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PENNSYLVANIA COMMON LAW MARRIAGE AND  
ANNULMENT: PRESENT LAW AND  
PROPOSALS FOR REFORM

I. INTRODUCTION

Although the institution of marriage is age-old, as societal values and structures change, it is incumbent upon the law to keep pace with these changes. There has been a movement in Pennsylvania over the past 8 years to modify the existing marriage and divorce laws so that they may more adequately reflect a recognition of the current problems in the delicate areas of creation and termination of marriage. It is the purpose of this Comment to examine the existing law and the proposed changes in two important areas — Common Law Marriage and Annulment.

II. COMMON LAW MARRIAGES

*A. Requirements*

A common law marriage is brought about through an agreement of the parties and absent a ceremony or a license.<sup>1</sup> At the present time such marriages are recognized as valid in Pennsylvania. This is so because the courts have construed the Pennsylvania statute relating to the issuance of marriage licenses as merely directory in nature rather than mandatory.<sup>2</sup> There is thus state recognition of common law marriage if the claim is reasonable and circumstances which would normally invite suspicion or doubt as to its validity are absent. In order to dispel this suspicion or doubt, certain essential requirements must be met for the establishment of a common law marriage. These requirements are: (1) some type of holding out to the public of one's marital relationship, or (2) the effectuation of the marital union through the use of words expressing present intent and consent. Additionally presumptions are available which affect the evidentiary burdens of claimants.

*1. Holding Out*

Holding out is essentially equivalent to what one would consider reputation "in the sense that the parties had, relying upon their agreement, lived together as husband and wife [cohabited] and were so known and recognized in the communities in which they lived."<sup>3</sup> The require-

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1. A. FREEDMAN & M. FREEDMAN, *MARRIAGE AND DIVORCE IN PENNSYLVANIA* 100 (2d ed. 1957) [hereinafter cited as FREEDMAN]. See also *Sinclair v. Sinclair*, 197 Pa. Super. 59, 176 A.2d 23 (1962).

2. *E.g.*, *Buradus v. Gen. Cement Prod. Co.*, 159 Pa. Super. 501, 48 A.2d 883, *aff'd*, 356 Pa. 349, 52 A.2d 205 (1947). See generally 51 DICK. L. REV. 137 (1947).

3. *Ksionska v. Philadelphia & Reading Coal & Iron Co.*, 169 Pa. Super. 439, 442, 82 A.2d 505, 506 (1951). This case further indicates that if a valid marriage contract exists, evidence of cohabitation and reputation is merely corroborative of that fact, thereby discounting the independent necessity of having a holding out. See

ment of holding out is used to ensure that the parties regard themselves as husband and wife. This recognition allegedly arises from the fact that if the public deems them married, the parties, in creating such an impression, also consider themselves married. However, this requirement is an anachronism in light of the mobility of today's society. This mobility often makes it difficult to establish a holding out for there is always the chance that a couple may not be in one place long enough to make the public aware of the fact that they consider themselves married and would like everyone else to so regard them. A hypothetical situation presents the essence of the problem: Migrant workers entering into alleged common law marriages have great mobility. If the "public" to which they must hold themselves out as husband and wife consists of more than their constant traveling companions, it appears that the holding out requirement could never be satisfied and the parties involved could never enter into a valid common law marriage.

## 2. *Words of Present Consent*

In addition to the holding out resulting in public knowledge of marital status, the marriage must be effected through an informal contract between the parties which, in the manifestation of consent, refers to a present as opposed to a future marriage. The requisite manifestation of present consent is found in the use by the parties of words *verba de praesenti* (words of present consent such as "I do take you as my wife") as opposed to words *verba de futuro* (words of future consent such as "I will take you to be my wife").<sup>4</sup> The emphasis on this verbal distinction is allegedly for the purpose of determining whether the parties spoke the words "with a view and for the purpose of establishing the relationship of husband and wife. . . ."<sup>5</sup> But the reliance on what was said in order to prove or disprove this present intent is prone to criticism because, in fact, the distinction is not promotive of its intended function. The distinction fails because "unlettered persons frequently become confused in the use of tenses. . . ."<sup>6</sup> It would appear that those most likely to enter into common law marriage would be the ones least

also FREEDMAN, *supra* note 1, at 108; H. CLARK, LAW OF DOMESTIC RELATIONS 48 (1968). See generally *Chilpala v. A.A. Morrison & Co.*, 44 F. Supp. 894, *aff'd*, 132 F.2d 320 (3d Cir. 1942); *In re Estate of Stauffer*, 372 Pa. 537, 94 A.2d 726 (1953); *Buradus v. Gen. Cement Prod. Co.*, 159 Pa. Super. 501, 48 A.2d 883, *aff'd*, 356 Pa. 349, 52 A.2d 205 (1947); *Stump*, 111 Pa. Super. 541, 170 A. 393 (1934).

4. FREEDMAN, *supra* note 1, at 100, 108-09. See, e.g., *In re Estate of Manfredi*, 399 Pa. 285, 159 A.2d 697 (1960); *Pierce v. Pierce*, 355 Pa. 175, 49 A.2d 346 (1946); *Wilkinson v. Bethlehem Mines Corp.*, 180 Pa. Super. 546, 119 A.2d 564 (1956); *In re Estate of Mathewson*, 10 Lycoming 137 (1966). The court will look, not only to the literal meaning of the words, but also to the context and circumstances under which they were spoken. *In re Estate of Seifert*, 302 Pa. 477, 448-49, 153 A. 722 (1931). The parties do not necessarily have to be in each other's presence. *Commonwealth v. Amann*, 58 Pa. D. & C. 669 (Q.S. Camb. 1947).

5. *In re Estate of Manfredi*, 399 Pa. 285, 291, 159 A.2d 697, 700 (1960); *Rager v. Johnstown Traction Co.*, 184 Pa. Super. 474, 480, 134 A.2d 918, 922 (1957).

6. *Caddy v. Johnstown Firemen's Relief Ass'n*, 129 Pa. Super. 493, 499, 196 A. 590, 592 (1938).

familiar with tensual nuances.<sup>7</sup> Thus, the interest of the state in fostering those marriages in which the parties really intended to be wed seems to be negated by the requirements imposed to establish such a marriage. The harsh effects on those who had the requisite intent compels the conclusion, already noted by one commentator,<sup>8</sup> that the verbal distinction is totally theoretical and unrealistic, and, as such, should be abandoned.

### 3. *Presumptions*

The difficulties in proving the essential elements to establish a common law marriage are mollified to some extent by the availability of presumptions which may aid the claimant in his attempt to justify his position. For example, it has been established in Pennsylvania that cohabitation plus reputation yields a rebuttable presumption of marriage.<sup>9</sup> However, where a relationship was illicit at its inception, it is further presumed to continue as such and the parties are prevented from availing themselves of the presumption of marriage arising from the proof of cohabitation and reputation. An illicit relationship is most often encountered where there was an impediment — *e.g.* a prior subsequent marriage — to a valid marriage which was later removed.<sup>10</sup> Yet such a meretricious relationship has also arisen where a man met a woman in a brothel and thereafter lived with her as his mistress.<sup>11</sup> However, the presumption of continuance of an illicit relationship can be overcome by "clear and convincing evidence"<sup>12</sup> — *i.e.*, proof of a marriage ceremony — that the relationship has been changed from illicit to licit.<sup>13</sup> As previously mentioned, the presumption relating to continuance of illicit relationships is most often encountered where there existed an impediment to a valid marriage which was removed during the continuance of the relationship. The necessity of proving, by "clear and convincing evidence," a change in the character of the relationship in order to overcome the presumption of illicitness and therefore have a valid marriage upon the removal of the impediment has not been accepted without criticism. The viewpoint of one authority is that "the requirement of proof of a specific contract after the removal of the impediment seems to be a departure from the principle which recognizes the presumption of innocence. Where the presumption of innocence is strengthened by the issue of legitimacy [where there is a child in-

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7. See discussion p. 140 *infra*.

8. FREEDMAN, *supra* note 1, at 120. See generally 7 PA. B.A.Q. 29 (1931), which deals with the problem of words used in creating an informal marriage.

9. FREEDMAN, *supra* note 1, at 126. See, *e.g.*, *In re Estate of Wagner*, 398 Pa. 531, 159 A.2d 495 (1960); *Bisbing's Estate*, 266 Pa. 529, 109 A. 670 (1920); *Wilkinson v. Bethlehem Mines Corp.*, 180 Pa. Super. 546, 119 A.2d 564 (1956).

10. FREEDMAN, *supra* note 1, at 135, 138-39; *Pierce v. Pierce*, 355 Pa. 175, 49 A.2d 346 (1946).

11. *In re Estate of Patterson*, 237 Pa. 24, 85 A. 75 (1912).

12. *Drebot v. Drebot*, 199 Pa. Super. 439, 441, 185 A.2d 617, 618 (1962).

13. FREEDMAN, *supra* note 1, at 138; *Pierce v. Pierce*, 355 Pa. 175, 179, 49 A.2d 346, 348 (1946).

volved], it is usually applied. The resulting discrimination, based upon this mere difference in degree, would appear unsound."<sup>14</sup>

There is no authoritative classification of cases involving the removal of an impediment in Pennsylvania. However, the fundamental test applied in cases of this sort appears to be whether the relationship has an innocent or bona fide character in terms of knowledge of the impediment.<sup>15</sup> For purposes of the following discussion it is assumed that the impediment has been removed. The general statutory rule is that where one or both of the parties entered into the marriage in good faith without knowledge of the impediment or in the belief that the impediment had been terminated, then upon removal of the impediment they will be considered legally wed.<sup>16</sup> The application of this test varies according to the factual situation presented, but there are generally only three types of cases which arise. The first class of cases concerns the situation in which both parties knew of the impediment at the time of the intended marriage. When faced with this factual situation, the majority view holds that the requisite matrimonial intent may not be ascribed.<sup>17</sup> However, as already noted, there is a contrary view which posits that the presumption of innocence necessitates the position that matrimonial cohabitation upon removal of the impediment is sufficient to render the marriage valid.

Of the two divergent views the latter is more sound because the courts could concern themselves most strongly with the bona fide desire for matrimony rather than focusing solely on the question of knowledge of the impediment.<sup>18</sup> By allowing the main inquiry to center on the actual intent of the parties, the entire basis for common law marriage would then appear to be made more uniform. This uniformity would arise by virtue of the consistent emphasis placed on intent which, as already seen, is the prime basis for the verbal distinction recognized in establishing a valid common law marriage.<sup>19</sup> It would seem ludicrous to allow parties to establish the essential requirement of intent only to subsequently have this intent nullified on the basis of knowledge of an

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14. FREEDMAN, *supra* note 1, at 139.

15. *Id.* at 142.

16. PA. STAT. tit. 48, § 1-17 (1965), provides:

If a person, during the lifetime of a husband or wife with whom a marriage is in force, enters into a subsequent marriage pursuant to the requirements of this act, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage was entered into by one or both of the parties in good faith in the full belief that the former husband or wife was dead, or that the former marriage has been annulled or terminated by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by death of the other party to the former marriage, or by annulment or divorce, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and immediately after the removal of such impediment.

17. *Pierce v. Pierce*, 355 Pa. 175, 49 A.2d 346 (1946); *In re Estate of Yardley*, 75 Pa. 207 (1874).

18. PA. STAT. tit. 48, § 1-17 (1965); FREEDMAN, *supra* note 1, at 145.

19. See discussion pp. 135-36 *supra* on *verba de praesenti* and *verba de futuro*.

impediment. This is especially true since the impediment has already been removed.

A second category of cases involves the situation in which neither of the parties had knowledge of the impediment. In this factual context removal of the impediment validates the marriage between the parties. Although the law presently provides for this result only in cases of licensed marriage,<sup>20</sup> one commentator states "that the statutory provision is an adequate expression of public policy which would find judicial acceptance in cases of common law marriage."<sup>21</sup> If so accepted, the result reached would be realistic since, despite the fact that knowledge of the impediment is still the main inquiry, the recognition of the validity of the marriage effectively reflects the actual intent of the parties.

A third situation involves a marriage where only one of the parties is innocent and without knowledge of the impediment. A Pennsylvania statute validates such a marriage subsequent to removal of the impediment,<sup>22</sup> thus expressing a view contrary to that of prior case law.<sup>23</sup>

The current law concerning the validity of common law marriages after removal of a prior impediment seems thoroughly inadequate since it does not reflect the intent of the parties. As one commentator has stated: "[I]t would be well to be freed of the artificial view that a man and woman who live together as husband and wife have no matrimonial intention merely because it is impossible for them legally to accomplish the result which they desire."<sup>24</sup>

### *B. Utility of Common Law Marriage*

There are a number of divergent views concerning the usefulness of common law marriages. One argument is that its justification is reduced today because there is little difficulty in obtaining a marriage license.<sup>25</sup> It is posited that when transportation was inadequate and churches were scarce there was a sound justification for common law marriages. Additionally, the practicalities of the situation, including the difficulties incurred in trying to find someone to perform the ceremony, necessitated the recognition of these marriages.<sup>26</sup> Religious leaders see no need today for allowing such an informal method of entering into

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20. PA. STAT. tit. 48, § 1-17 (1965).

21. FREDMAN, *supra* note 1, at 146. See also JOINT STATE GOVERNMENT COMMISSION, PROPOSED MARRIAGE AND DIVORCE CODES FOR PENNSYLVANIA (1961). This is actually a compilation of separate Divorce and Marriage Codes which will hereinafter be cited as PROPOSED MARRIAGE CODE or PROPOSED DIVORCE CODE as appropriate. PROPOSED MARRIAGE CODE, section 221 retains the same provisions but with the additional provision that all children born to the marriage, whether before or after removal of the impediment, shall be considered as legitimate issue.

22. PA. STAT. tit. 48, § 1-17 (1965).

23. See *Hunt's Appeal*, 86 Pa. 294 (1878), which held that the innocence of one party made no difference. See generally 17 PA. B.A.Q. 89 (1945), on presumptions in Pennsylvania.

24. FREDMAN, *supra* note 1, at 157.

25. PROPOSED MARRIAGE CODE § 301, comment at 31.

26. 14 OKLA. L. REV. 291, 298 (1961); 18 TEMP. L.Q. 264, 265 (1944).

such a solemn relationship.<sup>27</sup> Modern conveniences, they state, make it easy for parties to "formally" marry, but their view is less objective than it might be since these leaders have an interest in formal religious ceremonies. In any case, these differing views appear to be based on the false presumption that common law marriages are entered into as a result of a positive choice in lieu of a ceremonial marriage. In reality they most often result from the belief of the parties that such a relationship will create a valid marriage or because the social customs of the class condone the relationship.<sup>28</sup>

The point of time at which the law becomes involved is the basis of additional arguments against the continuance of common law marriage. It is argued that abolition is necessary in order to curtail fraudulent claims of marriage which arise most frequently in the settlement of decedent's estates or in Workmen's Compensation claims. To fortify their positions it has been found that claimants frequently recite the latest appellate opinion language.<sup>29</sup> Thus a court is expected to believe that perhaps 20 years ago the parties expressed their present intent to be husband and wife in the exact manner found sufficient in the latest decision. This practice has led the courts to closely scrutinize claims of common law marriage and to adopt the view that such marriages are to be tolerated but not encouraged.<sup>30</sup> This view seems to be a strained one at best since the evidentiary requirements in such proceedings seem to substantially lessen the chances for perpetration of a fraud. Likewise, it would not seem presumptuous to believe that a court could distinguish between fraudulent and legitimate claims.

Concomitant to the theory that common law marriage increases fraud is the notion that it encourages vice in the form of debasement of the institution of marriage.<sup>31</sup> This argument appears to be based on circular reasoning. It is because common law marriages are held in disrepute that they are recognized as promotive of vice. If, in actual practice, they were recognized as having full validity along with ceremonial marriages rather than being viewed with suspicion at the outset, the allegedly immoral effects of their existence would be significantly reduced. Additionally, the recognition of their validity does not debase the institution of marriage. Debasement would seem to be more prevalent where the validity of a marriage depends solely upon the performance of a ceremony because the essential functions of a marital relationship do not require a marriage certificate. The elimination of common law

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27. PROPOSED MARRIAGE CODE § 301, comment at 35; 14 OKLA. L. REV. 291, 297 (1961).

28. H. CLARK, *supra* note 3, at 57, 58; ten Broek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 17 STAN. L. REV. 614, 617 (1965), wherein it is noted that "[c]eremonial marriage is often expensive and also may not be a part of the cultural mores of various minority groups."

29. FREEDMAN, *supra* note 1, at 102-04; PROPOSED MARRIAGE CODE § 301, comment at 35.

30. *In re Estate of Wagner*, 398 Pa. 531, 159 A.2d 495 (1960).

31. H. CLARK, *supra* note 3, at 57; 14 OKLA. L. REV. 291, 297 (1961).

marriages could thus cause more injustice than permitting its continuance. This is particularly true in cases involving those economic and social classes which are not governed by the middle class standards which are applied to marriages.<sup>32</sup> Additionally, commentators agree that the common law marriages are most prevalent among lower class Negroes and whites and the poorer segments of society where it is generally accepted.<sup>33</sup> These groups, which compose a significant portion of society, must be taken into consideration before any steps are taken to deny their marriages of their viability.

The arguments in favor of the continuance of common law marriage seem to be more persuasive in that they take into account the true social needs of society rather than purely administrative practicalities. The United States, largely a melting-pot for individuals of other nationalities, should remain cognizant of the varying social systems of the world as well as those of its own sub-strata, and therefore retain as flexible a structure as possible to validate those marriages which elsewhere are socially and legally acceptable.<sup>34</sup>

### C. *The Proposed Code*

The Proposed Marriage Code would abolish common law marriages and require that all future marriages be licensed according to the provisions of that Code.<sup>35</sup> This would eliminate most of the problems previously discussed, and result in bringing Pennsylvania's law into conformity with that of the vast majority of American jurisdictions.<sup>36</sup> However, as previously noted, the retention of common law marriage is to be preferred.

If the major deficiencies with the common law marriages as administered in Pennsylvania could be corrected then the basic structure might be worth preserving. To maintain any viable system of common law marriage, legislation is required to protect the legitimacy of children

32. H. CLARK, *supra* note 3, at 58; Arraros, *Concubinage in Latin America*, 3 FAM. L.J. 330, 333 (1963), discusses concubinage as a sexual relationship between parties living together who procreate and raise a family although they never have undergone a civil or religious marriage ceremony. He notes that concubinage is accepted among the poor who develop their own norms, values, and attitudes despite the fact that licensing is mandatory for a valid marriage. This illustrates the point that classes often have their own standards not only with regard to concubinage, but also as to common law marriage.

33. J. SIRJAMAKI, *THE AMERICAN FAMILY IN THE TWENTIETH CENTURY* 69 (1959). See also Arraros, *supra* note 32, at 333; Borah & Cook, *Marriage and Legitimacy in Mexican Culture: Mexico and California*, 54 CALIF. L. REV. 946, 947 (1966); ten Broek, *supra* note 26, at 618-19. However, see 14 OKLA. L. REV. 291, 298 (1961), where it is stated: "The Indian tribes . . . are now civilized and it is inconceivable that anyone could be ignorant of this statutory scheme for marriage."

34. See Arraros, *supra* note 32, at 333, 334, where it is suggested that the law must supply social needs and that to be successful "the framers of any non-totalitarian legal system must base it on social facts, needs, and aspirations of its citizenry."

35. PROPOSED MARRIAGE CODE § 301.

36. *Id.*; H. CLARK, *supra* note 3, at 45; E. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 207 (2d ed. 1966).



and the property rights of the alleged spouse. Perhaps leaning toward the idea that common law marriages should be retained the Pennsylvania Legislature has already taken steps to insure the legitimacy of children of defective marriages.<sup>37</sup> The result of this legislation is the assurance of the legitimacy of offspring irrespective of the validity of the alleged marriage. Similarly, in an attempt to rectify the difficult property problems which arise where the relationship is found wanting of one of the elements necessary to establish a common law marriage, the legislature has enacted the following provision:

In all matrimonial causes the court having jurisdiction may, either dismiss the complaint, or enter a decree of divorce from the bonds of matrimony, from bed and board or annulment of the marriage. Where the court has jurisdiction over both parties . . . *it shall include in its decree, or in separate decrees pertaining to each matter separately, an order or orders determining and disposing of property rights and interests between the parties, custody and visitation rights, child support and any related matters.*<sup>38</sup>

Although the statute makes it incumbent upon the court in all matrimonial causes to resolve the question of property rights in some equitable fashion, the inherent difficulty in the provision is that its application is *limited* to matrimonial causes. As previously noted,<sup>39</sup> most claims of common law marriage do not arise in those cases which can be considered matrimonial causes (actions for divorce or annulment) but most often arise in the settlement of a decedent's estate or in Workmen's Compensation cases. The unjust results which could arise through a strict application of the "matrimonial cause" distinction is best seen in the following hypothetical situation:

A and B believe they have entered into a valid common law marriage for 20 years. A dies intestate and there is a proceeding concerning the distribution of A's property. If the court finds no valid common law marriage, B receives no property.

In such a situation it would seem equitable for the survivor to have some rights respecting the property left by the deceased.<sup>40</sup> The deleterious

37. PA. STAT. tit. 48, § 169.1 (1965), provides:

In all cases where a supposed or alleged marriage is contracted, which is absolutely void by reason of one of the parties thereto having a spouse living at the time of the supposed or alleged marriage, or if for any other lawful reason, the said marriage was void or voidable when contracted, all children born to such parties shall be deemed the legitimate children of both parties for all purposes. It would appear that on nolicy grounds alone this provision would merit application to situations involving unsuccessful attempts to create a common law marriage.

38. PA. STAT. tit. 23, § 55(1) (Supp. 1969) (emphasis added). Section (2) of this provision provides for the use of the equity power of the court in order to implement effective measures for the protection of these rights and interests. This provision is identical to the PROPOSED MARRIAGE CODE §§ 601(1), (2), and (3), which, as noted, would abolish common law marriages.

39. See p. 139 *supra*.

40. It is important to remember that common law marriages are rarely challenged by the parties themselves in a matrimonial proceeding. Therefore, the claim of common law marriage would arise most frequently in a situation such as the hypo-

consequences encountered in the hypothetical situation could clearly be avoided by amending the present provision to allow the court to make property divisions in all causes which ultimately turn on the validity of the alleged marriage rather than restricting its scope to "matrimonial causes."

An alternative solution to the problem noted in the hypothetical would be to allow the parties to petition for a prior determination of the validity of their supposed marriage, and upon a finding of invalidity, to permit the parties to rectify the situation with a subsequent valid marriage. A statutory provision of this type could be modeled along the lines suggested in the following provision of the Code:

When the validity of any marriage shall be denied or doubted by either of the parties a bill or petition in the nature of a declaratory judgment action may be filed in the court having jurisdiction over divorce and annulment matters, seeking a declaration of the validity or invalidity of the marriage, and upon due proof of the validity or invalidity thereof it shall be decreed valid or invalid by decree or sentence of such court, and, unless reversed upon appeal, such declaration shall be conclusive upon all persons concerned.<sup>41</sup>

Although the second alternative is adequate in theory, it raises serious practical problems. If common law marriages occur most frequently among lower class Negroes and whites it would seem that these people are the ones who will be least likely to know about such a procedure let alone avail themselves of it. Therefore, the first alternative, in a practical light, would appear to be much better suited to the needs of that portion of society affected. Probably the most useful solution would be the adoption of both alternatives, thereby affording complete protection to those who are involved. With these positive changes in mind, the institution of common law marriage could be retained with a more enlightened outlook as to its social utility.

### III. ANNULMENT

#### *A. Void and Voidable Marriages*

As a general proposition, the necessity for and effects of an annulment are contingent upon the classification of the marriage as being *void* or

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thetical. As opposed to the common law marriage situation, there are protections offered in other States to a surviving spouse in decedent's estates proceedings when the marriage was *voidable* (subject to annulment). Here, the validity of the marriage may not be questioned after the death of one of the parties. Presently there are no *voidable* grounds for annulment in Pennsylvania and therefore no such protection is afforded. Where the marriage was *void*, the validity of it may be attacked in a collateral proceeding, and a problem similar to the hypothetical arises. The PROPOSED MARRIAGE CODE § 303, eliminates the problem by allowing the court to make an equitable property distribution under the circumstances.

41. PROPOSED MARRIAGE CODE § 305 (1961). This provision would be in conformity with the law in a number of states which permit suits to determine the status of a marriage. *Id.*, comment at 40.

On the subject of common law marriage in Pennsylvania *see generally* Pendel, *Common Law Marriage in Pennsylvania*, 49 DICK. L. REV. 94 (1945).

*voidable* since there are important distinctions between the two categories. *Void* marriages are deemed to have had no validity at any time, while *voidable* marriages are construed as valid until annulled by judicial decree. Thus *void* marriages may be removed of their vitality without the necessity of obtaining a judicial decree. Similarly, *void* marriages may be collaterally attacked by third parties leading to the possibility of challenges to their validity after the death of one of the parties. However, *voidable* marriages may not be attacked after the death of one of the parties.<sup>42</sup> The annulment of a *voidable* marriage destroys its validity *ab initio* (from the start) and thus, as with *void* marriages, results in the bastardization of any children and the impairment of property rights.<sup>43</sup>

In Pennsylvania prior to the adoption of the two statutes protecting legitimacy and property rights the policy was to make *voidable* marriages terminable only by divorce. Under that policy the unjust results mentioned above — illegitimacy and loss of a spouse's property rights occasioned by annulment — were avoided.<sup>44</sup> Such protection, however, is not completely afforded to *void* marriages. Even under the new provisions, the aforementioned problem engendered by declaring a *void* marriage invalid without a judicial decree would still exist because there is no matrimonial cause involved which would allow the court to make an equitable property distribution.

### B. Grounds For Annulment

Under existing Pennsylvania law the remedy of annulment is available only in the case of a *void* marriage pursuant to a statute which provides:

In all cases where a supposed or alleged marriage shall have been contracted, which is absolutely void by reason of one of the parties thereto having a spouse living at the time of the supposed or alleged marriage, or, if, for any other lawful reason, the said supposed or alleged marriage was absolutely void when contracted,

42. FREEDMAN, *supra* note 1, at 12-13.

43. *Id.* It should be remembered that *void* marriages lead to the same results. However, the problem has been resolved in Pennsylvania through the enactment of PA. STAT. tit. 48, § 169.1 (1965) (legitimizing children of *void* and *voidable* marriages even though *voidable* grounds presently do not exist) and PA. STAT. tit. 23, § 55 (Supp. 1969) (providing for equitable distribution of property, but only in matrimonial causes).

One commentator has distinguished *void* and *voidable* marriages by noting: A marriage is . . . void . . . when, due to some fact or circumstance existing at the time of the purported marriage, there . . . could not be any marriage at all. On the other hand, a *voidable* marriage refers to . . . where, due to some fact present at the time of the marriage, one or both of the parties is given a choice of either treating the marriage as valid or of rendering it invalid.

Reader, *The Annulment of Marriage in Pennsylvania*, 41 DICK. L. REV. 37, 38 (1938).

44. FREEDMAN, *supra* note 1, at 13; Reader, *supra* note 43. See Eisenberg v. Eisenberg, 105 Pa. Super. 30, 160 A. 228 (1932). See generally Good, *The Historical Evolution of the Concepts of Void and Voidable Marriages*, 7 FAM. L.J. 297 (1967).

The problem of property division has been resolved in most states by allowing the court to effect an equitable distribution upon annulment. H. CLARK, *supra* note 3, at 136; 1968 WASH. U.L.Q. 148, 156. See generally Annot., 31 A.L.R.2d 1255 (1953).

such supposed or alleged marriage, may, upon the application of either party, be declared null and void. . . .<sup>45</sup>

Courts have interpreted the statute as providing the following grounds for annulment where the marriages are *void*: (1) marriages by minors under 7 years of age; (2) marriages consummated where a party was insane or intoxicated; (3) bigamous marriages; (4) marriages between a respondent and co-respondent in adultery, contracted while the injured libellant is still living; and (5) marriages contracted by mistake as to matters essential to a marital union.<sup>46</sup>

The underlying basis of the concept of *void* marriages is the principle that since the status of marriage is arrived at by an agreement containing elements similar to that of a contract it cannot be effected without the mutual consent of the parties;<sup>47</sup> and this consent can only be determined by investigating the intentions of the parties at the time of contracting.<sup>48</sup> Therefore, those grounds available for annulment are, with the exception of marriage between a respondent and co-respondent in adultery, the ones where mutual consent is, theoretically, least probable.

### 1. *Marriage by Minors*

Contrary to the laws of the vast majority of other jurisdictions which have statutorily raised the age of consent above that sufficient under common law,<sup>49</sup> Pennsylvania has no statute fixing the minimum age requirements for unlicensed marriages.<sup>50</sup> Consequently, in Pennsylvania, common law marriages of males 14 years of age or over and females 12 years of age or over are binding. Where both parties are over the age of 7, but are below the common law age of consent, the marriage is held inchoate or imperfect and may be disaffirmed by either party after one or both of the parties have reached the common law age of consent. Only if either party is under 7 years of age, is the marriage *void* and annulable.<sup>51</sup> Public policy in the area of establishing

45. PA. STAT. tit. 23, § 12 (1965); See, e.g., *Brennen v. Brennen*, 80 Pa. D. & C. 90 (C.P. Fay. 1952).

46. FREEDMAN, *supra* note 1, at 13, 14; *Grygo v. Grygo*, 32 Pa. D. & C. 2d 176 (C.P. Lehigh 1964); *Battaglia v. Battaglia*, 23 Beaver 167 (1962). See generally Lawler, *Marital Status and Annulment in Pennsylvania*, 4 U. PITT. L. REV. 251 (1938), for a discussion of the history and development of the law of annulment in Pennsylvania.

47. FREEDMAN, *supra* note 1, at 15.

48. In *Barnett v. Kimmel*, 35 Pa. 13 (1859), it was noted that "the intentions of the parties to an alleged contract of marriage . . . is to be gathered from what took place at the time it was entered into, not from the mental reservations or secret intentions of either of the parties."

49. FREEDMAN, *supra* note 1, at 30, 31; Moore, *Defenses Available in Annulment Actions*, 7 FAM. L.J. 239, 256-58 (1967).

50. The common law age of consent is therefore not raised in Pennsylvania since, as previously noted, existing age requirements only apply to licensed marriages, which are not mandatory. See PA. STAT. tit. 48, § 1-5 (1965) and p. 134 *supra*.

51. FREEDMAN, *supra* note 1, at 28-29; Brown & Porta, *A Survey of the Law of Marriage and Divorce in Pennsylvania*, 23 TEMP. L.Q. 371, 389 (1949-50).

durable marriages seems to demand some protection against marriages at such an early age.

## 2. *Insanity and Intoxication*

In Pennsylvania, where either of the parties was insane at the time of contracting, the marriage is absolutely *void*.<sup>52</sup> The method of determining whether one is insane has been stated to be "whether at the precise time of the marriage the party had sufficient intelligence to understand the nature of the contract and relation into which he was entering."<sup>53</sup> This concept is easily justified because under such circumstances the party so afflicted is incapable of the prerequisite consent necessary to establish a marriage.

Additionally, where either or both of the parties are intoxicated to such a degree as to destroy one's mental capacity to contract, the marriage is held *void* for lack of consent.<sup>54</sup> Despite the apparent reasonableness of this position, it should be the subject of reform. It is conceivable that the parties, although intoxicated, did in fact intend to be married. This intent could have existed prior to and just after the ceremony despite the fact that the parties were inebriated at the time of the ceremony. Retention of the present provision would allow disaffirmance of the marriage even after a lengthy period of time, despite the fact that at the time of the ceremony the parties effectively had the requisite intent. In order to protect the parties in such cases, there should be a time limit imposed within which the action must be brought for it to be declared invalid.

## 3. *Bigamy*

Marriages contracted while there is a prior subsisting marriage are *void*.<sup>55</sup> Bigamy is thereby expressly repudiated and made grounds for annulment.<sup>56</sup> An exception to the application of the rule arises where the remarriage was entered into by one or both of the parties in "good

52. *In re Newlin's Estate*, 231 Pa. 312, 80 A. 255 (1911); *Nonnemacher v. Nonnemacher*, 159 Pa. 634 (1894); *Faivre v. Faivre*, 182 Pa. Super. 365, 128 A.2d 139 (1956) (holding the remedy of annulment is available against an insane defendant); *Herr v. Herr*, 109 Pa. Super. 42 (1933); *Ryce v. Ryce*, 15 Pa. D. & C. 2d 126 (C.P. Phila. 1959); *Zisser v. Zisser*, 60 Pa. D. & C. 21 (C.P. Dauph. 1947) (dictum). See Foster, *Domestic Relations*, 19 U. PRRT. L. REV. 348, 351 (1958), discussing the *Faivre* case.

53. *Nonnemacher v. Nonnemacher*, 159 Pa. 634, 637 (1894).

54. *Imhoff v. Witmer*, 31 Pa. 243 (1858); *Lupinacci v. Lupinacci*, 42 Pa. D. & C. 429 (C.P. Phila. 1941). Cf. *Chamberlain v. Chamberlain*, 45 Pa. D. & C. 659 (C.P. Blair 1942) (alleged marriage where both parties were intoxicated was held *voidable* and therefore not annulable).

55. *Heffner v. Heffner*, 23 Pa. 104 (1854); *DeRosay v. DeRosay*, 162 Pa. Super. 333, 57 A.2d 685 (1948); *Wagner v. Wagner*, 152 Pa. Super. 4, 30 A.2d 659 (1943); *Grygo v. Grygo*, 32 Pa. D. & C. 2d 176 (C.P. Lehigh 1964); *Grant v. Grant*, 71 Pa. D. & C. 523 (C.P. Phila. 1950). Pennsylvania as well as twenty three other jurisdictions consider a bigamous marriage *void*. In most of these jurisdictions plaintiff's knowledge of a prior marriage is no defense to an annulment proceeding against a bigamous spouse. Moore, *supra* note 49, at n.28, and at 265.

56. PA. STAT. tit. 23, § 12 (1965).

faith" without knowledge of any impediment and they continue to cohabit after removal of the impediment. Under those circumstances the marriage is legal.<sup>57</sup> Legality in such situations, although based on notions of knowledge, is appropriate because it also reflects the intentions of the parties. The real problem arises where both parties knew of the impediment and the present rule has already been criticized for its failure to reflect intent.<sup>58</sup>

#### 4. *Marriages of Adulterer and Co-Respondent*

The marriage of an adulterer and his co-respondent following a divorce on the grounds of adultery is *void* if entered into during the lifetime of the aggrieved spouse.<sup>59</sup> It appears that the underlying rationale for this view is that the adulterous parties should not be rewarded for their moral turpitude and further embarrass the innocent spouse. Such a concept seems to be based upon a logical inconsistency since the divorce proceedings may, in and of themselves, subject the spouse to embarrassment; and the interests of society are not served when punishment is made too severe or is unrelated to the "crime." The interest of society is served by promoting valid marriages; and if two adulterous parties are serious in their desire to be married subsequent to the divorce there appears to be no logical reason for preventing this. For if they are sincere, the imposition of invalidity upon their attempted marriage would force them into a meretricious relationship which appears far worse for the parties concerned; and is detrimental to the fulfillment of society's goals.

#### 5. *Mistake and Jest*

The validity of marriages made by mistake or in jest also rests on the basis of consent.

If . . . the mistake is of such character that it *prevents the party from understanding the nature of the marriage*, it must necessarily avoid it, for . . . there can be no mutual consent.<sup>60</sup>

Under this rationale, the fact that a party is mistaken as to the spouse's fortune, character, and the like is *not* sufficient to void a marriage, for they do not affect the essentials of the marriage.<sup>61</sup> The requirement that it "affect the essentials of the marriage" virtually nullifies the applicability of mistake as an annulment ground. It is thus in cases of marriages entered into in jest that the lack of mutual consent is most often found. And under such circumstances the marriages are deemed

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57. PA. STAT. tit. 48, § 1-17 (1965).

58. See pp. 137-38 *supra*.

59. Braun v. Braun, 194 Pa. 287, 44 A. 1096 (1900); Stull's Estate, 183 Pa. 625, 39 A. 16 (1898); Maurer v. Maurer, 163 Pa. Super. 264, 60 A.2d 440 (1948); Kolmbacher v. Kolmbacher, 63 Pa. D. & C. 195 (C.P. Susq. 1945).

60. FREEDMAN, *supra* note 1, at 26 (emphasis added).

61. *Id.*; see, e.g., Lindquist v. Lindquist, 130 N.J. Eq. 11, 20 A.2d 325 (1941).

to be *void*.<sup>62</sup> The problem in this area is that occasionally cases arise in which there was an intent to marry, but only in order to accomplish a specific purpose — *e.g.*, to give a child a name. Although one Pennsylvania case<sup>63</sup> has held such a marriage annulable, other cases which involve giving a child a name or marrying to fulfill a specific purpose indicate that a marriage contracted for such a purpose alone is not annulable.<sup>64</sup> This line of authority was probably a prime reason which led to the adoption of the statute guaranteeing the legitimacy of children.<sup>65</sup>

#### IV. THE PROPOSED CODE

The problems evident in the present Pennsylvania domestic relations law must be corrected. The Proposed Marriage and Divorce Code, in recognition of these problems, has incorporated in its provisions many useful suggestions. Although there are areas in which the Code could have made further improvement, it is, in its present form far better than existing law.

##### A. Marriages by Minors

As previously noted, in order to promote more stable marital relationships the state must take measures to prevent the occurrence of drastically underage marriages. The Proposed Marriage Code attempts to effectuate this policy by providing that:

The marriage of any person shall be deemed *voidable* and subject to annulment in the following cases:

(a) Where either party to such marriage was under sixteen years of age, unless such marriage was expressly authorized by a judge of the orphan's court, as provided in Section 207 of this act;

(b) Where such person, although sixteen years of age, is a minor under twenty-one who lacked the consent of parent or guardian or permission of the orphan's court and has not subsequently ratified such marriage upon reaching majority and such proceeding of annulment is commenced within sixty days after the ceremony as provided in Section 207 [c] of this act. . . .<sup>66</sup>

62. *See, e.g.*, *McClung v. Terry*, 21 N.J. Eq. 225 (1870); *Lannaman v. Lannaman*, 171 Pa. Super. 147, 89 A.2d 897 (1952).

63. *Osgood v. Moore*, 38 Pa. D. & C. 263 (C.P. Tioga 1940).

64. *Perry v. Perry*, 78 Pa. Super. 245 (1922) (to evade draft); *Proios v. Proios*, 76 Pa. D. & C. 509 (C.P. Beaver 1951) (to obtain entrance to the country); *Bove v. Pinciotti*, 46 Pa. D. & C. 159 (C.P. Phila. 1942) (to legitimize a child).

65. PA. STAT. tit. 48, § 169.1 (1965).

66. PROPOSED MARRIAGE CODE § 304 (emphasis added). Section 304(a) refers to section 207(b) which requires commencement of the annulment action within 60 days after reaching 16 years of age. On the other hand, section 304(b) makes reference to section 207(c) which requires petition for annulment while still under 21 years of age and within 60 days of the unauthorized marriage. Section 304(b) provides an additional defense in the form of ratification upon reaching majority. These provisions would help to alleviate the problem encountered where an underage marriage con-

These proposed provisions allow for a more sensible approach. They only make such marriages *voidable* and provide built-in defenses — commencement of the action within 60 days after reaching 16 years of age; subsequent ratification upon reaching majority and commencing suit within 60 days after the ceremony — which are sufficient to allow for dissolution in those marriages attributable to youthful indiscretion.<sup>67</sup>

### B. *Insanity and Intoxication*

In its treatment of insanity or mental disease and disorder section 303(c) of the Proposed Marriage Code preserves the *void* classification. As previously noted, this is justified since insanity at the time of contracting surely precludes any possibility of consent.

In addition, the Proposed Marriage Code is helpful in rectifying the problems encountered with intoxication as a ground for annulment. Under section 304(c) of the Code, intoxication at the time of contracting makes the marriage *voidable* if a petition for annulment is filed within 60 days after the date of the ceremony. This section is further refined by section 224(5) which declares that subsequent cohabitation when not intoxicated ratifies the marriage.<sup>68</sup> Additionally, there is a conclusive presumption of ratification if a petition is not filed within the aforementioned time limit. In proposing changes to the existing law, the drafters of the Code seem to be cognizant of the intentions of the parties. In effect, those who seriously intended to be married would be deemed to have a valid marriage, while those who did not intend to be married would be able to petition for annulment.

### C. *Bigamous Marriages*

The Proposed Marriage Code provision relating to bigamous marriages is quite similar to the present law. These marriages are still to be considered *void*,<sup>69</sup> and the "good faith" test with respect to subsequent removal of an impediment is retained.<sup>70</sup> One significant change, however, is made by providing that a remarriage will be considered valid where the party concerned has obtained a decree of presumed death of his or

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tracted in another jurisdiction which makes such marriages *voidable* is sought to be annulled in Pennsylvania. Presently, Pennsylvania will not annul the marriage because it was merely *voidable* in the state of celebration. *Forry v. Forry*, 42 Pa. D. & C. 2d 769 (C.P. Monroe 1967). See also PROPOSED DIVORCE CODE § 303.

67. It should be pointed out that if common law marriages are retained, then the common law age of consent should be raised by statute in order to afford greater protection against underage marriages.

68. See Moore, *supra* note 49, at 275-76, stating: "One can effect a ratification by continuing to cohabit after learning of the impediment . . . by pursuing an inconsistent remedy, or by expressly condoning the objectionable act or condition." It should be noted that the principle of ratification serves as a defense to a number of annulment actions based on *voidable* grounds. *Id.* at 275-89.

69. PROPOSED MARRIAGE CODE § 303(a).

70. PROPOSED MARRIAGE CODE § 221. However, the remarriage must be pursuant to a license since common law marriages are abolished.



her former spouse irrespective of whether or not the first spouse returns. The significance of the change arises from the fact that the period of absence recognized as creating a presumption of death is reduced from 7 to 5 years.<sup>71</sup> This latter change therefore takes notice of the improved means of communication and transportation existent today. With modern technology, information concerning the condition of the absent spouse is more readily obtainable.<sup>72</sup> However, the question of adequately reflecting the intentions of the parties upon removal of an impediment is left unanswered. The emphasis of the court would still be directed to knowledge of the impediment rather than matrimonial intent.

#### *D. Marriages Between Adulterers and Co-Respondents*

Although the Proposed Marriage Code does not specifically make marriages between an adulterer and co-respondent *void*, the probability of its prohibition is implicitly recognized in section 1002. This section refers to a court granting a divorce which "forbids either of the parties to marry again for a certain time or within the lifetime of a former spouse. . . ."<sup>73</sup> Therefore, it would appear that because the Code fails to make any definite change in this area the absurd results which arise from such a prohibition would be destined, at least for the present, to continue.

#### *E. Mistake and Jest*

Section 303(c) of the Proposed Marriage Code would appear to take a position consistent with present Pennsylvania law in the area of marriages in jest or through mistake by providing that these marriages are *void* "[w]here one or both parties to such purported marriage was incapable of consenting to the marriage relationship by reason of insanity, mental disease or disorder, or otherwise lacked capacity to consent *or did not intend to assent to such marriage relationship.*"<sup>74</sup> The provision would seem noteworthy only in its reinforcement of the fundamental notion of requisite intent.

### V. DEFENSES TO ANNULMENT AND NEW PROPOSED GROUNDS

The majority of American jurisdictions permit the interposition of a defense to annulment proceedings only when dealing with marriages which are *voidable*.<sup>75</sup> Thus, even where a plaintiff entered into a *void*

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71. PROPOSED MARRIAGE CODE §§ 303(a), 210. The present Pennsylvania provision is found in PA. STAT. tit. 48, § 1-8 (1965).

72. PROPOSED MARRIAGE CODE § 210, comment at 25.

73. PROPOSED MARRIAGE CODE § 1002.

74. PROPOSED MARRIAGE CODE § 303(c) (emphasis added).

75. Moore, *supra* note 49, at 240. These defenses are more appropriately termed bars to relief.

marriage with knowledge of the impediment and further conducted himself in a censurable fashion, he will be granted an annulment<sup>76</sup> — knowledge of the impediment may not be interposed as a defense. Pennsylvania only permits annulment for *void* marriages and therefore no defenses may be raised in the action.<sup>77</sup>

The Proposed Marriage Code alters the present unavailability of defenses by advocating the adoption of annulment grounds which serve to make the marriage *voidable*. Additionally, although not as noteworthy, the Code adds a new *void* ground for annulment. As a result, a marriage would be *void* if the parties to it were related within the prohibited degrees of consanguinity.<sup>78</sup> It is important to note that although this type of marriage would be considered *void*, the Code provides that after the death of one of the parties the validity of the marriage may not be questioned if it was not annulled during the lifetime of the parties.<sup>79</sup> Such a provision is contrary to the general rule in *void* marriages which permits collateral attack after the death of one of the parties.<sup>80</sup> Thus, the harsh results that might occur in a proceeding to settle a decedent's estate if the marriage were attacked and found *void* are avoided.<sup>81</sup>

As previously mentioned, the more significant change made by the Code is the addition of *voidable* grounds for annulment. Those grounds which have been added are the following:

1. Impotency unless known to the other party at the time of the marriage.<sup>82</sup>
2. Inducement through "fraud, duress, coercion, or force, attributable to the other party, and there has been no subsequent voluntary co-

76. *Id.* at 261.

77. However, it has been noted by one commentator that in Pennsylvania, marriages *void* by reason of insanity may be validated upon cohabitation during a lucid interval. FREEDMAN, *supra* note 1, at 41.

78. PROPOSED MARRIAGE CODE §§ 219, 303(b), and 207(h). The following are the prohibited degrees of consanguinity:

- A man may not marry his mother.
- A man may not marry his father's sister.
- A man may not marry his mother's sister.
- A man may not marry his sister.
- A man may not marry his daughter.
- A man may not marry the daughter of his son or daughter.
- A woman may not marry her father.
- A woman may not marry her father's brother.
- A woman may not marry her mother's brother.
- A woman may not marry her brother.
- A woman may not marry her son.
- A woman may not marry the son of her son or daughter.

It should be noted that marriages between first cousins would no longer be within the prohibited degrees of consanguinity.

79. PROPOSED MARRIAGE CODE § 219.

80. *See* p. 143 *supra*.

81. *See* pp. 141-43 *supra*.

82. PROPOSED MARRIAGE CODE § 304(d).

habitation after knowledge of such fraud or release from the effects of duress, coercion, or force."<sup>83</sup>

3. Where the purposes of the marriage are immediately frustrated through the law or action of a jurisdiction which prevents the parties from living together as husband and wife, or the physical condition of one of the parties endangers the life or may seriously affect the health of the other.<sup>84</sup>

#### A. Impotency

Impotency is not presently a ground for annulment in Pennsylvania. However, section 304(d) of the Proposed Code would add impotency as a *voidable* ground. The proposed statute provides a built-in defense to a claim of impotency if the complaining party knew of the impotency at the time of the marriage. It has been stated that "a spouse normally will not be granted an annulment on the ground that his mate is impotent, or that he himself is thus afflicted, if the evidence indicates that the plaintiff knew of the impediment before the marriage."<sup>85</sup> Thus, the availability of this defense is well recognized and often is provided for within the statutory provision itself.<sup>86</sup> There are no particular problems associated with the addition of impotency as *voidable* ground for annulment other than the usual evidentiary requirements which would have to be met in order to establish the cause of action and the defense.

#### B. Fraud

The addition of fraud as a *voidable* ground for annulment would be new in Pennsylvania. In most other jurisdictions fraud does create a *voidable* marriage;<sup>87</sup> but it should be pointed out that as in cases of mistake, it would appear that the fraud must concern those matters vital to the marital relationship.<sup>88</sup> Where the remedy of annulment is available, courts tend to deny the action on the grounds of fraud where the party so alleging had prior knowledge that the claims were fraudulent. The view expressed in those cases is that there was no fraud since the requisite elements of deception and justifiable reliance are absent, and that therefore a subsequent request for annulment must be denied.<sup>89</sup> Section 304(e)

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83. PROPOSED MARRIAGE CODE § 304(e).

84. PROPOSED MARRIAGE CODE § 304(f).

85. Moore, *supra* note 49, at 255.

86. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1551 (1953).

87. *See Jewett v. Jewett*, 196 Pa. Super. 305, 175 A.2d 141 (1961).

88. *See* pp. 146-47 *supra*.

89. Moore, *supra* note 49, at 249-50. One interesting variation arises when the fraud perpetrated consisted of telling the party that he was the father of an expected child. Under these circumstances most courts will allow the annulment.

However, a significant number of decisions have denied the plaintiff relief, holding that he does not enter court with clean hands. Some courts consider plaintiff's hands to be sullied because he acted reprehensibly in having coitus with

of the Proposed Marriage Code, in making fraud a *voidable* ground for annulment, would, in all likelihood, allow the similar use of this defense. Additionally, section 304(e) provides for a specific defense by depriving the marriage of its *voidable* status where there is "subsequent voluntary cohabitation after knowledge of such fraud." The latter defense is especially objectionable because it is impregnated with the fault concept. As in the case of the defense of condonation in divorce, the notion of fault frequently fails to advance the state's interest of promoting stable marriages. One effect of the defense of cohabitation after knowledge of the fraud could be to promote an irreconcilable marriage. One might envision the "innocent" party, on advice of counsel and unsure of the future of his or her marriage, staying away from his or her spouse to prevent the interposition of the defense. This would prevent the imposition of subsequent cohabitation as a defense to the annulment action, but it would also serve to draw the parties apart pending annulment rather than encouraging reconciliation.

### C. *Frustration of Purpose and Physical Condition*

This provision, allowing annulment where the purposes of the marriage are frustrated by law or where the physical condition of one spouse endangers the life of the other, is a completely new concept in Pennsylvania and other jurisdictions. The latter part of the provision would appear to be subject to the defense that the physical condition of the one spouse does not dangerously affect the life or health of the other. One other possible defense might be knowledge of such physical condition at the time of the marriage. However, since this is not specifically noted, as it is for impotency, the availability of it as a defense is dubious. The first part of the provision presents some difficulties in that the drafters of the Code do not adequately explain its purposes. There seem to be two possible interpretations applicable to the provision. The first is that the ground provided is designed to allow annulment in some situations which would also constitute grounds for divorce. Thus, the frustration through law could be analogized to a divorce granted for desertion where one of the parties is a convicted criminal and is jailed for an extended period of time,<sup>90</sup> or to mental commitment which after a statutorily specified period of time might provide a ground for divorce.<sup>91</sup> An alternate choice of annulment in these cases would be advantageous because the action could be instituted

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respondent before marriage, and other courts deem his hands to be tarnished because he received antenuptial notice (from her conduct with him) that respondent was not virtuous.

*Id.* at 250-51.

90. See Comment, *Grounds and Defenses to Divorce in Pennsylvania*, 15 VILL. L. REV. 155, 157-58 (1969).

91. *Id.* at 171-72.

immediately<sup>92</sup> and the parties could be spared the social stigma attached to a divorce. However, the provision is equally open to the interpretation that it is designed to cover those situations which do not depend on the actions of the parties themselves, but rather on forces coming from outside of the marital union. An example of this would be where "an English sailor married a Russian woman . . . during the war. . . . After cessation of hostilities . . . he sought to get her to join him in England but Russian authorities forbade her leaving Russia and hence the law to which she was subject prevented the marriage from being fulfilled."<sup>93</sup> The drafters do not distinguish the type of situation that the provision is intended to cover. If it is either of the two aforementioned ones, or possibly a totally different one, then it is imperative that the drafters clear up the ambiguity.

The new grounds posited by the Proposed Marriage Code, if adopted, would bring Pennsylvania annulment law into harmony with other jurisdictions. As previously noted, at present only those marriages which are considered *void* are subject to annulment. The Code takes certain grounds which had previously been reserved as divorce grounds<sup>94</sup> and makes them grounds for annulment. Although annulment as a method of dissolving a marital relationship is not used to a great degree, it does serve important functions. Where applicable, it allows dissolution of a marriage without the stigma normally attached to a divorce proceeding; it allows dissolution without requiring an "innocent and injured" spouse,<sup>95</sup> and, it allows immediate termination which is not possible under certain divorce grounds.<sup>96</sup>

## VI. CONCLUSION

Although Pennsylvania has taken some positive steps — legitimacy of children and property distributions — in the reformation of its domestic relations law, there are many steps that could and should be taken to improve the field. The Proposed Marriage and Divorce Code could serve, by its adoption, as a vehicle for the implementation of many of these necessary changes.

The addition of *voidable* grounds for annulment is consistent with the approach of other jurisdictions in that it relegates antenuptial offenses to their proper place. The antenuptial offense, by virtue of its occurrence prior to the marriage, affects the validity of the marriage from its inception, unlike postnuptial offenses which arise after the marriage takes place. Therefore, they are more properly grounds for annulment.

92. For example, an action for desertion may not be brought before a lapse of 2 years. PA. STAT. tit. 23, § 10 (1955).

93. PROPOSED MARRIAGE CODE § 304, comment at 39-40.

94. PA. STAT. tit. 23, § 10 (1965).

95. Comment, *Domestic Relations — Law of Annulment in Pennsylvania — Effect of Proposed Marriage Code*, 4 VILL. L. REV. 533, 534 (1959).

96. PA. STAT. tit. 23, § 10 (1955).

Naturally, there are also a number of shortcomings in the recommended changes. In the area of removal of impediments the emphasis is still placed on knowledge of the impediment rather than on the intent of the parties. And the medieval concept prohibiting the marriage of an adulterer and a co-respondent during the lifetime of the libellant is certainly worthy of review.

The position of the drafters of the Code in regard to the abolition of common law marriages was, no doubt, based on the sincere belief that they served no purpose other than to confuse the law of domestic relations. However, it is submitted that the arguments advanced in support of the retention of common law marriage outweigh the difficulties which led to the proposal for change.<sup>97</sup> If the emphasis on abolition were redirected toward measures which would make common law marriages a viable institution, the result would be a more adequate reflection, in the legal system, of the social needs and realities of those whose relations are governed by such laws. It would seem that this should be a prime consideration in the establishment or proposal of any law.<sup>98</sup>

*Steven G. Brown*

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97. See pp. 138-40 *supra*.

98. See note 34 *supra*.