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"Child Marriages" in Kentucky

John R. Gillespie
University of Kentucky

"CHILD MARRIAGES" IN KENTUCKY

Kentucky, together with one or two sister southern states, has received a great deal of notoriety for its "child brides" In fact, so well publicized have been the isolated cases of child marriages that the practice has become linked with the name of the state in the minds of many of the members of the newspaper-reading public. The natural inference, of course, would be that Kentucky's marriage laws have been so fashioned as to permit such marriages and to sanction their valid existence when performed. It is the purpose of this note to examine the statutory and judicial age requirements for marriage in the state and to point out the various possibilities of validity of a marriage relationship, one or both of the parties to which are within such an age classification as to be legally termed an infant.

Of the several statutory provisions bearing upon the question, the one most directly in point is Ky R. S. 402.020, which reads as follows·

> "Marriage is prohibited and void:
> (1) With an idiot or lunatic;
> (2) Between a white person and a Negro or mulatto;
> (3) Where there is a husband or wife living, from whom the person marrying has not been divorced;
> (4) When not solemnized or contracted in the presence of an authorized person or society·
> (5) *When at the time of marriage, the male is under sixteen or the female under fourteen years of age.*" (emphasis writer's)[1]

The statute, as enacted in 1851,[2] prohibited marriages when the male was under fourteen or the female under twelve, and the present form was adopted by an amendment in 1928.[3] The Court of Appeals has consistently held marriages contracted in violation of each of the first four subsections absolutely void. It is, then, clear that a marriage of a mental incompetent,[4] of a Negro and a white,[5] of one having a living spouse not divorced,[6] or of

[1] These are not the only prohibited marriages. Ky. R. S. 402.010 prohibits consanguineous marriages.
[2] Ky Acts 1850, c. 617, p. 213.
[3] Ky. Acts 1928, c. 156.
[4] Johnson v Sands, 245 Ky. 529, 53 S.W 2d 929 (1932)
[5] Moore v. Moore, 30 Ky Law Rep. 383, 98 S.W 1027 (1907)
[6] Barth's Adm'r. v. Barth, 102 Ky 56, 42 S.W 1116 (1897).

parties who knowingly fail to conform to the formal requirements of subsection (4)[7] can have no validity from its inception. Subsection (5), however, was not interpreted by the court until 1932, in the case of *Crummies Creek Coal Corp.* v *Napier*[8] In that case it was held that a marriage in violation of subsection (5) was not void but merely voidable at the option of the infant. This result, while it appears to circumvent the wording of the statute, which as clearly prohibits this type of purported marriage as it does those mentioned in the other subsections, is consistent with the holdings of other states[9] and appears to be the proper one upon the facts. There the father of a deceased miner resisted a motion of the coal company, before the Workmen's Compensation Board, to set aside benefits which he received as a dependent of the deceased son. The motion was made on the ground that the father had subsequently married. The applicable statute declared that, "Compensation to any dependent shall cease at the legal or common law marriage of such dependent."[10] Napier, the father, contended that, since his marriage had been to an infant of thirteen years, it was void under the statute. The court, however, decided against this contention. holding that subsection (5) must be read and construed in connection with Ky R. S. 402.030 and 402.250, which declare respectively that,

> "Courts having general equity jurisdiction may declare void a marriage at the instance of any next friend, where the male was under sixteen or the female under fourteen years of age at the time of the marriage, and the marriage was without the consent of the father, mother, guardian or other person having the proper charge of his or her person, and has not been ratified by cohabitation after that age."

and that,

> "Where doubt is felt as to the validity of a marriage, either party may by petition in equity demand its avoidance or affirmance; but where one of the parties was within the age of consent at the time of the marriage, the party who is of proper age may not bring such a proceeding for that cause against the party under age."

Robinson v. Redd's Adm'r., 43 S.W 435 (Ky 1897) *see* Klenke v. Noonan, 118 Ky. 436, 81 S.W 241 (1904)

[8] 246 Ky 569, 55 S.W 2d 339 (1932).

[9] Willits v. Willits, 76 Neb. 228, 107 N.W 379 (1906) Hunt v Hunt, 23 Okla. 490, 100 Pac. 541 (1909)

[10] Ky. R. S. 342.080.

The court said that, when all of the above-mentioned sections are read together,

> " it is very plain that, notwithstanding subsection (5) of Ky R. S. 404.020 positively declares a marriage void, when at the time it is consummated 'the male is under sixteen, or the female is under fourteen years of age, it may be avoided in a court of equity (a) at the insistence of a next friend, if it was performed without the consent of the father, etc., or (b) where one of the parties who (sic) was within the age of consent at the time of the marriage. But, if the other party is of proper age at the time of the ceremonial marriage, he or she may not in a court of equity avoid the marriage for that cause against the party under age."

No case involving the question of the marriage of one below the age of consent has been decided by the Court of Appeals since the *Crummies Creek* case. In view of the broad language of the court above quoted, dictum though it may be, in application to cases other than those involving Workmen's Compensation,[11] it seems entirely possible that the court would in other cases hold a marriage merely voidable and not void, where it involved a female between the ages of seven and fourteen, or a male between the ages of seven and sixteen. It appears, however, that there is room for considerable doubt that such a marriage would be anything but fully valid if parental consent had been obtained.

However, an additional ground for distinguishing the *Crummies Creek* case may be found. The Workmen's Compensation statute, as has been seen, gives the same effect to a "common law marriage" as to a "legal marriage" At common law, the marriage of a female of thirteen was not void, hence, it might be argued this statute preserves it for Workmen's Compensation purposes *only,* it still being void for all others under Ky R. S. 402.020.

As to marriages involving parties below the age of seven years, no case has been decided in Kentucky It will be remembered, however, that such marriages were absolutely void at

[11] In Edgewater Coal Co. v. Yates, 261 Ky. 335, 87 S.W 2d 596, 597 (1935), it was said: "Common-law marriages, as such are not recognized in Kentucky. However, in applying section 4894 of the statutes (Ky. R. S. 342.080) it has been necessary for us to apply rules in determining the status in the same manner as if such marriages were accepted as legal for all purposes."

common law,[12] and that, according to a universally recognized principle of statutory construction, the common law rules are not to be considered as supplanted unless expressly or by necessary implication abrogated by statute. In view of this principle, then, and of the impelling social interest in the protection of such infants, any marriage contracted in Kentucky, one or both of the parties to which was below the age of seven, would almost certainly be declared void from its inception.

Another Kentucky statute prohibits the issuance of a marriage license in case

> " either of the parties is under twenty-one years of age and not before married, without the consent of his or her father or guardian, or if there is none or he is absent from the state, without the consent of his or her mother personally given or certified in writing to the clerk over the signature of the father, guardian or mother, attested by two subscribing witnesses, and proved by one of the witnesses, administered by the clerk. If the parties are personally unknown to the clerk, a license shall not issue until bond, with good surety, in the penalty of one hundred dollars is given to the Commonwealth, with condition that there is no lawful cause to obstruct the marriage."[13]

In the case of this statute, as with all of the Kentucky marriage laws concerning non-age, there is almost a total absence of judicial interpretation. A dictum in an old case sustains the position that a marriage ceremoniously contracted, but in violation of a similar statutory provision would nevertheless be valid.[14] This is thought to be the more desirable holding and is the almost universal rule of construction of such statutes in other jurisdictions.[15] A penalty is provided for any clerk[16] or deputy clerk[17] "knowingly" issuing a marriage license to any persons prohibited from marrying, but no prosecution under these sections has been reviewed by the Court of Appeals. It is apparent that the inclusion of the word "knowingly" constitutes an almost invincible armor of protection to any clerk who

[12] 1 BLACKSTONE COMM. 436; 2 BURN, ECCLESIASTICAL LAW 394 (4th ed. 1781).

[13] KY. R. S. 402.210.

[14] *See* 1 A. K. Marsh (8 Ky.) 76, 78 (1817).

[15] Fodor v. Kunie, 92 N. J. Eq. 438, 112 Atl. 598 (1920) *Ex parte* Hollopeter, 52 Wash. 41, 100 Pac. 159 (1909) *see* note 22 L.R.A. (N. S.) 1203.

[16] KY. R. S. 402.990(8).

[17] KY. R. S. 402.990(10).

chooses to take at face value the assertion of any applicant for a license that he is above the age of consent. A penalty of not more than three years imprisonment is also provided for " any person who falsely personates the father, mother, or guardian of an applicant in obtaining a license "[18]

The only remaining statute bearing upon the question of the marriage of an infant is the one which provides that when a

> " female under sixteen years of age marries without the consent of her father or guardian, or of her mother if there is no father or guardian or he is absent from the state, the court having general equity jurisdiction in the county of her residence shall, on the petition of a next friend, commit her estate to a receiver, who upon giving bond, shall hold her estate, and, after deducting a reasonable compensation for his services, pay out the rents and profits to her separate use during her infancy under the direction of the court. When the wife arrives at the age of twenty-one the receiver shall deliver her estate to her unless the court considers it for her benefit to continue it in the hands of the receiver."[19]

It is interesting to note that, although the statutes forbid the issuance of a license to any person under the age of twenty-one, without consent, the above provision in fact appears to recognize that such a marriage may be performed and to acknowledge its validity This is true even though the female is under sixteen and has married without parental consent! The statutes, as interpreted, have apparently attempted to control infant marriage only by providing penalties for clerks or others who aid in the procurement of the license, and not by invalidating the marriage, although, presumably, Ky R. S. 402.030 and 402.250 would still be considered effective.

It is therefore submitted, in conclusion, that, as to the validity of marriages in Kentucky of persons below the age of twenty-one, the following situation exists: (1) Marriages, one or both of the parties to which are less than seven years of age, are absolutely void from their inception, (2) marriages in which the female is between the ages of seven and fourteen years of age, and those in which the male is between the ages of seven and sixteen years of age, may be voidable at the suit of the infant or of his next friend (although there is doubt on this point where the consent of parents or guardian had been

[18] KY. R. S. 402.990(6)
[19] KY. R. S. 402.260.

obtained), (3) marriages duly performed but wherein one or both of the parties is above the age of consent (fourteen for females, sixteen for males) but below the age of twenty-one are absolutely valid, although the clerk is prohibited, under penalty of a fine, from issuing a license to any person under twenty-one who does not have the consent of his parent or guardian, (4) the estate of a female under sixteen who marries without the consent of her parent or guardian may be committed to a receiver upon petition of the infant's next friend, (5) the statutes are in serious need of clarifying revision.

It is further submitted that the marriage laws of Kentucky may not, in any sense, be considered more lax with regard to age requirements than are the laws of the great majority of the states.[20] The causes of the alleged frequency of child marriages in this state are, therefore, to be sought in sociological studies, since they do not result from any exceptional laxity in the law.

JOHN R. GILLESPIE

[20] *See* 1 VERNIER, AMERICAN FAMILY LAWS sec. 29 (1931) Eleven other jurisdictions have the same statutory age requirements for females as does Kentucky, while twelve are lower. For males, nine have the same, while eleven are lower.