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MARRIAGE ANNULMENT—THE NEED FOR LEGISLATION

BEVERLY A. ROWAN*

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I. INTRODUCTION

In the field of family law there is a very real difference between divorce and annulment. Divorce is generally granted for causes arising after the marriage ceremony, and it presupposes the existence of a valid marriage. Annulment is granted as a result of conditions existing at the time of the ceremony, and the marriage is void or voidable from the beginning. Annulment is a hazy, poorly-defined area in the field of marriage law; not only is there much confusion throughout the United States in the treatment of divorce and annulment, but the distinction between the two actions has also become increasingly blurred.

The logical and traditional grounds employed in annulment actions are made grounds for divorce in many states. Nine states provide for divorce if the marriage is bigamous;¹ four jurisdictions grant divorce when the marriage is incestuous;² thirty-two states provide for the

* Member of the Editorial Board, *University of Miami Law Review*.

1. ARK. STAT. ANN. § 34-1202 (1962); DEL. CODE ANN. tit. 13, § 1522(2) (1953); FLA. STAT. § 61.041(9) (1967); ILL. ANN. STAT. ch. 40, § 1 (Smith-Hurd Supp. 1969); MISS. CODE ANN. § 2735 (1957); MO. ANN. STAT. § 452.010 (1952); OHIO REV. CODE ANN. § 3105.01(A) (Page 1960); PA. STAT. ANN. tit. 23, § 10(b) (1955); TENN. CODE ANN. § 36-801(2) (1955).

2. FLA. STAT. § 61.041(1) (1967); GA. CODE ANN. § 30-102(1) (1952); MISS. CODE ANN. § 2735 (1957); PA. STAT. ANN. tit. 23, § 10(h)(2) (1955).

granting of a divorce for impotency;³ seven provide that divorce is the remedy in cases which involve fraudulent marriage contracts.⁴ At least twelve states permit a husband to obtain a divorce when his wife was pregnant by another man at the time of the marriage without the husband's knowledge.⁵ Maryland and Rhode Island permit divorce for any reason which renders the marriage void *ab initio*,⁶ and Washington and Delaware allow divorce if one of the parties was incapable of consenting to the marriage for lack of age.⁷

In most states there is a substantial difference between the number of divorces and annulments granted.⁸ Annulments accounted for only 3 percent of marriage dissolutions in the United States during 1963.⁹ Probably one of the major reasons why there are relatively few annulments is that generally a woman seeking an annulment thereby relinquishes her claim to alimony. Thus, though she might legitimately be entitled to such a remedy, she is compelled to resort to divorce in order to be awarded alimony.

Annulment has been used extensively in a few states in order to

3. ALA. CODE tit. 34, § 20 (1959); ALASKA STAT. § 09.55.110 (1962); ARIZ. REV. STAT. ANN. § 25-312(10) (1956); ARK. STAT. ANN. § 34-1202 (Supp. 1967); COLO. REV. STAT. ANN. § 46-1-1(b) (1963); FLA. STAT. § 61.041(2) (1967); GA. CODE ANN. § 30-102(3) (1952); ILL. ANN. STAT. ch. 40, § 1 (Smith-Hurd 1956); IND. ANN. STAT. § 3-1201(2) (1968); KY. REV. STAT. § 403.020(1)(a) (1962); ME. REV. STAT. ANN. tit. 19, § 691 (1964); MD. ANN. CODE art. 16, § 24 (1966); MASS. GEN. LAWS ANN. ch. 208, § 1 (1958); MICH. COMP. LAWS ANN. § 552.6(2) (1967); MINN. STAT. ANN. § 518.06(2) (1969); MISS. CODE ANN. § 2735 (1957); MO. ANN. STAT. § 452.010 (1952); NEB. REV. STAT. § 42-301(2) (1968); NEV. REV. STAT. § 125.010(1) (1967); N.H. REV. STAT. ANN. § 458:7(1) (1968); N.M. STAT. ANN. § 22-7-1(3) (1953); N.C. GEN. STAT. § 50-5(2) (1966); OHIO REV. CODE ANN. § 3105.01(D) (1960); OKLA. STAT. ANN. tit. 12, § 1271 (1961); ORE. REV. STAT. § 107.030(1) (1967); PA. STAT. ANN. tit. 23, § 10(1)(a) (1955); R.I. GEN. LAWS ANN. § 15-5-2 (1956); TENN. CODE ANN. § 36-801(1) (1955); UTAH CODE ANN. § 30-3-1(1) (1953); VA. CODE ANN. § 20-91(2) (1960); WASH. REV. CODE ANN. § 26.08.020(3) (1961); WYO. STAT. ANN. § 20-38 (1957).

4. CONN. GEN. STAT. REV. § 46-13 (1958); GA. CODE ANN. § 30-102(4) (1952); KY. REV. STAT. § 403.020(2)(e) (1962); OHIO REV. CODE ANN. § 3105.01 (F) (1960); OKLA. STAT. ANN. tit. 12, § 1271 (1961); PA. STAT. ANN. tit. 23, § 10(g) (1955); WASH. REV. CODE ANN. § 26.08.020(1) (1961).

5. ALA. CODE tit. 34, § 21 (1958); ARIZ. REV. STAT. ANN. § 25-312(8) (1956); GA. CODE ANN. § 30-102(5) (1952); IOWA CODE ANN. § 598.9 (1946); KY. REV. STAT. § 403.020(4)(a) (1962); MISS. CODE ANN. § 2735 (1957); N.M. STAT. ANN. § 22-7-1(4) (1953); N.C. GEN. STAT. § 50-5(3) (1966); OKLA. STAT. ANN. tit. 12, § 1271 (1961); TENN. CODE ANN. § 36-801(9) (1955); VA. CODE ANN. § 20-91(7) (1960); WYO. STAT. ANN. § 20-38 (1957). The Kansas and Oklahoma statutes do not require that the husband be unaware of the wife's pregnancy by another at the time of the marriage.

6. MD. ANN. CODE art. 16, § 24 (1966); R.I. GEN. LAWS ANN. § 15-5-1 (1956).

7. DEL. CODE ANN. tit. 13, § 1522(7)(8) (1953); WASH. REV. CODE ANN. § 26.08.020(1) (1961).

8. For every annulment in the United States there are approximately 137 divorces. U.S. DEP'T OF H.E.W., DIVORCE AND ANNULMENT: DETAILED STATISTICS FOR REPORTING AREAS 1956, 37, table 2 (Vital Statistics—Special Reports, Vol. 48, No. 2, 1958). In 1968, there were 31,367 divorces granted in Florida, as opposed to 253 annulments. BUREAU OF VITAL STATISTICS, FLORIDA STATE BD. OF HEALTH, DIVORCES AND ANNULMENTS BY CAUSE OF SEPARATION (1959-1968).

9. U.S. DEP'T OF H.E.W., PUBLIC HEALTH SERVICE, DIVORCE STATISTICS ANALYSIS (1963).

avoid strict divorce laws.¹⁰ For example, in California remarriage by either party is prohibited for one year following the final decree of divorce.¹¹ In New York, until recently, adultery was the only ground for divorce,¹² and the guilty party in a divorce action could not remarry during the lifetime of the other spouse without obtaining permission from the court.¹³ However, in 1967 five additional grounds for divorce were provided by statute in that state,¹⁴ and parties to a divorce are now free to remarry without restriction.¹⁵ Presumably, the divorce-annulment ratio in New York will undergo a corresponding shift.

II. JUSTIFICATION FOR THE ACTION

Annulment has a valid place in modern marriage law. The social stigma attached to divorce may constitute a significant burden to some. Although there has been a substantial increase in the number of divorces since the early part of this century,¹⁶ nevertheless disapproval of divorce still exists in large segments of our society. For example, there are religious objections to divorce; only about 100 Roman Catholic marriages a year are declared invalid by church courts in the United States, and barely 1000 a year from all over the world are declared invalid.¹⁷ The number of Catholics affected by the impossibility of divorce in this country alone has been estimated at between three and five million individuals among some 46 million members of all ages.¹⁸ Although a civil annulment does not satisfy Catholic canon law, it may be preferable to some Catholics because it is theoretically more consistent with the religious remedy than is divorce.

Also of substantial importance is a consideration of psychological pressures. Certain individuals may not be emotionally equipped to cope with divorce, but can accept the idea of annulment in that it reinforces the denial that any meaningful bond ever existed.

III. THE FLORIDA POSITION

Florida has no statutes providing for annulment. There are, therefore, no statutory guidelines to follow, and the few reported cases offer

10. California and New York have accounted for almost 73% of all annulments in the United States. C. FOOTE, R. LEVY & E. SANDER, *CASES ON FAMILY LAW* 177 (1966).

11. CAL. CIV. CODE § 132 (Deering 1960).

12. N.Y. DOM. REL. LAW § 170 (McKinney 1964).

13. N.Y. DOM. REL. LAW § 8 (McKinney 1964).

14. Cruel and inhuman treatment of the plaintiff, abandonment for 2 or more years, confinement in prison for 3 or more years, living apart pursuant to a separation for 2 years, and impotency are now grounds for divorce in New York. N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1966).

15. N.Y. DOM. REL. LAW § 8 (McKinney Supp. 1966).

16. H. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 93, 173 (1959).

17. Pospishil, *The Problem of Divorce in the Catholic Church*, 7 J. FAMILY L. 595 (1968).

18. *Id.*

little aid. Annulment is mentioned in only two places in the Florida Statutes: in the ninth ground for divorce¹⁹ and in the provision for constructive service of process.²⁰

A few of the traditional grounds for annulment are also grounds for divorce in Florida.²¹ It would appear, from the statistics enumerating the grounds for which divorces and annulments are granted,²² that in this state an action on the grounds of incest, bigamy, impotency, extreme cruelty, and desertion could be brought for either divorce or annulment.²³

In addition, the statistics²⁴ list the failure to consummate a marriage as a separate ground for annulment in Florida. Cruelty and desertion should be properly limited to actions for divorce, while nonconsummation of the marriage, discussed below, should be treated not as a separate and distinct ground but rather as a prerequisite to the annulment action in certain instances, such as where the marriage was entered into as a jest or on a dare. Furthermore, the Florida statistics indicate that habitual intemperance,²⁵ ungovernable temper,²⁶ adultery,²⁷ and the fact that the defendant was divorced from the plaintiff in another jurisdiction²⁸ are grounds for divorce exclusively. On the other hand, fraud, marriage while intoxicated, non-consummation of the marriage, marriage by an underage party, duress, and insanity are used exclusively in granting annulments and are not available as grounds for divorce.²⁹

Incest, bigamy, and impotency are made grounds for divorce in Florida³⁰ in order to enable a wife who innocently entered into the marriage contract to obtain alimony. All three of these grounds should be grounds for annulment exclusively. Bigamous marriages are absolutely void, and incest³¹ and bigamy³² are both felonies. The problem could be avoided by providing, in the court's discretion, allowance of alimony to a deserving wife.

Children born of bigamous marriages are bastardized by statute,³³ a situation for which there is no legitimate excuse in this enlightened

19. FLA. STAT. § 61.041(9) (1967).

20. FLA. STAT. § 49.011(4) (1967).

21. Incest, impotency, and bigamy. FLA. STAT. § 61.041(1), (2), (9) (1967).

22. BUREAU OF VITAL STATISTICS, FLORIDA STATE BD. OF HEALTH, DIVORCES AND ANNULMENTS BY CAUSE OF SEPARATION (1959-1968) (hereinafter cited as VITAL STATISTICS).

23. Incest, impotency, extreme cruelty, desertion, and bigamy are grounds for divorce in Florida. FLA. STAT. § 61.041(1), (2), (4), (7), (9) (1967).

24. See note 22 *supra* and accompanying text.

25. FLA. STAT. § 61.041(6) (1967).

26. FLA. STAT. § 61.041(5) (1967).

27. FLA. STAT. § 61.041(3) (1967).

28. FLA. STAT. § 61.041(8) (1967).

29. See note 22 *supra* and accompanying text.

30. FLA. STAT. § 61.041(1), (2), (9) (1967).

31. FLA. STAT. §§ 741.21, 741.22 (1967).

32. FLA. STAT. § 799.01 (1967).

33. FLA. STAT. § 61.051 (1967).

age. Statutory provision should be made so that the children of annulable marriages are deemed legitimate for all purposes.

The entire area of divorce and annulment in Florida should be clarified by statute. To employ grounds exclusively for annulments, or to allow alternative remedies of divorce or annulment without making statutory provision therefor, is to foster and sustain the confusion rampant in this field of the law.

IV. THE VOID-VOIDABLE DISTINCTION

Traditionally, a void marriage is void from its inception and does not require a nullifying decree. It may be attacked either during the marriage or subsequent to the death of one of the parties. A voidable marriage, on the other hand, is valid until annulled by decree. It must be attacked during the lifetime of the parties, and it can be ratified.

In the United States, irregularities which are usually deemed to render a union void are incest³⁴ and bigamy.³⁵ Marriages burdened by impotency are declared voidable in seven jurisdictions and void in two.³⁶ At common law the marriage of an imbecile or lunatic was regarded as void,³⁷ and statutes of eleven states so provide.³⁸ In thirteen states the marriage of a mental defective is labelled voidable.³⁹ Statutes of eight jurisdictions declare marriages void for non-age,⁴⁰ but statutes of fifteen

34. *See, e.g.*, ALA. CODE tit. 14, § 326 (1958); ARK. STAT. ANN. § 55-103 (1947); ILL. ANN. STAT. ch. 89, § 1 (Smith-Hurd 1966); MASS. GEN. LAWS ANN. ch. 207, §§ 1, 2, 8 (1958); MICH. COMP. LAWS ANN. § 552.1 (1967).

35. *See, e.g.*, D.C. CODE ANN. § 30-101 (1961); IND. ANN. STAT. § 44-104 (1965); KY. REV. STAT. § 402.020 (1962); MO. ANN. STAT. § 451.030 (1952); NEB. REV. STAT. § 42-103 (1968).

36. The seven jurisdictions are Arkansas, District of Columbia, Mississippi, New York, Vermont, Virginia and West Virginia. ARK. STAT. ANN. § 55-106 (1947); D.C. CODE ENCYCL. ANN. § 30-103 (1961); MISS. CODE ANN. § 2748-02 (Supp. 1968); N.Y. DOM. REL. LAW § 7(3) (McKinney 1964); VT. STAT. ANN. tit. 15, § 512 (1958); VA. CODE ANN. § 20-45 (1953); W. VA. CODE ANN. § 48-2-1 (1966).

The two state codes which term such alliances void are N.C. GEN. STAT. § 51-3 (1966); and TEX. REV. CIV. STAT. ANN. art. 4628 (1960).

37. *Wightman v. Wightman*, 4 Johns. Ch. 343 (N.Y. 1820); *see* F. HARPER & J. SKOLNICK, PROBLEMS OF THE FAMILY 77 (1962).

38. GA. CODE ANN. §§ 53-102, 53-104 (1960); IND. ANN. STAT. § 44-104 (1965); KY. REV. STAT. § 402.020 (1962); ME. REV. STAT. ANN. tit. 19, §§ 32, 631 (1964); MICH. COMP. LAWS ANN. § 552.1 (1967); MO. ANN. STAT. § 451.020 (1949); NEB. REV. STAT. § 42-103 (1968); N.C. GEN. STAT. § 51-3 (1966); R.I. GEN. LAWS ANN. § 15-1-5 (1956); UTAH CODE ANN. § 30-1-2 (1953); WYO. STAT. ANN. § 20-32 (1957).

39. ALASKA STAT. § 25.05.031 (1962); ARK. STAT. ANN. § 55-106 (1947); COLO. REV. STAT. ANN. § 46-3-1 (1963); D.C. CODE ANN. § 30-103 (1961); MINN. STAT. ANN. § 518.02 (1969); MISS. CODE ANN. § 2748-02 (Supp. 1968); NEV. REV. STAT. § 125.330 (1967); N.Y. DOM. REL. LAW § 7(2) (McKinney 1964); ORE. REV. STAT. § 106.030 (1967); VT. STAT. ANN. tit. 15, § 512 (1958); VA. CODE ANN. § 20-45 (1953); WASH. REV. CODE ANN. § 26.04.130 (1961); W. VA. CODE ANN. § 48-2-1 (1966).

40. GA. CODE ANN. §§ 53-102, 53-104 (1961); KY. REV. STAT. § 402.020 (1962); MASS. GEN. LAWS ANN. ch. 207, § 9 (1958); MICH. COMP. LAWS ANN. § 552.2 (1967); MINN. STAT. ANN. § 518.01 (1969); N.H. REV. STAT. ANN. § 457:4 (1968); N.C. GEN. STAT. § 51-3 (1966); UTAH CODE ANN. § 30-1-2 (1953).

states describe such marriages as voidable.⁴¹ Unions induced by fraud are designated voidable in thirteen states⁴² and void in two.⁴³ Those entered into as a result of duress are considered voidable in eleven jurisdictions⁴⁴ and void in two.⁴⁵

In Florida a final decree of divorce or annulment takes effect as of the time it is entered.⁴⁶ The annulment of a voidable marriage, therefore, cannot bastardize a child.⁴⁷ If the marriage is void, however, *e.g.*, bigamous marriages and marriages of mental incompetents, there is dictum to the effect that the child is illegitimate.⁴⁸ Again, this situation should be remedied by statute.

Also, in Florida the void-voidable distinction plays a significant part in the relation-back doctrine. The 1966 case of *Reese v. Reese*⁴⁹ held that after dissolution of her void second marriage, a wife was entitled to have alimony from her first husband reinstated; but *Evans v. Evans*⁵⁰ held that the wife was not entitled to reinstatement of alimony from her first husband where her second marriage was merely voidable. In light of these cases, whether the first husband will have to resume alimony payments to his former wife after the annulment of her second marriage will depend on whether the second marriage is void or voidable. The first husband who, finding himself free of the obligation to support his first wife, contracts a second marriage, may then discover that the payments to his first wife must be resumed. This inequitable result could be avoided by statutory provision, as has been accomplished in Colorado.⁵¹

The void-voidable classification would seem to have no place in modern annulment legislation. While the dual classification perhaps is

41. ALASKA STAT. § 25.05.031 (1962); ARK. STAT. ANN. § 55-106 (1947); COLO. REV. STAT. ANN. § 46-3-1 (1963); D.C. CODE ENCYCL. ANN. § 30-103 (1968); IND. ANN. STAT. § 44-106 (1965); MISS. CODE ANN. § 2748-02 (Supp. 1968); NEB. REV. STAT. § 42-118 (1968); NEV. REV. STAT. § 125.310 (1967); N.M. STAT. ANN. § 57-1-9 (1953); N.Y. DOM. REL. LAW § 7(1) (McKinney 1964); ORE. REV. STAT. § 106.030 (1967); VT. STAT. ANN. tit. 15, § 512 (1958); WASH. REV. CODE ANN. § 26.04.130 (1961); W. VA. CODE ANN. § 48-2-1 (1966); WYO. STAT. ANN. § 20-33 (1957).

42. ALASKA STAT. § 25.05.031 (1962); ARK. STAT. ANN. § 55-106 (1947); D.C. CODE ENCYCL. ANN. § 30-103 (1968); IND. ANN. STAT. § 44-106 (1965); MINN. STAT. ANN. § 518.02 (1969); MISS. CODE ANN. § 2748-02 (Supp. 1968); NEB. REV. STAT. § 42-118 (1968); NEV. REV. STAT. § 125.340 (1967); N.Y. DOM. REL. LAW § 7(4) (McKinney 1964); ORE. REV. STAT. § 106.030 (1967); VT. STAT. ANN. tit. 15, § 512 (1958); WASH. REV. CODE ANN. § 26.04.130 (1961); WYO. STAT. ANN. § 20-33 (1957).

43. GA. CODE ANN. §§ 53-103, 53-104 (1961); MICH. COMP. LAWS ANN. § 552.2 (1967).

44. ALASKA STAT. § 25.05.031 (1962); ARK. STAT. ANN. § 55-106 (1947); D.C. CODE ENCYCL. ANN. § 30-103 (1968); MINN. STAT. ANN. § 518.02 (1969); MISS. CODE ANN. § 2748-02 (Supp. 1968); NEB. REV. STAT. § 42-118 (1968); N.Y. DOM. REL. LAW § 7(4) (McKinney 1964); ORE. REV. STAT. § 106.030 (1967); VT. STAT. ANN. tit. 15, § 512 (1958); WASH. REV. CODE § 26.04.130 (1961); WYO. STAT. ANN. § 20-33 (1957).

45. GA. CODE ANN. §§ 53-103, 53-104 (1961); MICH. COMP. LAWS ANN. § 552.2 (1967).

46. *Jones v. Jones*, 119 Fla. 824, 161 So. 836 (1935).

47. *In re Ruff's Estate*, 159 Fla. 777, 32 So.2d 840 (1947).

48. *Id.* See note 33 *supra*.

49. 192 So.2d 1 (Fla. 1966).

50. 212 So.2d 107 (Fla. 4th Dist. 1968).

51. COLO. REV. STAT. ANN. § 46-1-5(5) (1963).

justifiable as a convenient means of reference, it carries with it the inaccurate conception that void marriages are different from those which are voidable. Such an arbitrary classification, varying as it does from jurisdiction to jurisdiction, does not clarify the basic issue of whether a marriage is annulable or not. It would be preferable to deal with each case individually under more comprehensive statutes.

V. GROUNDS

A. Incest

An incestuous marriage is one between persons who are related by blood or marriage. In addition to being a ground for divorce in Florida,⁵² incest is also a felony.⁵³

As a general rule, incestuous marriages are absolutely void even without a decree.⁵⁴ Florida, however, departs from the majority rule, and holds such marriages to be merely voidable.⁵⁵ All states have statutes dealing with consanguinity,⁵⁶ and about half the states have extended the prohibition to include affinity.⁵⁷ In some states, including Florida,⁵⁸ all restrictions are based on consanguinity, and first cousins are permitted to marry.⁵⁹ Other states prohibit first cousins from marrying, and the restriction extends to relationships arising from affinity.⁶⁰ There would seem to be no excuse for such variations throughout the United States, and a uniform provision, based on consanguinity, should be adopted.

Since an incestuous marriage constitutes a felony, it would seem preferable to make incest a ground for annulment exclusively. The interest of the state is to discourage these unions initially and to put an end to them as quickly as possible in order to prevent the conception of a

52. FLA. STAT. § 61.041(1) (1967).

53. See note 31 *supra*.

54. See note 34 *supra*.

55. *Johnson v. Landefeld*, 138 Fla. 511, 189 So. 666 (1939).

56. "Consanguinity" means relationship by blood and descent from a common ancestor.

57. "Affinity" means relationship established by marriage.

58. FLA. STAT. §§ 741.21, 741.22 (1967).

59. ALASKA STAT. § 09.55.080 (1962); ARIZ. REV. STAT. ANN. § 25-101 (1956); ARK. STAT. ANN. § 55-103 (1947); CAL. CIV. CODE § 59 (Deering 1960); COLO. REV. STAT. ANN. § 40-9-4 (1963); HAWAII REV. LAWS § 324-1(a) (Supp. 1965); IDAHO CODE § 32-205 (1963); ILL. ANN. STAT. ch. 89, § 1 (Smith-Hurd 1966); IND. ANN. STAT. § 44-103 (1965); KAN. STAT. ANN. § 23-102 (1964); KY. REV. STAT. § 402.010 (1963); MINN. STAT. ANN. § 517.03 (Supp. 1969); MO. ANN. STAT. § 451.020 (Supp. 1969); MONT. REV. CODES ANN. § 48-105 (1961); NEB. REV. STAT. § 42-103 (1968); NEV. REV. STAT. § 122.020 (1967); N.J. STAT. ANN. § 37:1-1 (1968); N.M. STAT. ANN. § 57-1-7 (1962); N.Y. DOM. REL. LAW § 5 (McKinney 1964); N.C. GEN. STAT. § 51-4 (1966); N.D. CENT. CODE § 14-03-03 (1960); OHIO REV. STAT. § 3101.01 (Page 1960); ORE. REV. STAT. § 106.020 (1967); UTAH CODE ANN. § 30-1-1 (1953); WASH. REV. CODE ANN. § 26.04.020 (1961); WIS. STAT. ANN. § 245.03 (Supp. 1969); WYO. STAT. ANN. § 20-32 (1957).

60. See, e.g., IOWA CODE ANN. § 595.19 (1946); ME. REV. STAT. ANN. tit. 19, § 31 (1964); TENN. CODE ANN. § 39-705 (1955); VT. STAT. ANN. tit. 15, §§ 1, 2 (1958); VA. CODE ANN. § 20-38 (1960).

child. Either party to the marriage, or the state attorney in the county in which either party resides, should be allowed to bring the action.

Of 2,240 annulments granted in Florida over the past ten years, only three have been on the ground of incest.⁶¹

B. *Bigamy*

A bigamous marriage is one contracted at a time when either party to the marriage already has a spouse living and undivorced.⁶² Bigamy is a ground for divorce in Florida,⁶³ and furthermore, is a felony⁶⁴ requiring no scienter.⁶⁵

Bigamous marriages are absolutely void. Generally when a marriage is void, there can be no alimony, dower, or interest in property, as no rights attach to a void marriage. States which make bigamy a ground for divorce do so for the express purpose of providing an innocent wife with the opportunity to obtain alimony.

Some states permit an annulment suit on the ground of bigamy to be brought by either spouse.⁶⁶ In Florida only an innocent party can bring an action for annulment or divorce on this ground.⁶⁷ Since bigamy is a crime which may be committed by a person who believes himself free to marry,⁶⁸ criminal prosecution in such a case seems unduly harsh. The state should have the option of proceeding criminally or civilly, and provision should therefore be made for annulment actions on this ground to be initiated by the state. Further, either party should be able to petition for determination of the marriage status. The interest of society in ending the relationship or in having the marital status clarified should take precedence over any interest society may have in punishing the parties. Also, the prior spouse should be given a statutory right to seek a judicial determination of the status of the second marriage. A continuation of the second marriage may confuse the various property interests involved, and the prior spouse should be in a position to ascertain his or her own status.

Once the disability of the prior marriage is removed by divorce or the death of the previous spouse, the second marriage should be deemed validated from the time the disability is removed if the parties continue to live together as man and wife. This position is presumably followed in

61. See VITAL STATISTICS, note 22 *supra*.

62. *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950).

63. FLA. STAT. 61.041(9) (1967).

64. FLA. STAT. 799.01 (1967).

65. *Ellison v. State*, 100 Fla. 736, 129 So. 887 (1930).

66. See, e.g., DEL. CODE ANN. tit. 13, § 1551(3) (1953); N.Y. DOM. REL. LAW § 140(a) (*McKinney* 1964); PA. STAT. ANN. tit. 23, § 12 (1955); VT. STAT. ANN. tit. 15, § 511 (1958); WIS. STAT. ANN. § 247.02(3) (1957).

67. *Brown v. Brown*, 186 So.2d 510 (Fla. 1966); *Burger v. Burger*, 166 So.2d 433 (Fla. 1964); *Higgins v. Higgins*, 146 So.2d 122 (Fla. 3d Dist. 1962).

68. See note 64 *supra*.

Florida;⁶⁹ at least it was followed prior to the nonrecognition of common law marriages in this state.⁷⁰ This acceptance of the second marriage as being validated without a new ceremony will amount to a limited adoption of the common law marriage in those states which do not recognize common law marriages. Society will gain nothing by denying recognition of the validity of the marriage if the parties continue living together as man and wife.

Of 2,240 annulments granted in this state since 1959, 556 have been on the ground of bigamy. With the exception of fraud, this ground is used more than any other in the state of Florida.⁷¹

C. Impotency

Impotency is the inability to copulate.⁷² It is a ground for divorce in some jurisdictions,⁷³ including Florida,⁷⁴ but it is not a ground for annulment in the absence of statute.⁷⁵ The majority of jurisdictions which have such enactments deem these marriages voidable.⁷⁶

Annulment is the traditional remedy when one of the parties is impotent at the time of the marriage, and many states so provide by statute.⁷⁷ Some states require that the disability be permanent or incurable,⁷⁸ a difficult prognosis to make with any definiteness. The law is similar in Florida, but by case law.⁷⁹ This is not a realistic approach to the problem; while the disability should be more than just temporary, it should not be required to be permanent or incurable. Most of the legislation dealing with impotency emphasizes a physical inability to perform the sex act.⁸⁰ There is also, in many cases, an incapacity to copulate which is psychogenic.⁸¹ Whether the inability is physical or mental, the result is the same: there is no sexual intercourse. Impotency as a ground for annulment should not be confined to "physical" or "permanent," but should also include mental or emotional difficulties which are likely to be more than merely temporary. Either party should be permitted to bring the action, subject to the defense of antenuptial knowledge.

69. *Jones v. Jones*, 119 Fla. 824, 161 So. 836 (1935).

70. FLA. STAT. § 741.211 (1967).

71. See VITAL STATISTICS, note 22 *supra*.

72. *Helen v. Thomas*, 52 Del. 1, 150 A.2d 833 (Super. Ct. 1959).

73. See note 3 *supra*.

74. FLA. STAT. § 61.041(2) (1967).

75. *Linneman v. Linneman*, 1 Ill. App. 2d 48, 116 N.E.2d 182 (1953).

76. See note 36 *supra*.

77. See, e.g., ARK. STAT. ANN. § 55-106 (1947); CAL. CIV. CODE § 82 (Deering 1960); COLO. REV. STAT. ANN. § 46-3-1(h) (1963); DEL. CODE ANN. tit. 13, § 1551(1) (1953); HAWAII REV. LAWS § 324-1(e) (Supp. 1965).

78. See, e.g., CAL. CIV. CODE § 82 (Deering 1960); TEX. REV. CIV. STAT. ANN. art. 4628 (1960); W. VA. CODE ANN. § 48-2-1 (1966); WIS. STAT. ANN. § 247.02(1) (1957).

79. *Cott v. Cott*, 98 So.2d 379 (Fla. 2d Dist. 1957).

80. See, e.g., ARK. STAT. ANN. § 55-106 (1947); CAL. CIV. CODE § 82 (Deering 1960); COLO. REV. STAT. ANN. § 46-3-1(h) (1963); DEL. CODE ANN. tit. 13, § 1551(1) (1953).

81. "Psychogenic" means attributable to mental causes.

Of 2,240 annulments granted in Florida since 1959, 81 have been on the ground of impotency. In frequency of use, the ground of impotency ranks near the middle.⁸²

D. Mental Incompetency

Various phrases are used to describe the mental condition which is sufficient to permit annulment. Lunacy,⁸³ idiocy,⁸⁴ feeble-mindedness,⁸⁵ imbecility,⁸⁶ insanity⁸⁷ and unsound mind⁸⁸ are some of the terms used. Some statutes refer to a mental incapacity to consent.⁸⁹ Some require that the condition exist at the time of marriage.⁹⁰ The reason for the annulment is the lack of ability to understand the nature and obligations of the marriage relationship. In legal terms, it is the absence of legal ability to consent.⁹¹

Marriages of mental incompetents are voidable in most states.⁹² In Florida a marriage with an idiot or a lunatic is void *ab initio*.⁹³ This state also considers void those marriages contracted with people in a "generally poor condition"⁹⁴ and people of advanced age⁹⁵—situations where there is not necessarily any real mental incompetency.

The statutes of a few jurisdictions provide that marriages with mental incompetents are voidable by either spouse,⁹⁶ while those of other states allow only the afflicted party or his guardian to bring the action.⁹⁷ The party suffering the disability or the competent party who enters into the marriage without being aware of the other's incapacity should be permitted to request annulment, even after consummation. If

82. See VITAL STATISTICS, note 22 *supra*.

83. See, e.g., DEL. CODE ANN. tit. 13, § 1551(5) (1953); KY. REV. STAT. § 402.020 (1962).

84. See, e.g., IND. ANN. STAT. § 44-104 (1965); KY. REV. STAT. § 402.020 (1962).

85. See, e.g., MASS. GEN. LAWS ANN. ch. 207, § 5 (1958); N.H. REV. STAT. ANN. § 457.10 (1955).

86. See, e.g., N.H. REV. STAT. ANN. § 457.10 (1955); VA. CODE ANN. § 20-46 (1960).

87. See, e.g., DEL. CODE ANN. tit. 13, § 1551(5) (1953); HAWAII REV. LAWS § 324-26 (1955).

88. See, e.g., ALASKA STAT. § 09.55.090(2) (1962); DEL. CODE ANN. tit. 13, § 101(b)(1) (1953).

89. See, e.g., ARK. STAT. ANN. § 55-106 (1947); COLO. REV. STAT. ANN. § 46-3-1(g) (1963).

90. See, e.g., CAL. CIV. CODE § 82 (Deering 1960); IOWA CODE ANN. § 598.19(4) (1946).

91. Mahan v. Mahan, 88 So.2d 545 (Fla. 1956), in which the parties were so intoxicated at the time of the marriage that they were mentally incapable of forming the intent necessary to enter into the contract.

92. See note 39 *supra*.

93. Kuehmsted v. Turnwall, 103 Fla. 1180, 138 So. 775 (1932).

94. *Id.*

95. Savage v. Olson, 151 Fla. 241, 9 So.2d 363 (1942).

96. See, e.g., DEL. CODE ANN. tit. 13, § 1551 (1953); N.Y. DOM. REL. LAW § 140(c) (McKinney 1964); OHIO REV. CODE ANN. §§ 3105.31, 3105.32 (Page Supp. 1968); WIS. STAT. ANN. § 247.02(5) (1957).

97. See, e.g., IND. ANN. STAT. § 44-106 (1965); OKLA. STAT. ANN. tit. 12, § 1283 (1961); VT. STAT. ANN. tit. 15, § 514 (1958); WASH. REV. CODE ANN. § 26.04.130 (1961).

the parties ratify the marriage by continued cohabitation after the competent party becomes aware of the incapacity, or after the disabled party recovers to the point of understanding the nature of the marriage contract, then the action should not be allowed by either party.

Of the 2,240 annulments granted in this state in the past ten years, 24 have been based on the ground of "insanity." This ground ranks near the bottom in frequency of use; only duress and incest are used less often.⁹⁸

E. *Intoxication or Influence of Drugs*

There may also be lack of consent where either of the parties was intoxicated or under the influence of drugs to such an extent as to be unaware of what was happening at the time of the marriage. These marriages are voidable in many states because of lack of understanding.⁹⁹ This is true in Florida as to intoxication,¹⁰⁰ but has not been extended to marriages contracted while one of the parties was under the influence of drugs. If the marriage is not consummated by later sexual intercourse, it should be annulable on the initiative of either party because of the desirability of ending the relationship as quickly as possible.

In the last ten years, only 40 annulments granted in this state have been on the ground of intoxication at the time of the marriage.¹⁰¹

F. *Jest or Dare*

The so-called "limited purpose" marriages are generally held not to be annulable.¹⁰² "Limited purpose" marriages are marriages wherein the parties marry for one specific and limited purpose, such as to give a child a name or to circumvent the immigration laws, with no intention to consummate the marriage or to live as man and wife. The majority of courts refuse to give effect to the intent of the parties, holding the marriages valid. Parties who enter into these marriages for one specific purpose should not be permitted to have the marriages invalidated, thus, in effect, using the courts to further their own limited interests.

The exceptions to holding these limited purpose marriages valid are those cases dealing with marriages entered into as a joke or on a dare. These unions lack the requisite consent of the parties; neither party seriously intends to enter into a permanent relationship. Colorado is the only state making these marriages annulable by statute.¹⁰³

98. See VITAL STATISTICS, note 22 *supra*.

99. See, e.g., ARK. STAT. ANN. § 55-106 (1947); N.Y. DOM. REL. LAW § 7(2) (McKinney 1964); N.C. GEN. STAT. § 51-3 (1966); OKLA. STAT. ANN. tit. 12, § 1283 (1961); WASH. REV. CODE ANN. § 26.04.130 (1961).

100. See note 91 *supra*. In the *Mahan* case, the marriage was never consummated, an extremely important factor in Florida.

101. See VITAL STATISTICS, note 22 *supra*.

102. See, e.g., *Schibi v. Schibi*, 136 Conn. 196, 69 A.2d 831 (1949).

103. COLO. REV. STAT. ANN. § 46-3-1(e) (1963).

Annulment should be available on the petition of either party if both parties entered the marriage as a jest or on a dare, or if one party so entered the marriage and this fact was known or should have been known to the other party, provided the parties do not thereafter live together as husband and wife. Otherwise, because of the possibility of fraud or collusion between the parties, the statute should not provide for annulment of limited purpose marriages.

G. *Incapacity Due to Nonage*

The ages at which individuals are permitted to marry vary from state to state. Most states require consent of the parents for marriages of males under the age of 21 and females under the age of 18.¹⁰⁴ These marriages are generally treated as voidable,¹⁰⁵ and can be ratified by continued cohabitation after attainment of the requisite age.¹⁰⁶ Most states also prohibit marriages of males under 18 and females under 16, even with the consent of their parents.¹⁰⁷ Florida establishes the age of 21 as the age of consent for both males and females,¹⁰⁸ and also prohibits the marriage of males under 18 and females under 16 but permits them to marry, in the court's discretion, without the consent of their parents or guardians upon their sworn application that they are the parents or expectant parents of a child.¹⁰⁹

The underage party or his parent or guardian should be allowed to bring the action. Where the male party is under the age of 18 and the female is under the age of 16, if the female is pregnant, they should be permitted to marry in the discretion of the court. Where the male is under 18 and the female is under 16, and no pregnancy is involved, the parents are not permitted to consent to the marriage, and the state attorney should be given the authority to initiate the annulment proceedings.

If the parents consent before or after the marriage of a female 16 or older and a male 18 or older, no annulment should be granted. The statute should provide for post-nuptial validation by parental consent, which should be in writing and authenticated.

Since 1958 there have been 95 annulments granted for nonage in Florida. This ground ranks somewhere in the middle in frequency of use.¹¹⁰

104. See, e.g., ALA. CODE tit. 34, § 10 (1958); ALASKA STAT. § 25.05.171 (1962); DEL. CODE ANN. tit. 13, § 123 (1953).

105. See note 41 *supra*.

106. See, e.g., Taylor v. Taylor, 355 S.W.2d 383 (Mo. App. 1962).

107. See, e.g., ARIZ. REV. STAT. ANN. § 25-102(a) (1956); DEL. CODE ANN. tit. 13, § 123(a) (1953); OHIO REV. CODE ANN. § 3101.01 (Page 1960); VA. CODE ANN. § 20-48 (1960).

108. FLA. STAT. § 741.04 (1967).

109. FLA. STAT. § 741.06 (1967).

110. See VITAL STATISTICS, note 22 *supra*.

H. *Fraud*

Fraud has as its basis the lack of consent of one of the parties. The reasoning is that his or her consent has been induced by the fraud of the other party and is therefore vitiated. This ground makes the marriage voidable. The fraud may take the form of either a misrepresentation or a failure to disclose and must generally go to the essentials of the marriage. The statutes providing for annulment for fraud,¹¹¹ however, do not enumerate elements which would satisfy the requirement that the fraud go to the essentials of the marriage. In some states a lesser degree of fraud is sufficient for annulment where the marriage has not been consummated.¹¹² In other states, including Florida,¹¹³ whether or not an annulment will be granted at all is dependent on whether the marriage has been consummated.¹¹⁴ Logically, consummation should not be relevant; a party cannot act upon a fraud until he discovers it.

The fraud cases run the gamut as to the particular facts that will constitute fraud sufficient to justify an annulment. No annulment will be granted, however, where the fraud goes only to personal qualities or attributes—a party's character, fortune, health, or temper.¹¹⁵

If a woman falsely represents to a man with whom she has had sexual relations that she is pregnant, and the man marries her in reliance on this misrepresentation, some jurisdictions will grant an annulment,¹¹⁶ but the majority will not.¹¹⁷ Most of the cases denying annulments sought on the ground of a fraudulent claim of pregnancy have done so because of 1) the *in pari delicto* doctrine,¹¹⁸ 2) the plaintiff's obligation, 3) a finding that the fraud did not go to the essence of the marriage, or 4) public policy.

Denial of annulment should not be allowed in order to punish the parties. In these situations, annulment is refused in order to punish a man who, by marrying the woman in reliance on her misrepresentation, has

111. See, e.g., ARK. STAT. ANN. § 55-106 (1947); COLO. REV. STAT. ANN. § 46-3-1(c) (1963); MINN. STAT. ANN. § 518.02 (1969); NEB. REV. STAT. § 42-118 (1968); ORE. REV. STAT. § 106.030 (1967).

112. See, e.g., *Damaskinos v. Damaskinos*, 325 Mass. 217, 89 N.E.2d 766 (1950); *Houlahan v. Horzepa*, 46 N.J. Super. 583, 135 A.2d 232 (1957); *Brillis v. Brillis*, 4 N.Y.2d 125, 149 N.E.2d 510, 173 N.Y.S.2d 3 (1958).

113. *Rubenstein v. Rubenstein*, 46 So.2d 602 (Fla. 1950).

114. See, e.g., *Hyslop v. Hyslop*, 241 Ala. 223, 2 So.2d 443 (1941).

115. See, e.g., *Arndt v. Arndt*, 336 Ill. App. 65, 82 N.E.2d 908 (1948).

116. See, e.g., *Parks v. Parks*, 418 S.W.2d 726 (Ky. 1967); *Masters v. Masters*, 13 Wis. 2d 332, 108 N.W.2d 674 (1961).

117. See, e.g., *Mobley v. Mobley*, 245 Ala. 90, 16 So.2d 5 (1943); *Mason v. Mason*, 164 Ark. 59, 261 S.W. 40 (1924); *Gondouin v. Gondouin*, 14 Cal. App. 285, 111 P. 756 (1910); *Brandt v. Brandt*, 123 Fla. 680, 167 So. 524 (1936); *Whitehouse v. Whitehouse*, 129 Me. 24, 149 A. 572 (1930); *Levy v. Levy*, 309 Mass. 230, 34 N.E.2d 650 (1941); *Diamond v. Diamond*, 101 N.H. 338, 143 A.2d 109 (1958).

118. *In pari delicto* refers to the equal guilt of both parties. The plaintiff, by engaging in premarital sexual relations with the defendant and thus having prior knowledge of the defendant's unchastity, should also have known that she was capable of deceiving him. *Westfall v. Westfall*, 100 Ore. 224, 197 P. 271 (1921).

sought to do the "right thing." In thus penalizing the man, the courts are approving and encouraging the fraudulent conduct of the woman. There is no valid reason why the woman, who has voluntarily entered into sexual relations with the man, should be given such preferential treatment, particularly in this day of "liberated" morality. If either party is to be favored, it should be the man, the less guilty of the two. He has at least, although somewhat tardily, acted commendably in marrying the woman; she has not only been as guilty initially as the man, but additionally has perpetrated a fraud in order to induce him to marry her.

Where the woman is actually pregnant by another man, and has misrepresented that the spouse is the father, thereby inducing his marriage to her, the results have varied from jurisdiction to jurisdiction. The husband must have been unaware of the facts at the time of the marriage if an annulment is to be granted. Most courts will allow the annulment if the husband can prove that the woman is pregnant by someone else, which would seem to be the better view.

Another area of fraud is that dealing with a fraudulent promise by one party to embrace the religious faith of the other party.

A party who consents to enter marriage on condition that the civil ceremony will be followed by a religious ceremony may have a cause of action for annulment if after the civil ceremony the other party refuses to perform the religious ceremony. The person seeking annulment must establish that the promise respecting the religious ceremony was a vital element inducing consent to the civil marriage.¹¹⁹

Another important area of fraud is that dealing with the refusal of one party to have uncontracepted intercourse with the other party. Nowhere in the United States is willful refusal to consummate the marriage an express ground for annulment or divorce, nor is refusal to have uncontracepted intercourse. Nevertheless, such refusal may enable the other spouse to obtain an annulment for fraud.¹²⁰ A number of cases have held that the requisite fraud exists where one party expressly and falsely promises before marriage to have children afterward.¹²¹ Some courts have even granted annulments for fraud on an implied promise to have children after marriage.¹²²

The alleged grounds for fraud appear to be diverse and inexhaustible. Annulments have been granted for inducing a woman to marry on a false pledge of love when the man entered the marriage solely to ob-

119. Comment, *Annulment of Marriage in New York for Fraud Based Upon Religious Factors*, 30 *FORDHAM L. REV.* 776, 780 (1962). It occurs to the writer that if religious unity were such a vital element, the party seeking an annulment on this ground might have insisted that conversion to his or her faith be effectuated prior to the marriage.

120. *Bernstein v. Bernstein*, 25 Conn. Supp. 239, 201 A.2d 660 (Super. Ct. 1964).

121. *See, e.g., Stegienko v. Stegienko*, 295 Mich. 530, 295 N.W. 252 (1940).

122. *See, e.g., Pisciotta v. Buccino*, 22 N.J. Super. 114, 91 A.2d 629 (1952).

tain preferential immigration treatment,¹²³ a woman's failure to disclose that she never intended to adopt her husband's name or live with him,¹²⁴ and a man's marrying a woman to defraud her of her property.¹²⁵ Whether or not an annulment will be granted for fraud must necessarily depend on the particular circumstances of each case.

Mention should be made of fraud perpetrated by a third party. The parents of one of the parties could make false representations of which neither party to the marriage is aware. Although this case would probably be relatively rare as compared to fraud practiced by a party to the marriage, the result would be the same—lack of real consent. An annulment should be available in such a case.

The innocent party who was induced to enter into the marriage contract by the fraud of the other party should be permitted to bring the action. If both parties to the marriage were induced because of the fraud of a third party, either one should be allowed to initiate the proceedings. Because of the uncertainty concerning the specifics of annulment on the basis of fraud, it will be necessary for the courts to deal with each case individually.

Of the 2,240 annulments in Florida since 1958, 669 were granted on the ground of fraud. Fraud is used the highest number of times as a ground for annulment.¹²⁶

I. *Duress*

Duress is another ground based on lack of consent. It involves no real consent because one of the parties has induced the other to marry by the use of threats or exercising physical force on the other party or his family. Duress makes the marriage voidable. Most of the cases involve a man's entering into the marriage in order to avoid prosecution for bastardy, seduction, or rape; the man has the choice of marrying the girl or going to jail. It is generally held that a marriage entered into in order to avoid the consequences of threatened prosecution may not be annulled.¹²⁷

About half the states have enactments expressly providing for the nullification of marriages contracted under duress,¹²⁸ but most of the remaining states have adopted the view that courts of equity have inherent jurisdiction to annul such unions.¹²⁹ Most legislation merely refers to

123. *Babis v. Babis*, 45 Del. 496, 75 A.2d 580 (Super. Ct. 1950).

124. *Handley v. Handley*, 179 Cal. App. 2d 742, 3 Cal. Rptr. 910 (1960).

125. See, e.g., *Sampson v. Sampson*, 332 Mich. 214, 50 N.W.2d 764 (1952).

126. See VITAL STATISTICS, note 22 *supra*.

127. See, e.g., *Jones v. Jones*, 314 S.W.2d 448 (Tex. Civ. App. 1958).

128. See, e.g., ALASKA STAT. § 25.05.031 (1962); CAL. CIV. CODE § 82 (Deering 1960); COLO. REV. STAT. ANN. § 46-3-1(d) (1963); MINN. STAT. ANN. § 518.02 (1969); N.Y. DOM. REL. LAW § 7(4) (McKinney 1964); WASH. REV. CODE ANN. § 26.04.130 (1961); WYO. STAT. ANN. § 20-33 (1957).

129. See, e.g., *Worthington v. Worthington*, 234 Ark. 216, 352 S.W.2d 80 (1962).

marriage induced by force, without making any attempt to define the kind or amount of force required.¹³⁰ Duress as a ground for annulment should be limited to physical force or very serious threats thereof. As stated, the most common allegation of duress is that involving threatened legal action growing out of premarital sexual relations where the party has a "free" choice.

Physical force applied by a third party, such as the father of the bride at a "shotgun" wedding, should also permit annulment. The source of the pressure should make no difference; there is still a lack of consent.

The majority of American jurisdictions permit an innocent party who has married under duress to have the union annulled.¹³¹ In Florida twelve annulments were granted on the ground of duress over the past ten years. Except for incest, this ground is used less than any other.¹³²

VI. DEFENSES

Under the prevailing view, a plaintiff can obtain an annulment of a void marriage even though he entered the union with awareness of the impediment and even though his conduct may have been censurable in other respects.¹³³ The cases involving incest follow this principle, but the degrees within which marriage is forbidden vary from jurisdiction to jurisdiction. Generally, a marriage contracted locally between parties who are within the prohibited degrees is annulable regardless of the plaintiff's premarital knowledge of the impediment. However, if such a union was formed out of the state, it is valid locally if legal where celebrated.¹³⁴

Bigamous marriages are also generally held annulable whether or not the plaintiff knew of the prior existing marriage,¹³⁵ although there is a minority view to the contrary.¹³⁶ A few decisions take the position that even though a bigamous marriage is absolutely void, one who knowingly enters into such a relationship should be estopped from obtaining an annulment decree.¹³⁷ This view has been followed in Florida.¹³⁸

Estoppel is employed as a defense to attacks on defective marriages

130. See, e.g., CAL. CIV. CODE § 82 (Deering 1960); COLO. REV. STAT. ANN. § 46-3-1(d) (1963); HAWAII REV. LAWS § 580-21(6) (1968); MINN. STAT. ANN. § 518.02 (1947); N.Y. DOM. REL. LAW § 7(4) (McKinney 1964); WYO. STAT. ANN. § 20-33 (1957).

131. See, e.g., MINN. STAT. ANN. § 518.02 (1947); N.Y. DOM. REL. LAW § 7(4) (McKinney 1964).

132. See VITAL STATISTICS, note 22 *supra*.

133. See, e.g., Seacord v. Seacord, 33 Del. 485, 139 A. 80 (Super. Ct. 1927); Reed v. Reed, 202 Ga. 508, 43 S.E.2d 539 (1947); Townsend v. Morgan, 192 Md. 168, 63 A.2d 743 (1949); Smith v. Smith, 72 Ohio App. 203, 50 N.E.2d 889 (1943); Kiessenbeck v. Kiessenbeck, 145 Ore. 82, 26 P.2d 58 (1933).

134. Moore, *Defenses Available in Annulment Actions*, 7 J. FAMILY L. 239 (1967).

135. See, e.g., Johnson v. Johnson, 245 Ala. 145, 16 So.2d 401 (1944).

136. Rediker v. Rediker 35 Cal. 2d 796, 221 P.2d 1 (1950); Otte v. Pierce, 118 Colo. 123, 194 P.2d 331 (1948).

137. See, e.g., Keys v. Keys, 22 N.H. 553 (1851) (dictum); Storf v. Papalia, 24 N.J. Misc. 145, 46 A.2d 907 (Ch. 1946) (dictum).

138. Higgins v. Higgins, 146 So.2d 122 (Fla. 3d Dist. 1962).

and invalid divorces. In those states which have interlocutory divorce decrees,¹³⁹ if one of the parties gets married within the interlocutory period, the marriage is generally held void.¹⁴⁰ However, at least five states hold that a divorced person's remarriage within the restricted period is merely voidable.¹⁴¹ If the party under the interlocutory restriction marries someone else who has knowledge of the restriction, the person having such knowledge is estopped from attacking its validity, even in those states where the marriage is absolutely void.¹⁴² Further, if the person with knowledge of the restriction participates with the party under the restriction in obtaining an invalid divorce,¹⁴³ the doctrine of estoppel is also invoked. Thus, even though his marriage to the person who obtained the invalid divorce is void, he is estopped from attacking it because of his participation.

Antenuptial knowledge is a defense to annulment actions brought on the ground of impotency. If the plaintiff knew of the impotency of the other spouse before or at the time of the marriage, or had knowledge of facts sufficient to put him on notice, annulment will be denied.¹⁴⁴ Delaware,¹⁴⁵ New Jersey,¹⁴⁶ West Virginia¹⁴⁷ and Wisconsin¹⁴⁸ so provide in their annulment acts.

Marriages of mental incompetents, where voidable, can be ratified by continued cohabitation of the parties after the competent party becomes aware of the incapacity, or after the disabled spouse's faculties have been restored.¹⁴⁹ If the capable partner is aware of the other spouse's disability at the time of the marriage, the annulment should not be granted on his petition.

Marriages entered into while either party was intoxicated or under the influence of drugs can be ratified by cohabitation after the effect of the drinks or drugs wears off.¹⁵⁰

Marriages made in jest or on a dare can be ratified by cohabitation.¹⁵¹

If underage parties continue to cohabit or otherwise confirm the

139. See, e.g., ALA. CODE tit. 34, §§ 23, 38 (1958); IOWA CODE ANN. § 598.17 (1946); KAN. STAT. ANN. § 60-1610 (1963); OKLA. STAT. ANN. tit. 12, § 1280 (1961); TEX. REV. CIV. STAT. ANN. art. 4640 (1960); VA. CODE ANN. §§ 20-118, 20-119 (1953).

140. See, e.g., *Scuchart v. Scuchart*, 61 Kan. 597, 60 P. 311 (1900).

141. *Park v. Barron*, 20 Ga. 702 (1856); *State v. Yoder*, 113 Minn. 503, 130 N.W. 10 (1911); *Crawford v. State*, 73 Miss. 172, 18 So. 848 (1895); *Woodward v. Blake*, 38 N.D. 38, 164 N.W. 156 (1917); *Gress v. Gress*, 209 S.W.2d 1003 (Tex. Civ. App. 1948).

142. See, e.g., *Mallon v. Mallon*, 87 Pa. Super. 42 (1925).

143. For example, a divorce obtained in a state not having jurisdiction over the subject matter is invalid.

144. See, e.g., *Anonymous v. Anonymous*, 74 N.Y.S.2d 899 (Sup. Ct. 1947).

145. DEL. CODE ANN. tit. 13, § 1551 (1953).

146. N.J. REV. STAT. ANN. § 2A:34-1 (1952).

147. W. VA. CODE ANN. § 48-2-1 (1966).

148. WIS. STAT. ANN. § 247.02(1) (1957).

149. See, e.g., *Lewis v. Lewis*, 44 Minn. 124, 46 N.W. 323 (1890).

150. See, e.g., *Prine v. Prine*, 36 Fla. 676, 18 So. 781 (1895).

151. See, e.g., *Brooks-Bischoffberger v. Bischoffberger*, 129 Me. 52, 149 A. 606 (1930).

marriage after attaining majority, they have ratified the marriage and forfeited their right to annulment.¹⁵² Many states so provide by statute.¹⁵³

In cases involving fraud, a plaintiff may be denied relief even though he can prove that the defendant deceived him with regard to a matter material to their marriage, if the plaintiff had enough information to put him on notice of the fraud, or if his own premarital conduct was *in pari delicto*. Also, in most United States jurisdictions, one who by words or conduct ratifies or affirms a fraudulent marriage after discovery of the fraud forfeits his right to have the union annulled.¹⁵⁴

Ratification is operative as a defense to marriages contracted under duress if the parties continue to cohabit after the coercion has been removed.¹⁵⁵ Additionally, a person who has valid grounds for an annulment, but who delays bringing suit, may find himself barred from relief. Several states have statutes of limitation concerning annulment actions.¹⁵⁶

In order to clarify the law, it would be advisable to include certain of the foregoing defenses in statutes providing for annulment. The time in which the annulment suit may be brought should be specifically provided according to the ground under which the proceedings are initiated.

VII. JURISDICTION

Many states statutorily provide certain courts with the power to hear annulment suits. In those states that have no statutes, including Florida, the courts inherently have the power.¹⁵⁷

By analogy to divorce, the great weight of authority holds that the courts of the parties' domicile have jurisdiction to annul a marriage celebrated elsewhere.¹⁵⁸ The general view is that the domicile of only one of the parties within the state is sufficient to confer jurisdiction to grant annulment,¹⁵⁹ provided that there is proper service upon the non-resident defendant.¹⁶⁰ The main reason for adopting the state of domicile

152. See, e.g., *Taylor v. Taylor*, 355 S.W.2d 383 (Mo. App. 1962).

153. See, e.g., CAL. CIV. CODE § 82 (Deering 1960); D.C. CODE ENCYCL. ANN. § 16-403 (1966); IDAHO CODE ANN. § 32-501(1) (1963); MICH. COMP. LAWS ANN. §§ 552.2, 552.34 (1948); NEB. REV. STAT. § 42-118 (1968); N.J. STAT. ANN. § 2A:34-1 (1952); N.Y. DOM. REL. LAW § 140(b) (McKinney 1964); VT. STAT. ANN. tit. 15, § 513 (1958).

154. See A. JACOBS & J. GOEBEL, CASES AND MATERIALS ON DOMESTIC RELATIONS 312 (4th ed. 1961).

155. *Sherman v. Sherman*, 174 Iowa 145, 156 N.W. 301 (1916); *Merrell v. Moore*, 47 Tex. Civ. App. 200, 104 S.W. 514 (1907).

156. See, e.g., IDAHO CODE ANN. § 32-502 (1963); MONT. REV. CODES ANN. § 48-203 (1961); OHIO REV. CODE ANN. § 3105.32 (Page Supp. 1968); S.D. COMP. LAWS ANN. § 14.0602 (1967); WYO. STAT. ANN. § 20-46 (1957).

157. See 1 W. NELSON, DIVORCE AND ANNULMENT § 31.02 (2d ed. 1961).

158. See, e.g., *Hamlet v. Hamlet*, 242 Ala. 70, 4 S.2d 901 (1941); *Romatz v. Romatz*, 355 Mich. 81, 94 N.W.2d 432 (1959); *Foster v. Nordman*, 244 S.C. 485, 137 S.E.2d 600 (1964); *Everly v. Baumil*, 209 S.C. 287, 39 S.E.2d 905 (1946).

159. See, e.g., *Aiello v. Aiello*, 272 Ala. 505, 133 So.2d 18 (1961); *Perlstein v. Perlstein*, 152 Conn. 152, 204 A.2d 909 (1964); *Damaskinos v. Damaskinos*, 325 Mass. 217, 89 N.E.2d 766 (1950).

160. See, e.g., *Bing Gee v. Chan Lai Yung Gee*, 89 Cal. App. 2d 877, 202 P.2d 360

as the jurisdictional basis for annulment is the interest that the state has in the marital status of its citizens. Since a party may be a domiciliary of a state in which he does not reside, it would be preferable to base jurisdiction upon residence instead of domicile.

In addition, courts of the state where the marriage was celebrated are generally considered to have annulment jurisdiction.¹⁶¹ Some cases hold that the state of celebration has jurisdiction to annul a marriage even though neither party is a resident.¹⁶² The contrary view, to the effect that the state where the marriage was celebrated has no jurisdiction to annul where neither party is domiciled within that state, was derived from the decision of *Williams v. North Carolina*.¹⁶³

In annulment, courts generally apply the law of the state in which the marriage was contracted,¹⁶⁴ subject to the ultimate power of the domicile to apply its own law.¹⁶⁵

Absent an express provision, it is commonly held that divorce residency requirements do not control, and that domicile within the jurisdiction need not have continued for any particular period in order to permit a suit for annulment.¹⁶⁶

VIII. SERVICE OF PROCESS

In the absence of statute, the cases disagree as to the type of service required for annulment. Most courts hold that personal service within the state is necessary,¹⁶⁷ although the Florida Statutes expressly provide for constructive service.¹⁶⁸ A minority position holds that the service requirements for annulment should be the same as those for divorce.¹⁶⁹

The issue has been somewhat clouded by the in rem-in personam distinction. Substituted or constructive service of process is allowed in connection with actions in rem. In these proceedings, a *res* which is at the domicile is required. The marital status is the *res* in divorce, but in an annulment action the contention is that there was never any marriage;

(1949); *Rinaldi v. Rinaldi*, 94 N.J. Eq. 14, 118 A. 685 (1922); *Winter v. Winter*, 256 N.Y. 113, 175 N.E. 533 (1931); *Piper v. Piper*, 46 Wash. 671, 91 P. 189 (1907).

161. *See, e.g.*, *Bramble v. Kemper*, 227 Ark. 186, 297 S.W.2d 104 (1957); *Feigenbaum v. Feigenbaum*, 210 Ark. 186, 194 S.W.2d 1012 (1946); *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929).

162. *See, e.g.*, *Jordan v. Courtney*, 248 Ala. 390, 27 So.2d 783 (1946); *Bramble v. Kemper*, 227 Ark. 186, 297 S.W.2d 104 (1957); *Feigenbaum v. Feigenbaum*, 210 Ark. 186, 194 S.W.2d 1012 (1946); *Titus v. Titus*, 115 W. Va. 229, 174 S.E. 874 (1934).

163. 317 U.S. 287 (1942).

164. RESTATEMENT OF THE CONFLICT OF LAWS §§ 115, 121 (1934); *see also* *Storke, Annulment in the Conflict of Laws*, 43 MINN. L. REV. 849 (1959).

165. RESTATEMENT OF THE CONFLICT OF LAWS § 132 (1934); *see also* *Storke, Annulment in the Conflict of Laws*, 43 MINN. L. REV. 849 (1959).

166. *See, e.g.*, *Foster v. Foster*, 89 N.H. 376, 199 A. 367 (1938).

167. *See, e.g.*, *Gayle v. Gayle*, 301 Ky. 613, 192 S.W.2d 821 (1946).

168. *See note 20 supra*.

169. *See, e.g.*, *Perlstein v. Perlstein*, 152 Conn. 152, 204 A.2d 909 (1964); *Winter v. Winter*, 256 N.Y. 113, 175 N.E. 533 (1931).

therefore there would be no *res*. Actions in personam require personal service within the state where the action is brought. The majority of states having no statutes on constructive service hold that the action must be in personam.¹⁷⁰ It is necessary to look to each jurisdiction in order to determine whether the action is classified as in personam or in rem.

A requirement of personal service would best insure that the defendant would have notice of the suit. However, if it is impossible for the plaintiff to effect personal service, he will be precluded from obtaining an annulment. Further, if the defendant is not living in his state of domicile, in the plaintiff's state of domicile, or in the state where the marriage was celebrated, he cannot be personally served in any state having subject matter jurisdiction. Therefore, statutory provisions for constructive service of process should be included as a part of the general annulment statute.

The in rem-in personam distinction is a workable theory where real estate is concerned, the *res* being the land involved. However, in divorce and annulment suits, the *res* is elusive, at best, and the distinction should be avoided.

IX. CONSEQUENCES

A. Custody, Support, and Legitimacy of Children

Many states have passed statutes making children of annulled marriages legitimate.¹⁷¹ Others have distinguished between marriages that are void *ab initio* and those that are voidable, holding the offspring of only the latter to be legitimate.¹⁷² Georgia¹⁷³ and North Carolina¹⁷⁴ have statutes that prohibit annulment when children are born or will be born of the marriage. In New Jersey a similar statute has been held to grant the courts discretion to deny annulment if it would be adverse to the child's best interests.¹⁷⁵ In the absence of statutory authorization, a number of courts have assumed the right to grant custody and support decrees on the basis of their inherent equity powers.¹⁷⁶ Florida's courts

170. See, e.g., *Cumington v. Belchertown*, 149 Mass. 223, 21 N.E. 435 (1889).

171. See, e.g., COLO. REV. STAT. ANN. § 46-3-5 (1963); CONN. GEN. STAT. REV. § 46-28 (Supp. 1969); KAN. STAT. ANN. § 23-124 (1964); MD. ANN. CODE art. 16, § 27 (1957); MONT. REV. CODES ANN. § 48-207 (Supp. 1969); N.H. REV. STAT. ANN. § 458.23 (1955); N.Y. DOM. REL. LAW § 175 (McKinney 1964); PA. STAT. ANN. tit. 48, § 169 (1967); TENN. CODE ANN. § 36-832 (1955); VA. CODE ANN. § 64-7 (1968).

172. See, e.g., D.C. CODE ENCYCL. ANN. §§ 16-907, 16-908 (1966); KY. REV. STAT. § 391.100 (1963); MISS. CODE ANN. § 2748-03 (Supp. 1968); WYO. STAT. ANN. §§ 20-68 to 20-70 (1957).

173. GA. CODE ANN. § 53-601 (1961).

174. N.C. GEN. STAT. § 51-3 (1966).

175. N.J. STAT. ANN. § 2A:34-1(g) (1952).

176. See, e.g., *Wallace v. Wallace*, 221 Ga. 510, 145 S.E.2d 546 (1965); *Cardenas v. Cardenas*, 12 Ill. App. 2d 497, 140 N.E.2d 377 (1956); *Clayton v. Clayton* 231 Md. 74, 188 A.2d 550 (1963); *Sanders v. Sanders*, 232 S.C. 625, 103 S.E.2d 281 (1958); *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. 1965).

so hold.¹⁷⁷ Even in the absence of a statute, it is generally accepted that the father of an illegitimate child owes him a duty of support.¹⁷⁸ As discussed *supra*, there is no justification for imposing the burden of illegitimacy on children of annulled marriages. Statutory provision should specifically be made for the purpose of legitimatizing all such children. Further, the court should have the power to determine custody and order support similar to its power in divorce proceedings.

B. *Alimony*

Absent express statutory provision, courts in a majority of states award temporary alimony and court costs when the wife enters a good faith defense to an annulment suit by the husband.¹⁷⁹ In Florida, a wife who defends such a suit may be awarded temporary alimony and suit money when necessary in the court's discretion.¹⁸⁰ Relief should be granted according to the wife's need and the husband's ability to pay. If the wife fails to assert the validity of the marriage, her request for temporary relief will be denied on the ground that no right to alimony arises in the absence of a valid marriage.¹⁸¹ If there are children, several courts have awarded temporary alimony for the express purpose of maintaining the children during the pendency of the action.¹⁸² This procedure has been followed in Florida.¹⁸³ A number of states have statutes that expressly permit the court to award temporary alimony and litigation fees in these proceedings.¹⁸⁴ The best solution would be to authorize temporary allowances in annulment suits where the woman has in good faith entered into the marriage. She has a right to such allowances, and neither the theoretical existence of a valid marriage nor her position as plaintiff or defendant should affect this right.

In the absence of an express statutory provision, most courts have not allowed permanent alimony following an annulment.¹⁸⁵ The courts

177. *Todd v. Todd*, 151 Fla. 134, 9 So.2d 279 (1942).

178. *Id.*

179. *See, e.g.*, *Peacock v. Peacock*, 264 Ala. 332, 87 So.2d 626 (1956); *Middlecoff v. Middlecoff*, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); *DuPont v. DuPont*, 46 Del. 592, 87 A.2d 394 (1952); *Franklin v. Franklin*, 365 Mo. 442, 283 S.W.2d 483 (1955); *Fowler v. Fowler*, 97 N.H. 216, 84 A.2d 836 (1951).

180. *Prine v. Prine*, 36 Fla. 676, 18 So. 781 (1895).

181. *See, e.g.*, *Peacock v. Peacock*, 264 Ala. 332, 87 So.2d 626 (1956); *Middlecoff v. Middlecoff*, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); *Pry v. Pry*, 225 Ind. 458, 75 N.E.2d 909 (1947); *Jenkins v. Jenkins*, 107 Utah 239, 153 P.2d 262 (1944).

182. *See, e.g.*, *Taylor v. White*, 160 N.C. 38, 75 S.E. 941 (1912).

183. *See* note 177 *supra*.

184. *See, e.g.*, D.C. CODE ENCYCL. ANN. § 16-911 (Supp. I, 1966); KAN. STAT. ANN. § 60-1607 (1964); N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1969); ORE. REV. STAT. § 107.090 (1967); WASH. REV. CODE ANN. § 26.08.090 (1961).

185. *See, e.g.*, *Peacock v. Peacock*, 264 Ala. 332, 87 So.2d 626 (1956); *Middlecoff v. Middlecoff*, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); *DuPont v. DuPont*, 46 Del. 592, 87 A.2d 394 (1952); *Sciamberg v. Sciamberg*, 220 Ind. 209, 41 N.E.2d 801 (1942); *Short v. Short*, 61 Ohio L. Abs. 49, 102 N.E.2d 719 (Ct. App. 1951).

of Florida have so held.¹⁸⁶ The reasoning behind these decisions is that since an annulment decree finds that no valid marriage ever existed, the alleged husband owes no duty of maintenance or support to his "spouse." Several states have enacted statutes expressly giving courts discretion to award permanent alimony in annulment suits when such an allowance would be just and equitable.¹⁸⁷ In Florida, if the annulment is granted and the court determines that the wife is an innocent victim of the husband's wrong, the supreme court has indicated that permanent alimony and attorneys fees may be allowed on equitable principles.¹⁸⁸ Awards of permanent alimony may be dictated in extreme circumstances, such as where, by reason of living together as man and wife, the wife's ability to maintain herself has been reduced. However, where the marriage has been of short duration, it is difficult to justify imposing upon the husband the burden of supporting a nonwife, no matter how needy she may be.

The relation-back doctrine comes into play in a consideration of alimony awards. In the state of Florida, payment of alimony by a man to his first wife may be reinstated after the first wife's second marriage has been annulled if the second marriage was void,¹⁸⁹ but not if it was voidable.¹⁹⁰ Thus, if her second marriage was to a man already married, an innocent wife could sue for divorce and obtain alimony from her second husband; or she could bring a suit for annulment and petition the court for reinstatement of alimony by her first husband on the ground that the second marriage was void. The wife should not have this opportunity of choosing which husband she is going to sue, depending on which one has the money. A Colorado statute provides that an ex-wife's subsequent marriage, whether void or voidable, relieves a husband from further payment of alimony.¹⁹¹ This would appear to be the better position and should be adopted by statute in this state.

C. Property Rights

In theory, an annulment decree places the parties in the same position as if the marriage had never existed. A majority of courts, however, will effect some equitable distribution of the property accumulated during the marriage.¹⁹² Some courts treat the property as held in joint

186. *Titcomb v. Titcomb*, 160 Fla. 320, 34 So.2d 742 (1948); *Therry v. Therry*, 117 Fla. 453, 158 So. 120 (1934).

187. *See, e.g.*, CONN. GEN. STAT. REV. § 46-28 (Supp. 1969); IOWA CODE ANN. § 598-24 (1946); N.H. REV. STAT. ANN. § 458.19 (1968); N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1969); WASH. REV. CODE ANN. § 26.08.110 (1961).

188. *See* note 48 *supra*.

189. *See* note 49 *supra*.

190. *See* note 50 *supra*.

191. *See* note 51 *supra*.

192. *See, e.g.*, *Middlecoff v. Middlecoff*, 171 Cal. App. 2d 286, 340 P.2d 331 (1959); *Arthur v. Arthur*, 152 Cal. App. 2d 87, 312 P.2d 762 (1957); *Rickards v. Rickards*, 53 Del. 134, 166 A.2d 425 (1960); *Lawrence v. Heavner*, 232 N.C. 557, 61 S.E.2d 697 (1950).

tenancy or tenancy in common, and order an equal division.¹⁹³ A substantial number of states have statutes specifically authorizing property division in annulment suits. Several provide for division of property in conjunction with the granting of alimony.¹⁹⁴ Although courts achieve generally satisfactory results in dividing property upon annulment, it would seem best, in the interests of clarity and simplicity, to provide a statute expressly granting the courts discretion to distribute both jointly and separately acquired property between the parties. Factors to be considered would be the duration of the marriage, by whom the property in question was acquired, who paid for it, the type of property involved, and the relative financial positions of the parties. This solution would promote consistency and fairness.

X. CONCLUSION

The marriage relationship, as one of the foundations of our society, must be strong and durable. It should not be forced on the parties, nor, on the other hand, should it be dissolved indiscriminately. An examination of the annulment cases reveals an apparent obsession to place guilt in these situations; but annulment is not penal in nature, and should not be granted or denied parties as a punitive measure.

There is a definite need for annulment legislation in Florida, to fill the gaps in our law and to provide more effective relief than is now available. Annulment should exist as a complete and separate remedy, and not merely as an atrophied arm of divorce.

A PROPOSED STATUTE

Section 1. *Incestuous Marriages.*

Any marriage between parents and children, including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, and aunts and nephews, whether the relationship is legitimate or illegitimate, is annulable in an action brought by either party to the marriage or by the state attorney of the county where either party resides.

Section 2. *Bigamous Marriages.*

Any marriage between parties, either of whom at the time of the marriage is lawfully married to another living person, is annulable in an action brought by either party to the marriage, or by the lawful spouse of either party, or by the state attorney of the county where either party resides.

193. See, e.g., *Donnelly v. Donnelly*, 198 Md. 341, 84 A.2d 89 (1951); *Lawrence v. Heavner*, 232 N.C. 557, 61 S.E.2d 697 (1950).

194. See, e.g., N.H. REV. STAT. ANN. § 458.19 (1968); ORE. REV. STAT. § 107.100 (1967); WASH. REV. CODE ANN. § 26.08.110 (1961).

A bigamous marriage shall not be annulled if the parties thereto live together as husband and wife after the prior lawful marriage giving rise to the bigamy has been dissolved, either by the death of the lawful spouse or by divorce.

Section 3. *Impotency.*

A marriage between parties, either of whom at the time of the marriage, for physical or mental reasons, was incapable of performing the sex act incident to the marriage relationship, is annulable in an action brought by either party to the marriage, provided that such incapacity persists to the time of the action and seems likely to persist for more than three years. Such a marriage shall not be annulable by the capable party if said party knew of the incapacity of the other party at the time of the marriage.

An action to annul a marriage on the ground of impotency must be brought within three years of the marriage.

Section 4. *Mental Incompetency*

A marriage is annulable if, at the time of the marriage, either of the parties was mentally incapable of understanding the nature of the marriage contract. The action may be brought by either party or the guardian of the incapacitated party, provided that the parties do not live together as husband and wife during a period when both are mentally capable of understanding the nature of the marriage contract. Such a marriage shall not be annulable by the competent party if said party was, at the time of the marriage, aware of the other's incapacity, or if the parties continue to live together as husband and wife after the competent party becomes aware of the incapacity.

An action to annul a marriage on the ground of mental incompetency must be brought within three years of the marriage by the incapacitated party, or within one year of the marriage by the party not incapacitated.

Section 5. *Intoxication or Influence of Drugs.*

A marriage is annulable if either of the parties was so intoxicated, or so under the influence of drugs, as to be unaware of the nature of the ceremony performed, provided that the parties do not live together as husband and wife after the incapacity induced by intoxication or drugs has ceased. The action may be brought by either party.

An action to annul a marriage on grounds described in this section must be brought within six months of the marriage.

Section 6. *Jest or Dare.*

A marriage is annulable if both parties entered the marriage as a jest or on a dare, or if one party entered the marriage as a jest or on a dare and this fact was known or should have been known to the other

party, provided the parties do not after the marriage live together as husband and wife. The action may be brought by either party.

An action to annul a marriage on the ground that it was entered into as a jest or on a dare must be brought within six months of the marriage.

Section 7. *Incapacity Due to Age.*

A marriage is annulable if at the time of the marriage either party was under the age of 21 years. If the male party is over the age of 18 years and the female party is over the age of 16 years, consent to the marriage may be given by a parent, guardian or person in charge of the underage party, in which event no annulment will be granted. The consent must be evidenced by a written document authenticated by a notary public or other competent authority, and may be given either before or after the marriage. The action may be brought by the underage party. A marriage described as annulable in this section shall not be annulled if the parties live together as husband and wife after the underage party reaches the age of consent.

If the male party is under the age of 18 years or the female party is under the age of 16 years, unless the county judge has issued the marriage license pursuant to Chapter 741.06, the marriage is annulable whether or not a parent, guardian or person in charge of such underage party consents thereto, and the action may be brought by the underage party, a parent, guardian or person in charge of the underage party, or the state attorney of the county where the underage party resides.

Section 8. *Fraud.*

A marriage is annulable in an action brought by:

1. A party who enters the marriage in reliance on a fraudulent act, misrepresentation or failure to disclose a material fact by the other party, provided that the fraud goes to the essence of the marriage.

2. A party who enters the marriage in reliance on a fraudulent act or misrepresentation made by a third person, whether or not the other party to the marriage was aware of the fraudulent act or misrepresentation, provided that the fraud goes to the essence of the marriage.

3. Either party, where both parties enter the marriage in reliance on a fraudulent act or misrepresentation made by a third person, provided the fraud goes to the essence of the marriage.

A marriage shall not be annulled on the ground of fraud if the complaining party was aware of the fraud at the time of the marriage or if the parties continue to live together as husband and wife after discovery of the fraud by the complaining party.

An action to annul a marriage on the ground of fraud must be brought within one year after discovery of the fraud, and in no case later than ten years.

Section 9. *Duress.*

A marriage is annulable in an action brought by the party who enters the marriage as the result of physical duress exercised by the other party, or by a third person whether or not the other party knew of the exercise of duress, or in an action brought by either party if both parties enter the marriage as the result of physical duress exercised by a third person.

No annulment on the ground of duress shall be granted if the parties continue to live together as husband and wife after the duress is removed.

An action to annul under this section must be brought within one year of the marriage.

Section 10. *Jurisdiction.*

The circuit courts of this state have jurisdiction of all actions for annulment of marriages.

To obtain an annulment, plaintiff need not reside in this state for any specific period of time before filing the action.

An action for annulment may be instituted if the marriage was contracted in this state, if either party to the marriage is domiciled in this state at the time the action is commenced, or if either party is a resident of this state at the time the action is commenced.

Section 11. *Service of Process.*

Service of process in actions for annulment of marriage may be served by publication or personal service on the defendant outside of the state.

Section 12. *Legitimacy of Children.*

All children born or to be born of annulable marriages shall be deemed legitimate for all purposes.

Section 13. *Custody, Support, Alimony, Property, Fees and Costs.*

At all times after the filing of an annulment action, the circuit court may issue such orders as the circumstances of the case may warrant for the care, custody, and support of the children who are dependent upon the parent or parents for support, and for suit money, court costs, and attorney's fees.

When a decree of annulment has been entered, the court may make such orders as the circumstances of the case may warrant relative to:

1. Care, custody and support of children who are dependent upon the parent or parents for support.
2. Alimony for an innocent female party who is dependent upon the other party for maintenance.
3. Division of property acquired during the marriage, other than

by gift to or inheritance by either party individually, in such proportions as may be fair and equitable.

4. Suit money, court costs, and attorney's fees.

5. Any other matters in controversy between the parties relevant to the annulment of the marriage.

The court shall have the power to require security to be given to insure enforcement of any such order.

The remarriage of a party entitled to alimony shall relieve the other party from further payments of said alimony.

The court shall retain jurisdiction of the action for the purpose of such later revisions of its orders as the circumstances may require.

Section 14. *Repeal of Laws in Conflict.*

All laws inconsistent with any provisions of this Act are hereby declared void and of no further force or effect.

Section 15. *Severability Provision.*

If any section, sentence, clause, phrase or word of this Act is for any reason held or declared to be unconstitutional, inoperative, or void, such holding of invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the intention of the Legislature to pass this Act without such unconstitutional, invalid, or inoperative part therein, and the remaining portions of this Act, after the exclusion of such part or parts, shall be deemed and held to be valid as if such excluded part or parts had not been included therein.