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Domestic Relations—Divorce—Separation By Mutual Consent

Since 1907, when the North Carolina legislature first enabled a husband and wife to be divorced after a specified period of separation, the question of whether it is necessary for both parties to consent to the separation has been an area of special confusion. The first separation statute was passed in 1907 and provided for absolute divorce after a 10-year separation.¹ The first case to be decided under this statute was *Cooke v. Cooke*.² The court used broad language in that case, stating that the plaintiff need not be the injured party and that the separation need not be based on mutual consent of the parties. The next two cases³ retreated somewhat from the broad language of the *Cooke* decision, and held that the party at fault could not seek a divorce under the statute. This resulted from a codification of the statutes which placed the statute in question under a heading which provided that only the injured party could maintain an action. Immediately after these cases, the legislature passed what is now G.S. § 50-6 in 1931.⁴ The new statute provided that a divorce would be granted on application of either party. The first case decided directly under G.S. § 50-6 held that the plaintiff could get a divorce though he was not the injured party.⁵

In 1936 the court decided *Parker v. Parker*.⁶ The plaintiff had been guilty of willful abandonment, but had left his wife without any deed of separation or mutual agreement. The court denied his divorce because there was no mutual consent. The court construed the clause in the statute providing that the separation must be "by deed of separation or otherwise" to mean "by deed of separation or

¹ N.C. GEN. STAT. § 50-5 (4) (1950).

² 164 N.C. 272, 80 S.E. 178 (1913).

³ *Lee v. Lee*, 182 N.C. 61, 108 S.E. 352 (1921); *Sanderson v. Sanderson*, 178 N.C. 339, 100 S.E. 590 (1919). When the statutes were codified, the old statute was placed under the heading, "The party injured may bring an action for absolute divorce." Separation thus became the fourth listed reason under the new codification.

⁴ N.C. Sess. Laws 1931, ch. 72.

⁵ *Long v. Long*, 206 N.C. 706, 175 S.E. 85 (1934). Two years later the North Carolina court reverted again to the position that willful abandonment would bar a plaintiff's action for divorce under the statute, on the basis that the statute had only been re-enacted. *Brown v. Brown*, 213 N.C. 347, 196 S.E. 333 (1938). The scope of this note is confined to the problem of mutual consent. For a discussion of the problem of the inability of a party guilty of willful abandonment to sue for divorce under the North Carolina separation statute, see Annot., 166 A.L.R. 498 (1947).

⁶ 210 N.C. 264, 186 S.E. 346 (1936).

otherwise by mutual consent." *Hyder v. Hyder*⁷ followed in the same year and the court reaffirmed the *Parker* holding. The legislature reacted swiftly and decisively. In 1937 the reference to "deed of separation or otherwise" was deleted from the statute, leaving the statute in its present form.⁸

When *Byers v. Byers*⁹ was decided in 1942, the court seemed to follow the lead of the legislature. Plaintiff proved that he was not guilty of willful abandonment, though he had walked out on his wife, and that he had provided for her since his departure. The court granted his divorce and indicated that the statutory change had in effect overruled *Parker*. The court stated that in *Parker* the term "separation" was construed too narrowly, and that the legislature had sought to avoid this in the future by completely deleting the phrase. The court also said that since the word "separation" was not mentioned the legislature evidently did not intend that that word, along with its doctrinal implications, be a prerequisite to an action for divorce under the statute. In regard to mutual consent, the court stated: "There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period; it must appear that the separation is with that definite purpose on the part of at least one of the parties."¹⁰ After the *Byers* case, there followed a line of four cases which either expressly or impliedly upheld the position of the court in *Byers* that the intent of one of the parties was sufficient under the statute.¹¹

*Moody v. Moody*¹² is the latest authority on the subject of mutual consent. In this case, the defendant husband had suffered a head injury. He and the plaintiff had separated and remained separate

⁷ 210 N.C. 486, 187 S.E. 798 (1936).

⁸ N.C. Sess. Laws 1937, ch. 100: "Marriages may be dissolved and the parties thereto be divorced from the bonds of matrimony on the application of either party; if and when the husband and wife have lived separate and apart for two years . . ."

⁹ 222 N.C. 298, 22 S.E.2d 902 (1942).

¹⁰ *Id.* at 304.

¹¹ *Mallard v. Mallard*, 234 N.C. 654, 68 S.E.2d 247 (1951); *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (1945); *Taylor v. Taylor*, 225 N.C. 80, 33 S.E.2d 492 (1945); *Lockhart v. Lockhart*, 223 N.C. 559, 27 S.E. 2d 444 (1943). *But see Williams v. Williams*, 224 N.C. 91, 29 S.E.2d 39 (1944), which seems out of line with the other decisions in that the court held there that there was no mutual consent because the defendant was mentally incapable of assenting, and denied a divorce. However, the plaintiff alleged and relied on mutual consent in this case.

¹² 253 N.C. 752, 117 S.E.2d 724 (1961).

and apart for over two years. Plaintiff brought her action under G.S. § 50-6, and a demurrer was sustained in the trial court. The supreme court affirmed, holding that there must be voluntary mutual consent to separate under the statute or no action may be maintained.

The *Moody* case adds little but confusion to the law on the subject and represents a departure from *Byers* and the line of cases following it. In the first place, an agreement made by the parties before the husband suffered his injury was only cursorily mentioned and thereafter disregarded. The only reason given for this was that the plaintiff had only intended to separate from the date of the injury.

The court discussed at length the "insanity" factor, and cited *Lawson v. Bennett*¹³ as authority. In that case, plaintiff brought his action under G.S. § 50-6. Plaintiff's wife was insane and confined in an institution. The court denied his divorce and held that the remedy of G.S. § 50-5(6),¹⁴ which provides for divorce after five years of separation when one spouse is incurably insane and confined in a mental institution, was exclusive in such cases. It is not argued that this statute should not be exclusive where it applies. But it is clear that in the *Moody* case the plaintiff could not possibly maintain an action under G.S. § 50-5(6) because the defendant was not insane nor confined in a mental institution; he was merely incompetent. These two things (incurable insanity and confinement) are prerequisites for a G.S. § 50-5(6) action and the court has so held.¹⁵ The result is that since the plaintiff could not sue under G.S. § 50-6 or under G.S. § 50-5(6), she has no statutory remedy in this state and is forced to remain married for life to a man from whom she has long been separated.¹⁶

The court in *Moody* relied mainly on the fact that the husband was incompetent and therefore unable to form an intent to separate. The intent of the wife standing alone was not enough. The court apparently ignored the clear language of the *Byers* case and those following it, and the rather obvious legislative intent expressed when the General Assembly deleted "by deed of separation or otherwise" from the statute.

¹³ 240 N.C. 52, 81 S.E.2d 162 (1954).

¹⁴ N.C. GEN. STAT. § 50-5 (6) (Supp. 1961).

¹⁵ *Mabry v. Mabry*, 243 N.C. 126, 90 S.E.2d 221 (1955).

¹⁶ The plaintiff could, however, establish an out-of-state domicile and bring an action in another state.

Many other states have statutory provisions for divorce after a designated separation period. Some are more liberal than North Carolina,¹⁷ and some require that the separation be voluntary.¹⁸ Seven states have statutes which are like, or are very similar to, the North Carolina statute.¹⁹ None of these states seems to have had the interpretation problems which have plagued the North Carolina court in regard to separation by mutual consent. Arkansas, Louisiana, Texas and Washington have explicitly held that mutual consent is not necessary.²⁰ Idaho and Kentucky have implicitly agreed.²¹ Nevada, whose statute provides for divorce after a separation in the trial court's discretion, also has held that mutual consent is not necessary.²² There have been no cases construing Virginia's recently-passed statute.

In view of the glaring inconsistency presented by the *Byers* case and those following it on the one hand, and the *Moody* case on the other hand, it would seem that the time has come again to look to the General Assembly and say, "Your move."

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¹⁷ ARIZ. REV. STAT. ANN. § 25-312 (1956) provides that a divorce shall be granted when husband and wife have been separated five years for any reason.

¹⁸ DEL. CODE ANN. § 13-1522 (Supp. 1960); D.C. CODE § 16-403 (1961); MD. ANN. CODE art. 16, § 24 (1957); WIS STAT. ANN. § 247.07 (1957).

¹⁹ ARK. STAT. ANN. § 34-1202 (Supp. 1961); IDAHO CODE § 32-610 (1948); KY. REV. STAT. § 403.020 (1959); LA. REV. STAT. ANN. § 9:301 (1951); TEX. REV. CIV. STAT. ANN. § 4629 (1960); VA. CODE ANN. § 29-91 (1960); WASH. REV. CODE § 26.08.020 (1961). These states permit absolute divorce after a specified period of separation. Mutual consent does not appear in any of these statutes.

²⁰ *Brooks v. Brooks*, 201 Ark. 14, 143 S.W.2d 1098 (1940); *Otis v. Bahan*, 209 La. 1082, 26 So. 2d 146 (1946); *Robertson v. Robertson*, 217 S.W.2d 132 (Tex. Civ. App. 1949); *Harp v. Harp*, 43 Wash. 2d 821, 264 P.2d 276 (1953).

²¹ In *Finnegan v. Finnegan*, 76 Idaho 500, 285 P.2d 488 (1955), the court stated that only three things must be proved under the separation statute: first, that the parties lived separate and apart; second, that there was no cohabitation; third, that they were separated for the statutory period.

In *Colston v. Colston*, 297 Ky. 250, 179 S.W.2d 893 (1944), the court held that the husband could count five years he was in jail into the separation period and also said that the wife would have been able to count this period had she brought the action. Thus it is inferable that the wife's intent alone would have been enough. See also *Hale v. Hale*, 137 Ky. 831, 127 S.W. 475 (1910).

²² *Pearson v. Pearson*, 359 P.2d 386 (Nev. 1961).