IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT JACKSON

BOBBY G. JOYCE,	)	Gibson County Chancery Court No. 11667
Plaintiff/Appellant.	)	
VS.	)	C. A. NO. 02A01-9602-CH-00034
ALICE IRENE JOYCE,	)	
Defendant/Appellee.	)	

From the Chancery Court of Gibson County at Trenton.
Honorable George R. Ellis, Chancellor

FILED

December 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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Attorney for Plaintiff/Appellant.

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Attorney for Defendant/Appellee.

OPINION FILED:

REMANDED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)
HIGHERS, J. : (Concurs)

Bobby G. Joyce (Husband) sought a divorce from Alice Irene Joyce (Wife) pursuant to T.C.A. § 36-4-101(12).[1] The parties were married September 2, 1967. The complaint alleges that they separated on October 2, 1992. Wife answered that it was on this date that she was committed to Western State Hospital where she remained for several weeks.

Wife's attorney was subsequently appointed her guardian ad litem. Wife further moved that the complaint be dismissed on the basis that she is mentally incompetent. The trial court dismissed the complaint on the basis of Wife's mental incompetence, and Husband appeals.

This appeal appears to present a matter of first impression in this jurisdiction, the issue being whether insanity is a defense to a divorce sought on the basis of the two year separation set forth in § 36-4-101(12).[2]

It is Husband's contention that the trial court erred in dismissing his complaint because the separation ground is a no-fault ground, that Wife's incapacity presents no prejudice to her because of the appointment of the guardian ad litem and that Wife's condition is not a statutory defense to divorce.

Courts from other jurisdictions have addressed this issue with varying results. For example, in ***Adams v. Adams***, 408 So.2d 1322 (La. 1982), wife sought a divorce based upon her having lived separate and apart from her husband continuously for more than one year.[3] She contended that under the statute she was entitled to a divorce notwithstanding that her husband was committed to a mental institution on the first day of the separation and had remained there ever since.

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[1]**36-4-101. Grounds for divorce from bonds of matrimony**. . . .

(12) For a continuous period of two (2) or more years which commenced prior to or after April 18, 1985, both parties have lived in separate residences, have not cohabitated as man and wife during such period, and there are no minor children of the parties.

[2]Subsection 12 was added to 36-4-101 by Public Acts 1985, ch. 178, § 1. It was amended by Public Acts 1989, ch. 393, § 1 which changed the three year period to two years.

[3]La.R.S. 9:301 provided:

When the spouses have been living separate and apart continuously for a period of one year or more, either spouse may sue for and obtain a judgment of absolute divorce.

She argued that the statute does not require that the separation be voluntary or that both parties be sane at the outset of the separation or thereafter. Husband argued that the separation contemplated by the statute is voluntary and cannot be voluntary when it commences because of the insanity and/or institutional commitment of one of the spouses. The Supreme Court of Louisiana determined that neither party's position was fully correct but that the "living separate and apart" contemplated by the statute must be voluntary on the part of at least one of the parties, even though the statute does not specifically so provide, and continues for a period of one year. The commencement of that year only begins when a spouse evidences an intent to end the marital association. The insanity of the other spouse, coincident with or subsequent to the outset of the couple's physically living separate and apart, is not necessarily determinative. The court stated that, under husband's interpretation of the statute, and further noting no statutory provision permitting a divorce on the grounds of insanity, it would be impossible to obtain a divorce once the other spouse exhibited behavior which might be considered insane by the trial judge. In contrast, where both spouses are sane, either may choose against the will of the other to live separate and apart continuously for one year and thereby establish the right to a divorce. In the case where one spouse is afflicted with mental illness, the healthy spouse is denied the right to secure a divorce, which right that spouse would otherwise have but for the mental condition. The Supreme Court of Louisiana reversed the trial court and awarded wife a divorce. ***See also Loudenback v. Loudenback***, 407 So.2d 73 (La. Ct. App. 1981).

In ***Altbrandt v. Altbrandt***, 322 A.2d 839 (N.J. Super. Ct. Ch. Div. 1974), husband sought a divorce based upon New Jersey's eighteen month separation statute.[4] Wife contended that the separation must be voluntary, which it could not be due to her mental incompetence. The court held that the statute does not require a voluntary act. Incompetence, if not treated by institutionalization, is no defense to a cause of action for divorce. The court noted that it was the legislative intent to establish a no-fault ground for divorce in accordance with the public policy of the state that dead marriages should be legally terminated. If the marital relationship has deteriorated

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[4]N.J.S.A. 2a:34-2(d) provides:

> Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least 18 or more consecutive months and there is no reasonable prospect of reconciliation; provided, further that after the 18-month period there shall be a presumption that there is no reasonable prospect of a reconciliation; . . . .

to the point that one party seeks a divorce, the court noted there is no social good to be achieved by denying it. Reconciliation cannot be achieved unilaterally. The opinion further noted that under another section of the divorce statute, N.J.S.A. 2a:34-2(g), separation as a result of institutionalization for mental illness must be for twenty-four months.

Illustrative of the contrary position is ***Dorsey v. Dorsey***, 195 F.2d 567 (D.C. Cir. 1952), wherein the parties voluntarily separated (the applicable statute provided a divorce may be granted for voluntary separation for five consecutive years without cohabitation). Shortly thereafter, Wife was adjudicated insane and institutionalized where she remained. Occasionally she was allowed to visit the home, but never indicated a desire to resume family or marital relations. In fact, she always expressed a desire to return to the hospital. The trial court's holding that the Wife's insanity, occurring within the five year period, terminated the voluntary nature of the separation was affirmed. Relying upon previous decisions that a period of insanity must be excluded in computing the statutory period of desertion, and reasoning that the continued desertion must depend upon the continued intention and, but for the insanity of the wife she may have repented and returned to her husband before the expiration of the statutory period, the court reasoned that this rule should apply with equal force to voluntary separation.

In ***Miller v. Miller***, 487 S.W.2d 382 (Tex. Civ. App. 1972), husband sought a divorce on the grounds of living apart without cohabitation for as long as three years. The court held that there would be a meritorious defense if any portion of the three year period of separation set forth in the statute fell within the period in which the defendant was mentally incompetent. The wife was so declared and indefinitely committed to a state hospital where she remained. The court stated that no act committed by an insane person while insane may be a ground for divorce.

The husband sought a divorce under Virginia's two year separation statute in ***Crittenden v. Crittenden***, 168 S.E.2d 115 (Va. 1969). Wife asserted her mental incompetence and commitment as a defense. The trial court granted husband a divorce and the appellate court reversed. Husband contended that the code section was without qualification and not dependant upon fault or provocation and, therefore, he was entitled to a divorce on the ground of separation for two years notwithstanding the wife's incompetence. The court acknowledged its prior determination that this

code section was enacted to permit the granting of divorce to either spouse regardless of fault when the parties have lived separate and apart for the required period and further acknowledged that the statute does not qualify the separation by use of the words "voluntary" or "mutual" and further does not contain an exception applying to a situation where the separation results from commitment for mental incompetence. However, the court reasoned as follows:

> "It is likewise true, as the complainant argues, that the statute in question does not qualify the separation there contemplated by use of the words 'voluntary' or 'mutual'. And the statute does not contain any exception applying to a situation where separation results from the commitment of one of the parties for mental incompetence.
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> But that does not mean that it was the intention of the legislature in enacting the statute indirectly to make mental incompetence a ground for divorce. And yet, to hold that the complainant is entitled to a divorce in this case would surely give effect to such a veiled intention.
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> To the contrary, we are of opinion that the legislature intended that the separation contemplated by Code, § 20-91(9) must be of parties who are sufficiently competent to be conscious of the fact that the act of separation has occurred. Were that not so, it would be tantamount to saying that one may separate from one's self, thus ignoring the logical meaning of the word 'separation' as requiring the existence of two entities. While a separation in divorce law often occurs as the result of the unilateral act of one party, the consciousness of the other party that such separation has occurred is essential under the statute here involved.
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> The conclusion is inescapable that one who is separated from his spouse as the result of his commitment for mental incompetence is not, as a matter of law, capable of being conscious of the fact that a separation has occurred. It follows that a separation so occurring is not sufficient to support a ground for divorce under Code, § 20-91(9)."

Crittenden, 168 S.E.2d at 116, 117.

The trial court in ***Shaw v. Shaw***, 182 S.E.2d 865 (S.C. 1971), granted husband a divorce pursuant to an amendment to the South Carolina constitution which inserted an additional ground for divorce for continuous separation for at least three years. The separation commenced when Wife was confined to a mental hospital. The lower court reasoned that there was no intention to except a separation caused by mental incompetence since it was not so stated in the amendment. The appellate court stated the converse of this proposition to be that the failure to recognize a distinction is tantamount to reading into the constitutional provision an intent to make mental

incompetency or insanity a ground for divorce. The court noted that when considering the public policy of South Carolina with regard to marriage and divorce, it is deemed inconceivable that there was any intent by the amendment to allow divorce where the continuous separation of the parties was occasioned by the mental incompetence of one of them or, in effect, to allow divorce on the ground of insanity. The court relied upon the rationale of ***Crittenden v. Crittenden***.

We find the reasoning as set forth in ***Crittenden v. Crittenden*** to be more persuasive. Our statute, like the one before that court, does not qualify the separation there contemplated by the use of the words voluntary or mutual. Our statute likewise creates no exception where the separation results from one of the parties' mental illness. However, to interpret the statute as appellant contends would be to create a ground for divorce based upon insanity. We are not unmindful that the lack of such a ground can create hardships on many spouses. However, this is a matter more properly addressed by the legislature. Our determination of this issue, however, is not dispositive of the case at bar. The order entered by the trial court states that the court found that the parties have been separated for a period of greater than two years prior to the filing of this action, and that the defendant is mentally incompetent and has been so since prior to the parties' separation and that the parties have no minor children. The order further states that the matter came on to be heard on October 9, 1995 upon the pleadings and the oral testimony of witnesses examined in open court and the entire record of the cause. However, the transcript of the October 9, 1995 proceedings consists solely of statements and argument of counsel and reveals that no evidence was presented to the trial court. Where the trial court hears evidence not preserved by a certified transcript or statement of the evidence, it is presumed that there was evidence to support the ruling of the trial court. ***Scarbrough v. Scarbrough***, 752 S.W.2d 94 (Tenn. App. 1988). However, statements of counsel do not provide a factual basis for judicial action unless they embody a clearly binding, prejudicial concession or a joint stipulation of the parties.

It is undisputed that no children were born to this marriage. Wife's answer denies the two year separation, but her attorney and guardian ad litem admitted at the hearing that the parties had been separated more than two years. It was further stipulated that Wife is "mentally incompetent."

Chapter 127, Public Acts of 1957, amended the statute to the effect that the term "mentally ill," was substituted for the term "insane" and "mental illness" for the term "insanity." The present statute provides that "[m]entally ill individual" means an individual who suffers from a psychiatric disorder, alcoholism, or drug dependence, but excluding an individual whose only mental disability is mental retardation. T.C.A. 33-1-101(14). ***Merriam-Webster's Medical Desk Dictionary*** 423 (1993) defines "mental incompetence" as "mental incapacity." "Mental Incapacity" is defined as "1: an absence of mental capacity 2: an inability through mental illness or mental deficiency of any sort to carry on the everyday affairs of life or to care for one's person or property with reasonable discretion."

Wife moved the trial court for an evaluation to determine the nature and extent of her mental condition. The order granting the motion ordered that she be examined and evaluated by Dr. Bernard Hudson of the Carey Counseling Center, Trenton, Tennessee. The record does not disclose whether that evaluation was made or, if so, the results. Reference is also made in the transcript to medical records from Western State, but these are likewise not to be found in the record before us. It is common knowledge that there are varying degrees of mental illness and mental incompetence.

Our supreme court has addressed the defense of insanity in a fault-based divorce. In ***Simpson v. Simpson***, 716 S.W.2d 27 (Tenn. 1986), wife was awarded a divorce on the grounds of cruel and inhuman treatment. In reversing the decision of the trial court, which had dismissed the petition based upon husband's defense of insanity, the court said "[w]e think the rule should be that a defendant in a divorce action asserting insanity as a defense to the commission of acts of cruelty must prove that at the time of such conduct, as a result of mental disease or defect, he or she lacked sufficient capacity either to appreciate the wrongfulness of his or her conduct or the volition to control his or her acts." ***Simpson***, 716 S.W.2d at 33. The court noted that this is the civil equivalent of the insanity rule applicable to criminal cases adopted in ***Graham v. State***, 547 S.W.2d 531 (Tenn. 1977). The question which must be answered in this case is whether or not Wife's condition, stipulated in this record as "mentally incompetent" meets the test set forth in ***Simpson v. Simpson, supra***, to wit, whether as a result of her mental disease or defect, she lacked sufficient capacity either to understand the nature of her actions or the volition to control her acts. The record does not disclose whether she was institutionalized for the full two year period of separation. If it is

determined that her condition meets the ***Simpson*** test, the period of separation would be tolled as long as that condition exists.

Therefore, pursuant to T.C.A. § 27-3-128, this cause is remanded to the trial court for further proceedings consistent with this opinion. The costs of this appeal are taxed to the appellant, for which execution may issue if necessary.

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FARMER, J.

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CRAWFORD, P.J., W.S. (Concurs)

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HIGHERS, J. (Concurs)