable influence of the Roman Catholic Church soon changed this view and marriage came to be viewed as a sacred bond upon which rested the stability of society.[37]

Under canonical law, one could not obtain a divorce "a vinculo matrimonii,"[38] even on the ground of adultery. However, grounds for a divorce "a mensa et thoro,"[39] as well as eighteen grounds for annulment were recognized.

The English Ecclesiastical Courts administered canon law in matrimonial disputes and, accordingly, no absolute divorce could be judicially granted in England.[40] From the time of Henry VII, however, Parliament assumed the right to grant absolute divorces. So costly was this, though, involving a Bill, tried by legal peers, that it was a rare occurrence until the eighteenth century.[41]

It was not until the middle of the eighteenth century that Parliament conferred upon the judiciary the power of decreeing an absolute divorce through the creation of the Court for Divorce and Matrimonial Causes.[42]

In regarding the practice of awarding alimony in the Ecclesiastical Courts, Blackstone states that alimony to the wife was settled at the discretion of the judge, upon consideration of all the circumstances.[43] However, he later states that she was not allowed alimony if she had eloped and was cohabiting with another man.[44]

English decisions indicate though, that even in such circumstances, the wife could be allowed temporary alimony.[45]

It is interesting to note that English courts frequently insert a limiting clause in their alimony decrees, "dum sola et casta vixerit,"[46] avoiding, therefore, the issue with which this article is concerned.

IV. SISTER JURISDICTIONS

The decisions on this issue rendered by courts in other states fall into three divisions: those applying a governing statute; those interpreting a provision in a separation agreement; and those unaided by either a statute or agreement.

A. Governing Statute

New York, for example, has a statute[47] which permits a court, in its discretion, to terminate alimony pursuant to a final judgment upon proof that the wife is habitually living with another man

and holding herself out as his wife, although unmarried. The New York courts have rather strictly interpreted this statute and have held that the "holding out may not be inferred simply from proof of "habitually living together."[48]

A California statute[49] creates a rebuttable presumption of decreased need[50] for support upon a showing of cohabitation. The Court has read into this statute a "holding out" requirement, as well.[51]

An Illinois act[52] permits support to be terminated if the recipient spouse cohabits with another on a "resident, continuing, conjugal basis." The Court here has interpreted "conjugal" to require proof of sexual conduct.[53]

A final example of this type of statute is the Georgian "live in lover" law.[54] Under this section a former spouse who voluntarily cohabits with a third party of the opposite sex in a meretricious relationship may have his or her alimony reduced or terminated.[55]

B. Separation Agreement

If the parties have agreed that alimony is to cease upon the wife's cohabitation, there seems little doubt that the courts will enforce this provision[56] and will not permit the support obligation to revive by the termination of that cohabitation.[57]

On the other hand, when the parties have agreed only that "remarriage" will terminate alimony, the courts have not permitted alimony to terminate on the mere showing of a "de facto" marriage, but for different reasons.

A Vermont court declared thusly on the theory that a "de jure" marriage carries with it duties of legal support and rights of inheritance, whereas a "de facto" marriage does not. Furthermore, in the instant case there was no "holding out" nor financial change of circumstances.[58]

Nevada reached the same conclusion by finding out that a "de facto" marriage cannot exist in a state which does not recognize common-law marriage.[59]

C. Neither Under Statute Or Agreement

The minority opinion appears to be that cohabitation in and of itself is a sufficient change of circumstances as to permit a court to reduce or terminate alimony.

The leading case espousing this view is *Rubinoff* which reasons that "it would be shocking to the conscience to compel the husband to continue to support the wife by payment of alimony while she is living in adultery with another man."[60]

The majority view, and the recent decisions, reject this "misconduct" theory as no longer in step with today's social world.[61] Accordingly, the majority rule is that the wife's conduct is to be considered only as it is relevant to a change in economic circumstances.[62] The court should therefore, under such circumstances, explore whether the wife is being supported to any extent by her paramour, or, alternately, whether her paramour is being supported by the wife's alimony.[63]

V. CONCLUSION

Where does all this leave us?

The writer is of the opinion that the Massachusetts Courts will continue to award alimony based on finances not morals.[64] The troublesome footnote to *Surabian*[65] is not the law and may never be so. Since the Commonwealth does not recognize common-law marriages, then the Court, following its sister state, Nevada,[66] may not listen kindly to the argument that some types of cohabitation can be viewed as a "de facto" marriage.

Accordingly, the writer would expect that if the Supreme Judicial Court were faced squarely with the issue of whether the conduct of a divorced wife, even if such conduct had all the earmarks of a marriage, save for the legal ceremony, would, in and of itself, warrant a modification, the Court would rule no.

FOOTNOTES

[1] Miller v. Miller, 366 Mass. 846, 314, N.E. 2d 443 (1974).

[2] Id. At 443 (N.E. 2d).

[3] Singer v. Singer, 1979 Mass. App. Ct. Adv. Sh. 1491, 1498.

[4] Miller, supra

[5] Supra at 1449.

[6] St. 1975, c. 400 § 33. The present form of this statute St. 1977, c. 467, is as follows:

> Upon divorce or upon motion in an action brought at any time after a divorce, the court may make a judgement for either of the parties to pay alimony to the other. In addition to or in lieu of a judgement to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

The slight difference between this and the 1975 version are not relevant to this article.

[7] Singer, supra at 1501.

[8] Miller, supra.

[9] St. 1931 c. 426 § 96.

> Upon a divorce, or upon petition at any time after a divorce, the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband.

[10] The present form of this statute, St. 1977, c. 495, is as follows:

> After a judgement for alimony or an annual allowance for the spouse or children, the court may, from time to time, upon the action for modification of either party, revise and alter its judgment relative to the amount of such alimony or annual allowance and the payment thereof, and may make any judgment relative thereto which it might have made in the original action.

[11] Robbins vs. Robbins, 178 N.E. 2d 281 (1961 Mass.).

[12] Id. at 282 (N.E. 2d).

[13] Id. at 284 (N.E. 2d).

[14] Id. at 284 (N.E. 2d).

[15] Gerrig v. Sneirson, 183 N.E. 2d 131 (1962 Mass.).

[16] Id. at 132 (N.E. 2d).

[17] Id. at 133 (N.E. 2d).

[18] The Supreme Judicial Court seemed to ground its opinion partially on the fact that the wife testified, at the lower court hearing, that she entered into this second marriage in Rhode Island for the express purpose of avoiding the statutory disability of the old c. 208, § 24 (St. 1943 c. 168 § 1) which placed a two year prohibition on remarriage on her second husband. The Court reasoned that the first husband had no reasonable means of discovering this and anticipated that that marriage would be declared void and "the contract cannot be interpreted as contemplating that he can act only at peril in ordering his own affairs in reliance on appearances." Id. at 133 (N.E. 2d)

[19] Glazer v. Silverman, 236 N.E. 2d. 199 (1968 Mass.).

[20] Gerrig, supra.

[21] Glazer, supra at 202 (N.E. 2d). In both *Gerrig* and *Glazer*, the Court gave some consideration to whether the wife gained the right to be supported by another man and indicated that there can be no mechanical applications of principles and equitable principals should be invoked to protect both husband and wife, as was suggested in 29 So. Cal. L. Rev. 367,368.

[22] Surabian v. Surabian, 285 N.E. 2d 909 (1972 Mass.).

[23] Id. at 910 (N.E. 2d).

[24] Id. at 911 (N.E. 2d).

[25] Gerrig, supra.

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