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ANNULMENT OF MARRIAGES IN NEW MEXICO: PART II—PROPOSED STATUTE

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Introduction

While annulment as an independent remedy is all but ignored, a reasonably comprehensive statutory treatment of divorce is found in most states. In fixing the grounds for divorce, however, the legislatures of the various states, New Mexico’s included, often have confused divorce and annulment. Thus by statute in New Mexico, a husband may obtain a divorce “when the wife, at the time of the marriage, was pregnant by another than her husband—said husband having been ignorant thereof.” At least twelve other states join New Mexico in stating this as a ground for divorce—a ground which, traditionally, would seem to call for annulment as evidencing fraud by the wife going to the essence of the marriage contract.

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3. "In Mason v. Mason, 164 Ark. 59, 261 S.W. 40, 41 [1924], this language appears: 'It has been held that a marriage induced by misrepresentation as to the paternity of a child will afford grounds for annulment, even where the parties had been having sexual intercourse before the marriage, and the husband was induced to believe by the false representations that he was the father of the child. . . .'

"While the quoted language was not necessary to the decision in the Mason case, nevertheless, the quotation is a correct statement of the trend of the modern cases. . . .

"The earlier decisions held that the husband was not entitled to an annulment in the circumstances as here alleged. Most of these cases denying the husband relief were based on either the equitable maxim that 'He who comes into equity must come with clean hands,' or that 'Equity aids the vigilant.' Cases based on the first maxim hold that the husband, having practiced antenuptial unchastity with the woman who subsequently became his wife, could not expect equity to aid him in granting an annulment. Cases based on the second maxim hold that the husband should have made diligent inquiry before marrying his wife, since he knew of her ante-nuptial unchastity; and that this desire for annulment came too late. . . .

"In Morris v. Morris, 1 Terry, Del., 480, 13 A.2d 603, 606 [1940] this statement is made . . .: 'It is a noteworthy fact that no case, pertinent to the present discussion, denying relief to the husband, has been determined since 1892.'

"The modern cases allow the husband relief in the situation here alleged, and grant him an annulment of the marriage. The reasoning on which most of these cases are based is well stated by the Supreme Court of Wisconsin in Winner v. Winner, 171 Wis. 413, 177 N.W. 680,681 . . . [1920]: 'To say that under such circumstances, the man
Impotence is also a ground for divorce in New Mexico.¹ Thirteen state statutes provide for the granting of a divorce if either party was physically incapable of performing the sex act at the time of the marriage and the incapacity continues at least to the time of filing suit for divorce.² In seven states, the divorce "impotency" provisions refer only to the condition's existence at

has no right to rely upon the woman's statements that he is the father of the child she is bearing, and that he must make inquiry elsewhere as to her chastity, is to negative all virtue, all truthfulness, and all decency in every woman that may have been imprudent enough to anticipate with her lover the rights of the marriage relation. * * * The act of marriage in such a case is not the result of negligent credulity, but of honorable motives to repair as far as possible wrongs inflicted or shared by him. Such conduct should be encouraged to the end that lesser wrongs be remedied instead of being followed by greater ones."

¹ Shatford v. Shatford, 214 Ark. 612, 217 S.W.2d 917,919 (1949). See e.g., Arndt v. Arndt, 336 Ill. App. 65, 82 N.E. 2d 908 (1948); Jackson v. Ruby, 120 Me. 391, 115 Atl. 90 (1921); Yager v. Yager, 313 Mich. 300, 21 N.W.2d 138 (1946); Gard v. Gard, 204 Mich. 255, 169 N.W. 908 (1918); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920). See also, Hardesty v. Hardesty, 193 Cal. 330, 223 Pac. 951 (1924) (By implication, with annulment being granted on the basis of the concealment of pregnancy caused by another); Morris v. Morris, 40 Del. 480, 13 A.2d 603 (1940): Annulment was refused because of condonation after discovery of the fraud, but in dictum the court adopted the view that fraud as to paternity was a proper basis for annulment; Mitchell v. Mitchell, 136 Me. 406, 11 A.2d 898,903 (1940): "If a man is induced to marry a woman who he knows is pregnant, believing and relying upon false and fraudulent statements made to him by her to the effect that he is the father . . . when, unknown to him, her pregnancy was caused by another, the marriage may be annulled for fraud. . . ." Relief was denied because of the failure to show reliance on the false statements. In Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312 (1916), fraud as to paternity was successfully asserted as a ground for divorce under a general "fraudulent contract" statutory provision.


the time of marriage.\textsuperscript{8} Twelve other jurisdictions, like New Mexico, merely list impotence as a ground for divorce without reference to the condition's permanence or its existence at the time of marriage.\textsuperscript{9} New Mexico's provision has not been before the state supreme court. But as impotency provisions have been construed elsewhere, the existence of the incapacity at the time of the marriage and its incurability are conditions precedent to divorce.\textsuperscript{8} Any other reading, of course, might make impotence a rather popular ground for divorce as the male ages. Annulment, and not divorce, is the traditional remedy when one of the parties is impotent at the time of the marriage.\textsuperscript{9}

Many other grounds normally thought to call for annulment have been established throughout the country as giving rise to divorce. Thus, ten state

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8. E.g., Cott v. Cott, 98 So.2d 379,380 (Fla. Dist. Ct. App. 1957): "It is essential that the impotency exist at the time of the marriage. . . ."; Bunger v. Bunger, 85 Kan. 564, 117 Pac. 1017, 1018 (1911): "Impotency as a cause for divorce means an incurable defect, permanent lasting inability for copulation. . . ."; Powell v. Powell, 18 Kan. 371,378 (1877): "[A]s to that alleged cause for divorce. . . .our statute is to be interpreted in harmony with the common law; and when the legislature enacted that a divorce might be granted for impotency, it was intended that the impotence must have existed at the time of the marriage. If a person should become impotent after marriage, the marriage is good, and no ground for divorce exists therefor. Such is the universal doctrine."; Lausier v. Lausier, 123 Me. 330, 124 Atl. 582,584 (1924): In referring to a prior suit between the parties in which a divorce was denied, the court said: "It is . . . clear that the justice hearing the libel for divorce must have found that libelant failed to show any permanent incurable impotency existing at the time of their marriage. . . ."; Chase v. Chase, 55 Me. 21,23 (1867): "Impotence, to be a ground for divorce, must have existed at the time of marriage."; Payne v. Payne, 46 Minn. 467, 49 N.W. 230 (1891): "The incapacity must also be incurable."; Bascomb v. Bascomb, 25 N.H. 267 (1852): "In all cases of impotency, in order that it should constitute a proper ground for divorce, it is necessary that it should be incurable." (at 271); "The corporal infirmity must exist at the time of marriage, in order to constitute the cause of impotency intended by the statute." (at 273).

9. Impotency is a statutory ground for annulment in eighteen states. Note 170 infra. See, e.g., Rickards v. Rickards, 166 A.2d 425 (Del. 1960); Helen v. Thomas, 150 A.2d 833 (Del.Super. 1959); S. v. S., 42 Del. 192, 29 A.2d 325 (1942); D. v. D., 41 Del. 263, 20 A.2d 139,141 (1941): "It is generally looked upon by all Courts that capability of consummation is an implied term in every marriage contract, and is so essential that upon the discovery of the entire incapacity upon one of the parties as to this duty of wedlock the other may . . . have a decree annulling said marriage."; Kaufman v. Kaufman, 164 F.2d 519 (D.C. Cir. 1947); Singer v. Singer, 9 N.J. Super. 397, 74 A.2d 622 (1950); Fehr v. Fehr, 92 N.J. Eq. 316, 112 Atl. 468 (1920); Tompkins v. Tompkins, 92 N.J. Eq. 113, 111 Atl. 599 (1920); Hiebink v. Hiebink, 56 N.Y.S.2d 394 (Sup.Ct. 1945), aff'd, 56 N.Y.S.2d 397 (App.Div. 1945); Steinberger v. Steinberger, 33 N.Y.S.2d 596 (Sup.Ct. 1940).
statutes provide for divorce if the marriage is bigamous;\(^{10}\) four do the same when the marriage violates statutory incest prohibitions;\(^{11}\) and eight make divorce the remedy in cases involving fraudulent marriage contracts.\(^{12}\) Maryland and Rhode Island permit divorce for any reason which renders the marriage null and void "ab initio."\(^ {13}\) Washington and Delaware do the same thing if one of the parties was incapable of consenting to the marriage contract because of lack of age.\(^ {14}\) There are other examples of statutory confusion of the two remedies.\(^ {15}\)

The conceptual difference between annulment and divorce is clear and widely accepted, and the statutory mingling of the two seems unlikely to have arisen from any conceptual confusion. Divorce, traditionally, is granted for reasons arising after marriage and presupposes the existence of a valid marriage status.\(^ {16}\) Annulment, on the other hand, is granted as a consequence of conditions existing at the time of the marriage and

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15. Arizona and Virginia provide for divorce if one of the parties had been convicted of an "infamous offense" prior to the marriage and that fact was not known to the other at the time of marriage. Ariz. Rev. Stat. Ann. §25-312(9) (1956); Va. Code Ann. §20-91(4) (1960). Insanity or idiocy at the time of marriage is a ground for divorce in Mississippi if, at the time of marriage, the other was unaware of the condition. Miss. Code Ann. §2735 (1957). Concealment of a loathsome disease is a ground for divorce in Kentucky. Ky. Rev. Stat. §403.020(2) (d) (1960). A wife may obtain a divorce in Delaware because of her spouse's congenital inability to support her unless the wife knew, or should have known, of the condition at the time of marriage. Del. Code Ann. tit. 13, §1522(9) (1953). Mental incapacity at the time of the marriage is a ground for divorce in Georgia. Ga. Code Ann. §30-102(2) (1952). And incapacity to consent for want of understanding is a ground in Washington. Wash. Rev. Code §26.08.020(1) (1958). And in Virginia, a husband may obtain a divorce if his wife conceals from him the fact that she had been a prostitute before marriage. Va. Code Ann. §20-91(8) (1960).

16. "Although it is sometimes said that the term 'divorce' includes annulment actions, we are not in accord therewith because, strictly speaking, a divorce action has for its objective the dissolution of the bonds of a valid marriage by reason of something which occurs after the marriage, while an annulment proceeding is founded upon the theory that no valid marriage ever existed by reason of some cause which was present at the time of the marriage." Goff v. Goff, 52 Cal.App.2d 23, 125 P.2d 848,852 (1942); "Divorce and annulment differ fundamentally. The former is based upon a valid marriage and a cause for terminating it which arises subsequently. . . ."
is based upon the premise (1) that the marriage sought to be
annulled was forbidden by law or regarded as against public policy;
in other words, that it was void at its inception; or (2) that there was
some imperfection, cognizable in equity (as with any contract) mak-
ing the marriage voidable at the instance of the party imposed upon.17

The conceptual distinction between the two remedies being clear, what has
given rise to the statutory confusion? In trying to ascertain the answer, it is
important to note that, while divorce is often granted on pre-marital grounds,
only one annulment statute, New York's, permits annulment for reasons aris-
ing after marriage. New York's law contemplates annulment when one of the
parties becomes insane and remains in an institution for a designated time.18
In no other state is a standard divorce ground19 treated as a basis for annul-
ment. Significantly, New York's divorce law is unique in this country in lim-
it ing the remedy, for all practical purposes, to cases involving adultery.20

Wherever divorce and annulment are combined, it is the divorce law which

The latter proceeds upon the theory that the marriage is void ab initio. Mazzei v.
Cantales, 142 Conn. 173, 112 A.2d 205,208 (1955); "An annulment proceeding, as dis-
ishguished from a divorce proceeding, is merely declarative of an existing status; it
does not create a new relationship or sever a prior one." Faiivre v. Faiivre, 182 Pa.Super.
365, 128 A.2d 139,142 (1956); "A suit for annulment presumes that there never was a
valid marriage and that therefore it should be declared void, while a suit for divorce
presumes a valid marriage, but asks that that relation be dissolved for postnuptual
a distinction made between the technical difference between divorce and annulment
and the common understanding of the words, at least in the opinion of the Mississippi
court: "The term 'divorce,' confined strictly to the legal sense of the term, means
the legal dissolution of a lawful union for a cause arising after marriage, while an
annulment proceeding is one maintained upon the theory that for some reason existing at
the time of a pretended marriage, no valid marriage ever existed. In the common
wider use of the term 'divorce' includes the dissolution of a valid marriage, a formal
separation of married persons, and the annulment of a marriage void from the be-

19. At least twenty-nine states have divorce insanity provisions similar to New
§30-102(11) (1952); Idaho Code Ann. §§32-603 (7) (1948), 32-801 (Supp. 1961); Ind.
20. Enoch Arden divorces are the only other ones permitted in New York. N.Y.
is expanded to include certain aspects of annulment. The inclusion of traditional annulment bases in divorce legislation would seem to indicate a legislative recognition that annulment problems do exist—a recognition accompanied by a legislative reluctance to solve the problems directly. Existing divorce channels have been utilized and indirect solutions have been sought. If the annulment remedy is to be available at all, it should be as regularized as divorce. I suggest that statutory grounds be established, that jurisdictional bases be clarified, and that the problems of children and property arising from annulable marriages be dealt with directly. If the remedy is to persist, it should be dealt with as a separate entity by the Legislature and not as a branch of divorce.

This portion of the article contains a proposed annulment statute for New Mexico. Since Part I dealt with jurisdictional questions, they are not here discussed. The proposed law attempts to cover all aspects of the annulment problem. The discussion, therefore, includes the treatment to be accorded out-of-state marriages.

Is the Annulment Remedy Necessary?

Before proceeding to an analysis of desirable legislation for New Mexico, two preliminary matters must be dealt with. First, taking into account the apparent legislative willingness to treat annulment problems in divorce legislation, is there any real justification for enacting a broad independent annulment law? Why not lump all actions under the heading of divorce by broadening divorce laws to embrace all of the traditional annulment grounds? States having progressive annulment legislation, while keeping the action separate from divorce, tend to grant the same or similar remedial relief in both. Children are declared legitimate. Custody and support orders result as they do from divorce. The wife's right to share in marital property is similar in both. Substituted service is provided. Despite the identity of method and


21. Any classification such as "progressive" annulment legislation necessarily must be somewhat subjective. As used here, the designation "progressive" refers to laws (1) containing a reasonably comprehensive statement of grounds; (2) making legitimate the children of most annulable marriages; (3) providing for the custody and support of such children; (4) providing for an equitable distribution of property acquired during the relationship; and (5) having reasonably broad jurisdictional provisions. Included in the progressive category are the statutes in Colorado, Hawaii, Oregon, Vermont, Washington and Wisconsin.


result, these states retain the distinction between the actions. Should New Mexico follow this pattern?

Tradition is a possible explanation for the continuation of the annulment remedy, *i.e.*, a sort of lethargy tending against change. Beyond this, however, there is a valid justification for the dual remedy persisting—a justification more closely related to divorce than to annulment. The social stigma attaching to divorce, I suggest, is a sufficient reason for retaining both divorce and annulment remedies in marriage cases. Justifiable or not, the divorce stigma exists. The antipathy probably has decreased with the increase in the number of divorces during the last fifty years. Divorce is now familiar, and less stigma attaches to the familiar than to the unfamiliar. Despite this, I believe that the social distaste for divorce is a very real thing in our society, or large portions of it. Further, many people, for religious reasons, prefer an annulment to a divorce. While a civil annulment may not meet the religious objection, it is at least consistent with the religious remedy. Thus, annulment as a separate and distinct remedy seems to have a valid place in modern marriage law. If it does have a place, an effort should be made to clarify the remedy by legislation.

**Current New Mexico Legislation**

A second consideration, before moving to a discussion of possible new legislation, is an examination of the adequacy of existing legislation in New Mexico. New Mexico's current statutory treatment of annulment at best is incomplete and, at worst, is confused, inadequate and uneven. There are but two statutory grounds for annulment: (1) incest and (2) nonage. While the definition of criminal incest is clear, the civil definition apparently resulted

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26. The number of divorces per thousand existing marriages increased from 6.6 in 1922 to 9.3 in 1955, reaching a peak in 1946 when the rate rose to 18.2. Jacobsen, American Marriage and Divorce 93 (1959), Table 44. On an absolute basis, 377,000 divorces were granted in 1955 as opposed to 151,651 in 1922. Id. at 173, Table A21.

27. Canon 1038, §1: "To declare authoritatively when the divine law forbids or invalidates a marriage belongs solely to the supreme authority of the Church." Risk, The Law of Catholic Marriage 28 (1957). Canon 1036, §2: "A *diriment* impediment both gravely prohibits the marriage and prevents it from being contracted validly." Id. at 26. Included among the *diriment* impediments listed by Father Risk are the following: (1) nonage (Canon 1067, §1); (2) impotence (Canon 1068); (3) bigamy (Canon 1069); (4) consanguinity and affinity (Canons 96, 97, 1076, 1077); (5) physical duress (Canon 1074). The various *diriment* impediments are listed and discussed in Chapter V of Risk, The Law of Catholic Marriage (1957).


29. *Ibid*.

from some mistake and its meaning is difficult, if not impossible, to comprehend.\textsuperscript{81} Incestuous marriages are declared "absolutely void" in one section,\textsuperscript{32} while another states that no such marriage "shall be declared void, except by a decree of the district court upon proper proceedings being had,"\textsuperscript{33}—a result normally associated with voidable marriages.\textsuperscript{34} Proper parties to initiate a nullity action involving an incestuous marriage are not designated.\textsuperscript{35} As far as the statutes provide, unless one of the parties wishes to bring a civil action, no one can bring it.

Marriages involving a minor party are not declared void by statute. They are merely prohibited.\textsuperscript{36} If the parties live together as husband and wife until the minor reaches a designated age, the marriage is validated, apparently from the beginning.\textsuperscript{37} A minor wife may be granted alimony upon an annulment, such payments to continue until she remarries or comes of age.\textsuperscript{38} The marriage of minors over a certain age—eighteen or over for males and sixteen or over for females—may be consented to by parents and others.\textsuperscript{39} Such consent is ineffective if the parties are younger.\textsuperscript{40} Children of annulable marriages involving a minor are legitimate, as are children of incestuous marriages.\textsuperscript{41}

Annulable marriages other than those involving incest or minors are not dealt with by statute. Apparently the children of other kinds of annulable marriages are illegitimate.\textsuperscript{42} Since the children of incestuous marriages and those involving minors are legitimate, they may inherit from either party. Children of other annulable marriages are not given this right unless the father recognizes them by a writing signed by him indicating that it was signed with the intention of recognizing such children as his heirs.\textsuperscript{43} A reading of the statute seems to limit alimony arising from annulment to the single case

\begin{thebibliography}{1}
\bibitem{31} N.M. Stat. Ann. §57-1-7 (1953).
\bibitem{32} Ibid.
\bibitem{34} "The invalidity of a void marriage may be asserted or shown in any proceeding wherein the fact of marriage is material, in any court, and between any proper parties. ... A voidable marriage, on the other hand, is subject only to direct attack by a proceeding brought during the joint lives of the contracting parties to obtain a judicial decree of annulment." Nelson, Divorce and Annulment §31.07 (2d ed. 1945).
\bibitem{35} N.M. Stat. Ann. §40-7-3 (1953).
\bibitem{36} N.M. Stat. Ann. §§57-1-5, 57-1-6 (1953).
\bibitem{38} Ibid.
\bibitem{40} N.M. Stat. Ann. §57-1-6 (1953).
\bibitem{42} New Mexico's statutes do not state that children of marriages annulable for reasons other than incest or nonage are illegitimate. Section 57-1-9 of the 1953 Compilation merely declares legitimate the children of marriages annulled for incest or nonage. The same section refers to alimony, and the Supreme Court has held the alimony portion to be limited to the designated kinds of marriage, incest and nonage. Prince v. Freeman, 45 N.M. 143,146,147, 112 P.2d 821,823 (1941). I assume that the legitimacy portion of the provision would be restricted in the same manner.
\end{thebibliography}
of a female minor. The Supreme Court of New Mexico in dictum, however, has indicated that alimony is also obtainable by the female party to an incestuous marriage, but is unavailable to the female in any other kind of annulled marriage. Aside from marriages involving minors, the proper person to bring an annulment action is not specified. Nor is provision made for the custody or support of children of any annulled marriage. And no statutory direction is given for the disposition of property acquired during the annulable marriage.

While incest and non-age are the only statutory grounds for annulment, other grounds do exist in New Mexico. The supreme court has recognized the existence of a common-law annulment action. But the common-law development throughout the country has been uneven, with little agreement other than in very general terms, concerning the bases for annulment actions. Confusion, thus, reigns in an area where certainty is socially desirable. Current legislation in New Mexico is wholly inadequate. A new and complete statute seems the only way to clarify the situation and to give equal treatment to the parties and issue of annulable marriages.

Proposed Statute

AN ACT

RELATING TO THE DISSOLUTION OF MARRIAGE; PROVIDING FOR THE ANNULMENT THEREOF; PRESCRIBING JURIS-

44. Section 57-1-9 of the 1953 Compilation reads as follows: "No marriage between relatives within the prohibited degrees or between or with infants under the prohibited ages, shall be declared void, except by a decree of the district court upon proper proceedings being had therein; said action may be instituted by the minor, by next friend, by either parent or legal guardian of such minor or by the district attorney; and in case of minors, no party to the marriage who may be over the prohibited age shall be allowed to apply for or obtain a decree of the court declaring such marriage void; but such minor may do so, and in the case of a female, the court may in its discretion grant alimony until she becomes of age or remarries; and all children of marriages so declared void as aforesaid, shall be deemed and held as legitimate, with the right of inheritance from both parents; and also in case of minors, if the parties should live together until they arrive at the age under which marriage is prohibited by statute, then and in that case, such marriage shall be deemed legal and binding." (Emphasis added.)

45. Prince v. Freeman, 45 N.M. 143, 147, 112 P.2d 821,823 (1941): "It is true that our statute makes provision for alimony, allowable in the discretion of the court, where annulment is had of an invalid or void marriage upon the ground of relationship within the prohibited degree, or where because the female is within the age where marriage is prohibited. Sec. 87-110, N.M. Comp.St. 1929 [N.M. Stat. Ann. §57-1-9 (1953)]. But this act obviously applies to no other character of invalid or void marriages."


47. There are no Supreme Court cases granting an annulment on a common-law ground. In denying annulment on jurisdictional grounds in State v. Scoggin, 60 N.M. 111, 287 P.2d 998 (1955), however, the court seemed to accept the concept of annulment on non-statutory grounds where jurisdiction was found. The same implied recognition is found in Prince v. Freeman, 45 N.M. 143, 112 P.2d 821 (1941).
DICTIONAL PREREQUISITES; AMENDING SECTIONS 22-7-1 AND 57-1-8 NEW MEXICO STATUTES ANNOTATED, 1953 COMPI-LATION (BEING LAWS 1901, CHAPTER 62, SECTION 22, AS AMENDED, AND LAWS 1876, CHAPTER 31, SECTION 3, AS AMENDED); REPEALING SECTIONS 57-1-4, 57-1-5, 57-1-7 AND 57-1-9 NEW MEXICO STATUTES ANNOTATED, 1953 COM-PILATION (BEING LAWS 1862-1863, PAGE 64, AS AMENDED, LAWS 1876, CHAPTER 31, SECTION 1, LAWS 1876, CHAPTER 32, SECTION 1, AS AMENDED).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.—
This act shall be known as and may be cited as the "Annulment Act."

Section 2. DEFINITIONS.—
As used in the Annulment Act, unless the context requires otherwise:
A. "Actions for annulment" include actions for determination of marital status;
B. "Bigamous marriage" means any marriage where either of the parties, at the time of the marriage, is lawfully married to some other person;
C. "Duress" is limited to physical duress;
D. "Incestuous marriage" means 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, aunts and nephews, whether the relationship is legitimate or illegitimate;
E. "To live together as husband and wife" means either (1) to reside together while holding themselves out as being married, or (2) to participate in the sex act normally incident to the marriage relationship.

Section 3. PUBLIC POLICY—AFFIRMING MARRIAGES—CONCLUSIVENESS.—
A. Any marriage, wherever contracted, is hereby declared to create a determinable marriages status. Any court having jurisdiction under the Annulment Act may determine such status and may enter a decree annulling a marriage described as annulable in the Annulment Act.
B. When the validity of any marriage shall be denied or doubted by either of the parties, the other party may commence an action to affirm the marriage, and the judgment in such action shall declare such marriage valid or annul the same.
Section 4. EXCLUSIVENESS OF REMEDY.—

A. Marriages shall be annulled only as provided in the Annulment Act.
B. No question concerning the validity of a marriage described as annulable in the Annulment Act, except a bigamous marriage, shall be raised in any civil action other than one authorized by the Annulment Act and brought within the time limits established herein; provided, however, that if one or both of the parties die before the running of the limitation periods established in the Annulment Act, the validity of the marriage may be questioned in any action relating to property rights accruing as a result of the marriage.

Section 5. BIGAMOUS MARRIAGES.—

A. A bigamous marriage is annulable in an action brought by
   (1) either party to the bigamous marriage;
   (2) the lawful spouse of either party; or
   (3) the district attorney of the judicial district where either of the parties resides.
B. 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 6. INCESTUOUS MARRIAGES.—

A. An incestuous marriage is annulable in an action brought by
   (1) either party to the marriage; or
   (2) the district attorney of the judicial district where either of the parties resides.
B. An incestuous marriage shall not be annulled, nor shall its validity be challenged on the basis of its being incestuous in any other proceeding, after either of the parties dies, provided the marriage was contracted more than two years prior to its severance by death.

Section 7. DURESS.—

A. A marriage is annulable in an action brought by either party if both parties enter the marriage as the result of duress exercised by a third person, provided the parties do not live together as husband and wife after the duress is removed.
B. A marriage is annulable in an action brought by the party who enters the marriage as the result of duress exercised by the other party, or by a third person whether or not the other party knew of the exercise of duress, provided the parties do not live together as husband and wife after the duress is removed.
C. An action to annul a marriage on the ground of duress must be brought within one year of the marriage.
Section 8. JEST OR DARE.—
A. A marriage is annulable in an action brought by either party 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 thereafter live together as husband and wife.

B. A marriage is annulable in an action brought by the party who entered the marriage with a serious contractual purpose if the other party entered the marriage as a jest or on a dare and this fact was not known, nor should it have been known, to the other party, provided the parties do not after the marriage live together as husband and wife.

C. 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 one year of the marriage.

Section 9. INTOXICATION OR UNDER THE INFLUENCE OF DRUGS.—
A. A marriage is annulable in an action brought by either party if one or both of the parties were so intoxicated, or so under the influence of drugs, as to be unaware of the identity of the other party or of the nature of the ceremony performed, provided the parties did not live together as husband and wife after the incapacity induced by intoxication or drugs has ceased.

B. An action to annul a marriage on grounds described in Subsection A of this section must be brought within one year of the marriage.

Section 10. FRAUD.—
A. A marriage is annulable in an action brought by

1. a party who enters the marriage in reliance on a fraudulent act, representation or failure to disclose by the other party, which fraud goes to the essence of the marriage.

2. a party who enters the marriage in reliance on a fraudulent act or representation going to the essence of the marriage made by a third person, whether or not the other party to the marriage knew of, or was responsible for, the fraudulent act or representation.

3. either party where both parties enter the marriage in reliance on a fraudulent act or representation going to the essence of the marriage made by a third person.

B. A marriage shall not be annulled on the ground of fraud if the parties thereto live together as husband and wife after discovery of the fraud.

C. An action to annul a marriage on grounds of fraud must be brought within three years of the marriage.
Section 11. IMPOTENCY.—

A. A marriage is annulable in an action brought by either party if at the time of the marriage one or both of the parties, for physical or mental reasons, were incapable of performing the sex act incident to the marriage relationship, and such incapacity persists to the time of the action and seems likely to persist beyond a temporary period, provided that such a marriage is not annulable if both parties knew of the incapacity at the time of the marriage.

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

Section 12. MARRIAGES OF MINORS TO WHICH PARENTAL CONSENT MAY BE GIVEN.—

A. A marriage is annulable if, at the time of the marriage, the male party is eighteen, nineteen or twenty years old or the female party is sixteen or seventeen years old, unless consent to the marriage is given by a parent, guardian or person in charge of the underage party.

B. The consent contemplated by Subsection A of this section shall be deemed given if the parent, guardian or person in charge of the underage party

(1) is present at the marriage and does not protest; or

(2) signs a written consent to the marriage which is authenticated before a competent authority. Such written consent may be given either before or after the marriage.

C. A marriage described as annulable in Subsection A of this section may be annulled in an action brought by

(1) the party who was underage at the time of the marriage; or

(2) a parent, guardian or person in charge of such underage party.

D. A marriage described as annulable in Subsection A of this section shall not be annulled

(1) if the parties live together as husband and wife after the underage party or parties reach the age of consent; or

(2) if the action is brought more than one year after the underage party or parties reach the age of consent.

E. Nothing in this section shall make annulable a marriage authorized by a proper order of a district court.

Section 13. MARRIAGES OF MINORS TO WHICH PARENTAL CONSENT MAY NOT BE GIVEN.—

A. A marriage is annulable if, at the time of the marriage, the male party is under the age of eighteen or the female party is under the age of sixteen, whether or not a parent, guardian or person in charge of such underage party consents to the marriage.
B. A marriage described as annulable in Subsection A of this section may be annulled in an action brought by

(1) the male party if he was under the age of twenty-one at the time of the marriage;
(2) the female party if she was under the age of eighteen at the time of the marriage;
(3) a parent, guardian or person in charge of a party described in subdivisions (1) and (2) of this Subsection; or
(4) the district attorney of the judicial district where the (i) male party resides if he is under the age of eighteen at the time the action is brought;
(ii) female party resides if she is under the age of sixteen at the time the action is brought.

C. A marriage described as annulable in Subsection A of this section shall not be annulled if

(1) after the male party becomes eighteen years old and the female party becomes sixteen years old, a parent, guardian or person in charge of the underage party or parties signs a written consent to the marriage which is authenticated before a competent authority;
(2) the parties live together as husband and wife after the male party reaches the age of twenty-one and the female party reaches the age of eighteen; or
(3) the action is brought more than one year after the parties reach the age described in subdivision (2) of this subsection.

D. Nothing in this section shall make annulable a marriage authorized by a proper order of a district court.

Section 14. MENTAL INCAPACITY.—

A. 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.

B. A marriage described as annulable in Subsection A of this section may be annulled in an action brought by

(1) either party, or the guardian of either party, if the marriage has not been consummated;
(2) the party incapacitated at the time of the marriage if such party is competent to participate in a judicial proceeding;
(3) the guardian of the party incapacitated at the time of the marriage;

or

(4) the party not incapacitated at the time of the marriage if such party was not then aware of the other's incapacity and if the parties do not
live together as husband and wife after the petitioning party learns of the incapacity.

C. A marriage described as annulable in Subsection A of this section shall not be annulled if the parties thereafter live together as husband and wife during a period when both are mentally capable of understanding the nature of the marriage contract.

D. An action to annul a marriage on grounds described in Subsection A of this section must be brought
   (1) by a party mentally incapacitated as described in Subsection A of this section, or a guardian of such party, within three years of the marriage;
   (2) by a party not so mentally incapacitated, within one year of the marriage.

Section 15. LEGITIMACY.—

All children conceived or born during a marriage defined as annulable in the Annulment Act shall be deemed legitimate for all purposes.

Section 16. OUT-OF-STATE MARRIAGES.—

A. New Mexico recognizes as valid all marriages valid by the law of the place of contracting and all marriages which would have been valid had they been contracted in New Mexico, whatever their status at the place of contracting.

B. A marriage entered into outside of New Mexico is deemed annulable in this state only if the marriage
   (1) is invalid by the law of the place of contracting; and
   (2) would have been invalid had it been contracted in New Mexico.

Section 17. JURISDICTION.—

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

B. An action for annulment of marriage may be instituted if:
   (1) the marriage was contracted in this state and the action is commenced within six months from the date of the marriage; or
   (2) either party to the marriage is domiciled in this state at the time the action is commenced and it is commenced within the times heretofore specified.

Section 18. SERVICE OF PROCESS.—

Actions for annulment of marriage are actions in rem, affecting a specific status. Process in such actions may be served by publication or personal service on the defendant outside of the state in the same manner as in any civil action.
Section 19. POWERS OF THE DISTRICT COURT.—

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

B. Upon decreeing a marriage annulled, the district court may issue such orders as the circumstances of the case may warrant relative to:

1. division of property acquired during the annulable marriage other than by gift or inheritance in such proportions as may be fair and equitable;
2. care, custody and support of children who are dependent upon the parent or parents for support;
3. suit money, court costs and attorney fees; and
4. any other matter in controversy between the parties, relevant to the dissolution of the marriage.

C. In addition to other methods of enforcing orders now or hereafter prescribed by statute or by rules of civil procedure, the district court shall have the power to require that security be given to secure enforcement of any order issued.

D. The district court, in its discretion, may retain jurisdiction of the action for the purpose of such later revisions in its orders as the circumstances may require.

Section 20. Section 22-7-1 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1901, Chapter 62, Section 22, as amended) is amended to read:

“22-7-1. GROUNDS FOR DIVORCE.—The several district courts within and for the state of New Mexico are hereby vested with full power and authority to decree divorces from the bonds of matrimony for any of the following causes:

1. Abandonment.
2. Adultery.
3. Impotency.
4. When the wife, at the time of the marriage, was pregnant by another than her husband—said husband having been ignorant thereof.
6. Neglect on the part of the husband to support the wife, according to his means, station in life and ability.
7. Habitual drunkenness.
8. Incompatibility.
9. Conviction for a felony, and imprisonment therefor, in the penitentiary, subsequent to the marriage."
Section 21. Section 57-1-8 New Mexico Statutes Annotated, 1953 Compilation (being laws 1876, Chapter 31, Section 3) is amended to read:

"57-1-8. [CONTRACTING OR] PERFORMING CEREMONY FOR UNLAWFUL MARRIAGE—PENALTY.— [If any person prohibited from contracting marriage by the foregoing sections, shall violate the provisions thereof by contracting marriage contrary to the provisions of said sections, he or they shall be punished by fine on conviction thereof, in any sum not less than fifty dollars; and every] Any person authorized [under] by the laws of this state to celebrate marriages, who [shall unite in wedlock any of the persons whose marriage is declared invalid by the previous sections of this chapter, on conviction thereof,] violates the provisions of Section 57-1-6 New Mexico Statutes Annotated, 1953 Compilations shall be fined in any sum not less than fifty dollars on conviction thereof."

Section 22. APPLICABILITY.—

The provisions of this act shall apply to all actions to annul marriages commenced after the effective date of the Annulment Act.

Section 23. SEVERABILITY.—

If any part or application of the Annulment Act is held invalid, the remainder of the act or its applicability to other situations or persons shall not be affected.

Section 24. REPEALER.—

The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed: Sections 57-1-4 and 57-1-5 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1862-1863, Page 64, as amended) and Section 57-1-7 New Mexico Statutes Annotated, 1953 Compilation (being Laws 1876, Chapter 31, Section 1, as amended) and Section 57-1-9 New Mexico Statutes Annotated, 1953 Compilation, (being Laws 1876, Chapter 32, Section 1, as amended).

In preparing the above, legislation from all jurisdictions in the United States was examined. Colorado is one of the few states with a comprehensive statutory treatment of annulment. Its law, adopted in 1957, has been used here, not so much as a model for legislation in New Mexico, but as a point of departure. In discussing the various provisions of the proposed New Mexico statute, the comparable provisions of Colorado's law are analyzed and discussed.

Void and Voidable Marriages

Tradition in the law of marriage distinguishes between void and voidable marriages. Theory dictates that the voidable marriage creates a legal status

which persists until a court decrees the marriage annulled.\textsuperscript{49} No such legal status ever comes into being as the result of a void marriage,\textsuperscript{50} although as pointed out in Part I, even with a void marriage, "the uncertainty as to the state of the relationship, in the eyes of the parties and the community, is itself a status, albeit not a marriage status."\textsuperscript{51}

In the absence of statute, the difference in effect between void and voidable marriages is quite clear. Nelson in his treatise, Divorce and Annulment,\textsuperscript{52} explains it as follows:

The invalidity of a void marriage may be asserted or shown in any proceeding wherein the fact of marriage is material, in any court, and between any proper parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly by a petition for annulment or collaterally in another proceeding. A voidable marriage, on the other hand, is subject only to

\textsuperscript{49} E.g., Yeager v. Fleming, 173 F.Supp. 316,318 (S.D. Fla. 1959): "The parties to a void marriage can repudiate it without court decree. . . . The parties to a voidable marriage, on the other hand can not abandon their marriage without a court decree. . . . Until the decree of annulment, the marriage has all the attributes and incidents of a valid marriage."; Saunders v. Saunders, 49 Del. 515, 120 A.2d 160 (1956): Comparing the annulment of a voidable marriage to a divorce decree; Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613, 615 (1944); Dibble v. Meyer, 203 Ore. 561, 278 P.2d 901,903 (1955): Stating that little difference exists in Oregon between a suit for divorce and one to annul a voidable marriage; Gordon v. Pollard, 207 Tenn. 45, 336 S.W.2d 25 (1960): Holding that the annulment of a voidable marriage would not permit an action for a tort occurring during the voidable marriage; Portwood v. Portwood, 109 S.W.2d 515,522 (1937): Voidable marriages "must be treated as valid for all civil purposes until annulled. . . ."; In re Romano's Estate, 40 Wash.2d 796, 246 P.2d 501, 505 (1952): "The term 'voidable' is used to designate any marriage subject to a disability or impediment of such degree or nature that the marriage is considered valid unless set aside by court decree. . . ."


\textsuperscript{51} 1 Natural Resources J. 146,152 (1961).

\textsuperscript{52} §31.07 (1945). See, e.g., Hitchens v. Hitchens, 47 F.Supp. 73,76,77 (D.D.C. 1942); Osoinach v. Watkins, 235 Ala. 564, 180 So. 577,581 (1938): Void marriage may be attacked after death of one of the parties; In re Duncan's Death, 360 P.2d 987,990 (1961); Pry v. Pry, 225 Ind. 458, 75 N.E.2d 909,913 (1947); In re Shun T. Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942): Void marriage subject to collateral attack before or after death; Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613,615 (1944); Patey v. Peaslee, 99 N.H. 335, 11 A.2d 194, 196 (1955); First Nat'l Bank v. North Dakota Work. Comp. Bureau, 68 N.W.2d 661,664 (1955); Dibble v. Meyer, 203 Ore. 561,278 P.2d 901,903 (1955); Bennett v. Bennett, 195 S.C. 1, 10 S.E.2d 23 (1940); Simpson v. Neely, 221 S.W.2d 303,308-09 (Tex.Civ.App. 1949); Alexander v. Kuykendall, 192 Va. 8, 63 S.E.2d 746,748-49 (1951): "A void marriage is a mere nullity and its validity may be impeached in any court, whether the question arises directly or indirectly, and whether the parties be living or dead. This is not true of a voidable marriage."; In re Romano's Estate, 40 Wash.2d 796, 246 P.2d 501, 505-06 (1952).
direct attack by a proceeding brought during the joint lives of the contract- ing parties to obtain a judicial decree of annulment. Until so annulled, it is valid for all civil purposes, and incapacitates either party to enter into a marriage with a third party. . . . And if not so annulled during the lives of both of the parties it becomes a valid marriage, in the sense that, after the death of one party, it is not subject to attack.

Although retained in Colorado's law, the void-voidable classification would seem to have no place in modern annulment legislation. The usage in Colorado is almost purely formal, with the only difference being found in the statement of proper parties to bring the annulment action. While the dual classification, perhaps, is justifiable as a convenient means of reference, it carries with it the dual concept (1) that void marriages, as a group, are somehow different from those which are voidable; and (2) that within each group, the problems raised are somehow identical. Neither of the concepts is really accurate. Colorado lists incestuous, bigamous and certain marriages involving underage parties as void. While the listings may be consistent with tradition, the problems presented in each are quite different and require different treatment. Annulment legislation in New Mexico should be predicated, not on an antiquated classification system, but on an enlightened understanding of society's needs as they relate to each individual kind of annulable marriage. Problems raised by bigamous marriages are very different from those found in incestuous marriage. They should be treated independently. Thus, the void-voidable usage has been avoided in the proposed statute. All references are to "annulable" marriages, and the concept of annulment has been defined to include "actions for determination of marital status," the language found in the Colorado act when referring to void marriages.

Criminal Marriages: Incest and Bigamy

Incestuous and bigamous marriages involve the parties, or one of them, in the commission of a felony. For incest, the penalty may run as high as fifty years. For bigamy, the guilty party may be sent to the penitentiary for not less than two nor more than seven years. On the civil side, New Mexico considers both as void marriages. Despite the similarities, incestuous and bigamous marriages

56. Section 2(A), p. 279 supra.
60. In New Mexico, incestuous marriages are declared "absolutely void" by statute.
give rise to very different problems and must be treated separately, both legisla-
tively and in the present analysis.

(a) Incestuous Marriages

(i) Generally

New Mexico’s incest statute is limited. First cousin marriages are not pro-
hibited and all restrictions are based on consanguinity. Many states go well
beyond New Mexico, with first cousins being denied the right to marry, and
statutory prohibitions extending beyond blood relationships to include those
arising from affinity.

New Mexico’s present treatment of incest leaves much to be desired. Section
57-1-7 of the 1953 Compilation reads as follows:

All marriages between relations and children, including grand-

This statute was enacted originally in 1876 and was amended in 1880 to

N.M. Stat. Ann. §§57-1-7 (1953). The bigamous marriage, while not specifically made
void by statute, has been treated as void by the Court: “We need not cite authority to
the proposition that the ceremonial marriage between the parties was void, as at the
time of such marriage the defendant was the wife of . . . [another].” Prince v. Free-
man, 45 N.M. 143, 146, 112 P.2d 821, 822 (1941).


62. First cousin marriages are prohibited in at least twenty-seven states: Ariz.
(1939); Utah Code Ann. §§ 30-1-1 (1953); Wash. Rev. Code § 26.04.020 (1959); Wis.

63. At least nineteen states extend the incest prohibition beyond blood relationships
to include those established by marriage: Ala. Code tit. 34, §§ 1, 2 (1959); Conn. Gen.
and (2) (1939); Tenn. Code Ann. §§ 39-705 (1955); Tex. Pen. Code arts. 496, 497 (1952);

64. N.M. Sess. Laws, 1876, ch. 31, § 1.

delete any reference to first cousins. As written, the section makes little sense. Prohibiting marriages between "relations and children" is rather meaningless. It seems likely that New Mexico's incest provision was patterned after Missouri's, translated into Spanish and then to English. The Missouri law referred to "parents and children." The Spanish text in New Mexico was in terms of "parientes e hijos," the translator apparently assuming "that parientes was the equivalent of English parents." In fact "parientes" means relations or relatives, and when the section was translated back to English, it referred to relations. Even assuming that "parents and children" was the phrase intended, the English version of the statute establishes no prohibition against the marriage of grandmothers and grandsons. The statute specifically includes within the prohibition of "relation-children" marriages those between grandfathers and granddaughters. No mention, however, is made of grandmother-grandchildren marriages. In the Spanish version, the word used is "abuelos" which, properly translated, "equals 'grandmother and grandfather' or 'grandmothers and grandfathers' or merely 'grandfathers'." Here, the English translation was improper.

Whatever the reason for the confusion, it exists and was recognized by the Legislature in 1917 when a new criminal incest law was enacted:

Persons within the following degrees of consanguinity, to wit: 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, aunts and nephews, who shall intermarry with each other . . . shall be adjudged guilty of incest, and be punished by imprisonment in the penitentiary not exceeding fifty [50] years.

The criminal provision is similar to incest laws found in several states. Prior to 1917, incestuous marriages as defined in the 1876 statute were punishable by imprisonment for not more than one year, or by a fine of not less than fifty dollars. In 1917 the penalty was drastically increased and the definition was changed, all without reference to the earlier law.

The Compiler's note says that the 1917 enactment "is deemed to supersede" the earlier penal provision "insofar as the latter relates to incestuous mar-

67. Letter from Robert M. Duncan, Chairman, Department of Modern and Classical Languages, University of New Mexico, October 23, 1961.
69. Ibid.
riages. The Compiler may be right. But the 1917 provision makes no reference to marriage within the prohibited degrees where the relationship is illegitimate. The earlier law includes such prohibition. In a criminal statute, the exclusion of illegitimate relationships from the prohibition may be justified on the ground that the parties are unlikely to be aware of their relationship. Eugenically, of course, if the prohibition is valid when the relationship is legitimate, it is equally valid when it is illegitimate. Query whether the marriage of an aunt and nephew, when the nephew is the illegitimate son of the aunt's brother, might result in the parties being punished under the original "one year-fifty dollar" provision?

Any annulment legislation enacted in New Mexico should clarify the incest provisions so that those within the prohibited degrees are clearly forewarned. I suggest that the "one year-fifty dollar" section be amended to exclude any reference to incest, and that the civil incest provision be modified to coincide with the 1917 criminal provision, retaining, of course, the civil prohibition as it relates to illegitimate relationships. Thus, Section 2(D) of the proposed statute defines an incestuous marriage as:

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, aunts and nephews, whether the relationship is legitimate or illegitimate.

(ii) Who May Bring the Action?

Section 6(A). An incestuous marriage is annulable in an action brought by

(1) either party to the marriage; or
(2) the district attorney of the judicial district where either of the parties resides.

Since an incestuous marriage constitutes a criminal offense, the annulment statute should be written to encourage the severance of the relationship. Clearly, either party to the marriage should be permitted to petition for a judicial determination of its status. The state, in the person of the district attorney, also has a clear interest in seeing to it that the relationship ends. Therefore, I suggest that the district attorney in the judicial district in which the parties, or one of them, reside be permitted to petition for an annulment. This will give the state an option of proceeding criminally or civilly in combatting incestuous marriages. Further, under the criminal statute as currently written, an incestuous marriage involving an illegitimate relationship apparently is not criminal, nor is it terminable by any other action of a state official. Section 6(A) grants this power.

(iii) Validating the Relationship After Death

In dealing with incestuous marriages, New Mexico's interest is to discourage them initially and to end the illegal relationship as quickly as possible after

the marriage has been celebrated—the primary goal being to prevent the con-
ception of a child. Once the relationship has been severed by death of one of
the parties, there would seem to be no reason to continue to hold the relationship
invalid. Assume that an uncle and niece marry and live together as husband
and wife for twenty-five years before the uncle dies. Should the relationship
then be subject to attack in order to cut off the “wife’s” interest in what would
be her share of the community property? Why should the children of the
marriage be permitted to cut off their mother’s interest? Neither they nor other
relatives of the dead man, who have contributed nothing to the accumula-
tion of whatever property is involved, should be permitted to assert rights
superior to those of the “wife.”

Society opposes incestuous marriages, partially on the ground that they are
considered immoral and contrary to the generally accepted mores of the com-
munity, and partially on eugenic grounds. If the relationship is ended by death,
society’s interest is not forwarded by a judicial determination that the marriage
was invalid. Holding that the wife is cut off from any share in her husband’s
estate, of course, might operate as a deterrent to other such marriages. This
remote possibility, however, should not be permitted to prevent the wife from
sharing in the husband’s property. The only real gain, if the wife is cut off, is
to third persons who have contributed nothing.

Section 6(B) of the proposed statute is an effort to codify the views here
expressed: 74

Section 6(B). An incestuous marriage shall not be annulled, nor
shall its validity be challenged on the basis of its being incestuous in
any other proceeding, after either of the parties dies, provided the
marriage was contracted more than two years prior to its severance
by death.

It can be seen that the only condition precedent is that the parties have been mar-
ried for at least two years prior to the marriage being ended by death. If the
marriage relationship has been a short term affair, the surviving spouse is not
considered to have “earned” a right to the property to a sufficient extent to
overcome the disability created by the incestuous nature of the marriage.

74. Delaware, Pennsylvania and Wisconsin have provisions similar to Section
shall not have been annulled during the lifetime of the parties the validity thereof
shall not be inquired into after the death of either party.”; Pa. Stat. Ann. tit. 48, §§1-16
(Supp. 1962): “All marriages within the prohibited degrees of consanguinity or affinity
... are hereby declared voidable to all intents and purposes, but when any of said
marriages shall not have been dissolved during the life time of the parties, the unlaw-
fulness of the same shall not be inquired into after the death of either of the parties
riage has not been annulled during the lifetime of the parties, the validity thereof
shall not be inquired into after the death of either party.” See also, N.C. Gen. Stat.
§ 51-3 (Supp. 1961).
(b) **Bigamy and Polygamy**

(i) **Generally**

Bigamy and polygamy currently are not defined by statute in New Mexico. The only statutory reference to them is found in Section 40-7-1 of the 1953 Compilation:

> Every person who shall be convicted of bigamy or polygamy shall be imprisoned not more than seven [7] nor less than two [2] years.

In *State v. Lindsey,* a bigamy prosecution, the statute was attacked for its failure to define "bigamy." The Court, in rejecting the attack, said:

> The meaning of the word 'bigamy' used in the statute is universally understood, and no language could have been employed which would have made clearer the intention of the legislature.

> The commonly understood meaning of the term 'bigamy' is the having of two or more wives or husbands at the same time.

> "Strictly, bigamy is a form of polygamy; but the term bigamy is generally used for the offense, however often repeated." As distinguished from incest where the elements vary from state to state, the words "bigamy" and "polygamy" have a uniformly accepted meaning and a single common factor. Whether speaking of bigamy or polygamy, the objectionable factor is the existence of a lawful spouse at the time an additional relationship is contracted. However many marriages are entered into, our monogamous society recognizes only one as being lawful at any one time. Thus, for convenience of expression, the word "polygamy" is not used in the proposed statute. Its content is included in the Section 2 definition of a bigamous marriage as "any marriage where either of the parties, at the time of the marriage, is lawfully married to some other person."

Bigamy, while having a clearly defined meaning, is not always easy to prove, particularly when attempting to get the second marriage annulled. Often the decision must turn on the validity of a divorce from a prior spouse, a determination which may be difficult and complicated. Further, "the finding in favor of the plaintiff's second marriage is supported by one of the strongest presumptions known to the law. . . . Where to hold otherwise would convict innocent parties of bigamy, slight evidence will support a finding that exonerates them of the charge." This presumption of the validity of the second marriage is said

75. 26 N.M. 526, 194 Pac. 877 (1921).
76. *State v. Lindsey,* 26 N.M. 526, 528, 529, 194 Pac. 877 (1921).
78. Notes 62, 63, 64 *supra.*
79. Ferrett v. Ferrett, 55 N.M. 565, 577, 237 P.2d 594, 601 (1951). In handling an estate involving competing claims of two women both claiming as widow, the Court said: "[T]he proof [of the first marriage] is not so clear, strong, and unequivocal as to produce a moral conviction in our minds that the marriage in India, if it ever existed, was a bar to a legal marriage in New Mexico. This we hold, should be required in this case. . . ." *In re Jubala's Estate,* 40 N.M. 312, 314, 315, 59 P.2d 356, 357 (1936).
to be “based upon the consideration that human nature is ordinarily consistent with innocence, morality, and legitimacy, which will counter-balance and overcome the presumption of the continuance of the former relation.”

The complexity of the legal questions involved and the difficulty of proof make uncertain the status of parties to what may be a bigamous marriage. Judicial determination of the status would be helpful to the parties and to a society desirous of ending the relationship if, in fact, it is illegal. Annulment legislation obviously should provide the machinery for determining the status of parties to an allegedly bigamous marriage.

(ii) **Who May Bring the Action?**

Either party to a bigamous marriage should be in a position to obtain a judicial determination of the marriage status. Certainly the “innocent” party, i.e., the party not possessing a prior spouse and not knowing of the other’s disability, should be able to ascertain the status of the relationship via an authoritative court decree. What of the “guilty” party, i.e., the one with a prior living spouse, or the “innocent” party who knew that the relationship was illegal? Should such a party be permitted to obtain judicial relief? I urge that society’s interest in ending the relationship and in having the martial status clarified should take precedence over any interest society may have in punishing the parties. Either party, whatever his “guilt” or “innocence,” should be permitted to petition for the annulment of a bigamous marriage.

In New Mexico, bigamy is a crime requiring no scienter. It may be committed by a person who believes himself free to marry. A man may honestly believe that his wife is dead, or that a valid divorce decree has been issued; but if he is wrong, his second marriage is criminal. In such a case, criminal prosecution seems unnecessary and unduly harsh. The state, through the district attorney, should have the option of proceeding criminally or civilly. Section 5(A)(3) of the proposed statute adds the civil option to the already existing criminal remedy by making specific provision for state-initiated annulment actions. And, of course, if neither party to a bigamous marriage wishes to take the initiative in having the marriage status determined, the state will be in a position to do so.

Finally, the prior living spouse is given a statutory right to seek a judicial determination of the status of the second marriage. Such party may be the only one with sufficient information or interest to proceed. A continuation of the second marriage well may confuse the various property interests involved, a situation the prior spouse will wish to prevent. This interest would seem to give the prior spouse standing to petition for a judicial determination of the validity

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81. State v. Lindsey, 26 N.M. 526, 194 Pac. 877 (1921).
of the second marriage. In this way, the prior spouse will be able to ascertain his or her own status.

(iii) Validating the Relationship

In discussing incestuous marriages, I have suggested that, upon the dissolution of the relationship by death of one of the parties, nothing would be gained by permitting the validity of the marriage to be challenged. The same cannot be said of bigamous marriages. If the prior marriage persists, challenge must be permitted. But what of the situation where the disabling prior marriage is dissolved by death or divorce at a time when the parties to the second marriage are living together as husband and wife? Nothing is gained by a later court decree that the second marriage is void. Once the disability is removed, therefore, if the parties continue living together, the proposed statute provides that the second marriage be deemed validated from the time the disability is removed.83

By validating the second marriage from the time of the removal of the disability by the dissolution of the prior marriage, all parties are protected. The prior spouse loses no property rights. And it seems a senseless formality to require that the parties go through another ceremonial marriage in order to validate their relationships.

The acceptance of the second marriage as valid without a new ceremony amounts to a minor breach in New Mexico's rejection of the concept of common-law marriages. But in rejecting that concept, the majority in In re Gabaldon's Estate said:

It is urged, as an unfortunate consequence of what we hold, that children of innocent parents may be bastardized. But, recalling the ease with which a mere adulterous relation may become, in the mouths of interested and unscrupulous witnesses, a common-law marriage, an opposite conclusion promises the same or worse results of illegitimacy and upsetting of titles.84

Where a ceremonial marriage has taken place, even though bigamous, validating

83. Pennsylvania and Wisconsin have provisions similar to the one proposed, although not quite as broad in scope. Pa. Stat. Ann. tit. 48, § 1-17 (Supp. 1961): "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."; Wis. Stat. Ann. § 245.24 (Supp. 1962).

84. 38 N.M. 392,396, 34 P.2d 672,675 (1934).
the relationship does not depend upon "the mouths of interested and unscrupulous
witnesses." Proof of the ceremony is no more difficult where the marriage is
bigamous than where it is not. The only additional proof relates to the death of
the prior spouse; or calls for proof that a divorce has been obtained. And if the
parties have lived together and continue to live together, society gains nothing
by denying recognition to the marriage's validity. Perhaps children have been
born of the bigamous relationship. Or they may be born after the disability is
removed. Why subject them to a public display of their parent's illegal marriage?
Even in the absence of children, since nothing is gained by branding the relation-
ship bigamous and void after the fact and after the prior spouse or spouses have
ceased to exist, the proposed statute validates the relationship as follows:

Section 5(B). A bigamous marriage shall not be annulled if the
parties thereto live together as husband and wife after the prior law-
ful marriage giving rise to the bigamy has been dissolved, either by the
death of the lawful spouse or by divorce.

Non-Consensual Marriages

By statute in New Mexico, marriage is established as a
civil contract requiring the free consent of competent parties. It is, of course, a
unique contract. Marriage, the most personal and private of human relationships,
paradoxically,—or, perhaps, because of its importance to individuals—is treated
in law as involving the highest degree of public interest and is subjected to
substantial state control, both in its creation and its dissolution.

The marriage status is not one which concerns the parties to the
ceremony alone. . . . The State of New Mexico, the children, and the parties . . . are all equally concerned. . . . The parties can-
not throw off their marital ties as they would a worn out pair of
shoes.87

For the same reason that marital ties are not permitted to be shucked off
casually, the marriage relationship itself should not be forced on the parties. If
a high degree of permanence is desirable in marriage, the law should not permit

Ann. § 25.2 (1957); Minn. Stat. Ann. §§17.01 (1947); Mo. Ann. Stat. § 451.010 (1952);
Stat. § 122.010 (1959); N.Y. Dom. Rel. Laws § 10; N.D. Cent. Code § 14-03-01 (1960);
the marriage to come into being unless the parties enter the relationship freely, seriously and with a reasonable understanding of their undertaking. The parties must be capable of performing the marriage contract, including the vital sexual aspects of it. Unless these factors are present, permanency will not result. And when these factors are absent, society should not and does not insist on enforcing the marriage contract. Annulment is the legal remedy supplying relief in such cases.

(a) Fraud Inducing Consent

Statutes in many states, following the case-law development, provide that marriages are annulable where the consent of one of the parties was induced by fraud. The fraud may take the form of an affirmative misrepresentation or may arise as the result of a failure to disclose a material fact. Whatever the


89. See cases cited notes 91, 92 infra.


91. E.g., Hyslop v. Hyslop, 241 Ala. 223, 2 So.2d 443 (1941): Concealment of lack of intention to consummate the marriage; Handley v. Handley, 179 Cal.App.2d 742, 3 Cal.Rep. 910 (1960): Secret intention not to live with husband; Rathburn v. Rathburn, 138 Cal.App.2d 568, 292 P.2d 274,277 (1956): "When therefore, the court concluded upon substantial evidence . . . that appellant at the time of the solemnization of the marriage, 'had the secret intention to refuse to consummate said marriage by permitting or engaging in reasonable or any sexual inercourse', and persisted therein, a judgment of annulment was justified."; Osborne v. Osborne, 134 A.2d 438 (D.C. Munic. Ct. App. 1957): While rejecting as a ground for annulment the concealment by the male of his lack of premarital chastity, the court held the nondisclosure of an intention not to live with the woman as man and wife was sufficient for annulment; Damaskinos v. Damaskinos, 325 Mass. 217, 89 N.E.2d 766,767 (1950): "The libellee married the libellant to get out of trouble with the immigration authorities, and he refrained from telling the libellant of this because he was afraid she might refuse to marry him if she knew
form of the fraud, the norm is to require (1) that it be such as to go to the essence of the marriage,92 and (2) that there be no condonation by a continued living together after the defrauded party learns of the deceit.93

Current legislation makes no effort to list or detail the elements which cause the fraud to be deemed to go to the essence of the marriage relationship.94 Details uniformly are left to the courts, and the courts have been rather rigid in requiring a showing of fraud of a most serious nature before decreeing annulment. Further, as approached by some courts, the concept of fraud going to the essence is treated as a variable, with a lesser degree of fraud being sufficient to annul an unconsummated marriage than is required where the marriage has been consummated.95 This variance or shading has nothing to do with a contractual

of it."; Watson v. Watson, 143 S.W.2d 349 (Mo.App. 1940): Female concealing the fact that she was afflicted with syphilis; Jerosolimski v. Jerosolimski, 8 App. Div. 2d 301, 188 N.Y.S.2d 272 (1959): Concealment by male of his impotency. See also Allen v. Allen, 126 W.Va. 415, 28 S.E.2d 829, 831 (1944): Annulment was refused here, but in the course of its opinion, the court said: "Uncommunicated intention of one party to a marriage not to engage in normal sexual intercourse with the other, following marriage, existing at its date, and subsequently carried into effect, is such fraud as will entitle the innocent party to an annulment of the marriage."

92. E.g., Williams v. Williams, 268 Ala. 223, 105 So.2d 676,678 (1958): Refusing annulment because the bill did "not allege fraud of such nature as to go to the essence of the marriage relation."; Handley v. Handley, 179 Cal.App.2d 742, 3 Cal.Rep. 910,912 (1960): "[A] marriage may be only annulled for fraud if the fraud relates to a matter which the state deems vital to the marriage relationship."; Douglass v. Douglass, 148 Cal.App.2d 867, 307 P.2d 674,675 (1957): "The test in all cases is whether the false representation or concealment were such as to defeat the essential purpose of the injured spouse inherent in the contracting of a marriage. Nothing short of this would justify an annulment. . . ."; Babis v. Babis, 45 Del. 496, 75 A.2d 580 (1950); Osborne v. Osborne, 134 A.2d 458,439 (D.C. Munic. Ct. App. 1957): "Although we are unable to find any Maryland cases in point, there are holdings to the effect that the fraud necessary to obtain an annulment must be of such character as to go to the very foundation of marriage."; Stegienko v. Stegienko, 295 Mich. 530, 295 N.W. 252,254 (1940): "Marriage may be annulled for fraud of any nature wholly subversive of the true essence of the marriage relationship."; Watson v. Watson, 143 S.W.2d 349 (Mo. App. 1940); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); Pisciotta v. Bucino, 22 N.J.Super. 114, 91 A.2d 629,630,631 (1952): "[T]he law has declared that annulment will be granted only when the fraud is of an extreme nature and goes to an essential of the marriage. . . ."; Diamond v. Diamond, 101 N.H. 338, 143 A.2d 109,110 (1958): The fraud must be "such that a 'persistent and united state of public mind' . . . demands that the parties should not be bound by the marriage contract."; Allen v. Allen, 126 W.Va. 415, 28 S.E.2d 829 (1944); Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920).

93. E.g., Curtis v. Curtis, 82 Cal.App.2d 965, 187 P.2d 921 (1947); Saunders v. Saunders, 49 Del. 515, 120 A.2d 160 (1956). In almost every case where a question of annulment for fraud is raised, there is an allegation either of a complete absence of sexual intercourse or an immediate cessation of it upon discovery of the fraud. See cases cited in notes 91, 92, 93 supra.

94. See statutes cited note 89 supra.

95. E.g., Rubenstein v. Rubenstein, 46 So.2d 602,603 (Fla. 1950): "[T]he primary point involved, and the one which should be first determined, is the consummation of the marriage, for it is established law that one who has become a party to that ceremony by fraud of the other party may secure annulment if the marriage has not been com-
analysis of marriage. If the defrauded party leaves the other immediately upon discovering the fraud, although after consummating the marriage, contract theory does not necessarily dictate that his position be weaker than the party who discovers the deceit immediately after the ceremony and participates in no postnuptual intercourse. The non-contractual personal nature of the relationship dictates the result. In addition, some courts enunciate a "clean-hands" doctrine, and establish different standards of fraud depending on whether or not the parties engaged in premarital sexual intercourse.

As noted, fraud sufficient to annul may be based either on a failure to disclose information or on affirmatively false representations. Colorado's statute may constitute a withdrawal from this, providing for annulment, as it does, where:

One party entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act or repre-

pleted by sexual intercourse."; Damaskinos v. Damaskinos, 325 Mass. 217, 89 N.E.2d 766,768 (1950): "We have examined the decisions of the courts of the State of New York, and they uniformly hold that fraud practiced upon one of the parties to marriage by the other affords a ground for annulment of the marriage, particularly where the marriage was not consummated. And it was said in Hanson v. Hanson, 287 Mass. 154,159, 191 N.E. 673,675 [1934] . . . , 'The trend of the authorities is that annulment of an unconsummated marriage may be secured more readily than in a case where the parties have cohabited.'"; Houlahan v. Horzepa, 46 N.J. Super. 583, 135 A.2d 232,234,235 (1957): "Though marriage becomes valid before consummation, still the nonconsummated status wherein unborn children and the community have not yet acquired the specially grave and weighty interest, is very different from the consummated one. Cohabitation ripens the marriage to a public concern and policy."; Brillis v. Brillis, 4 N.Y.2d 125, 149 N.E.2d 510,511 (1958): "It is settled, and indeed the proposition is not challenged, that, where one prospective spouse, in order to induce the other to enter a civil marriage, makes a promise of a subsequent religious ceremony, without intending to keep it, an annulment will be granted, at least where, as in the present case, there has been no consummation by cohabitation."; Pretlow v. Pretlow, 177 Va. 524, 14 S.E.2d 381,385 (1941): "The trend of the authorities is that annulment of an unconsummated marriage may be secured more readily than in a case where the parties have cohabited."

It should be remembered that the fact of consummation is but one element in many considered by the court in annulment cases.

96. E.g., Brandt v. Brandt, 123 Fla. 680, 167 So. 524 (1936); Boisclair v. Boisclair, 313 Mass. 442, 47 N.E.2d 921 (1943); States v. States, 37 N.J.Eq. 195 (1883); Marcley v. Marcley, 189 S.W.2d 8,9 (Tex. Civ. App. 1945): "It is obvious, and was unblushingly admitted by both, that on the first occasion of being out together they freely and of their own volition and without any preliminary threats, promises or other inducing considerations, engaged in that act [sexual intercourse]. By this means plaintiff came to know defendant as she was, and whatever she was, and if she was not in fact then or theretofore of easy virtue, or unchaste, or immoral, plaintiff led her into the category at a moment and under such circumstances that he should be forever estopped by every consideration of decency and fairness to invoke equity and the law of the land to free him from a normal and natural consequence of his own doing, especially as against a sixteen-year-old school girl." See also Mobley v. Mobley, 245 Ala. 90, 16 So.2d S (1943); Rhoades v. Rhoades, 10 N.J. Super. 432, 77 A.2d 273 (1950); Lindquist v. Lindquist, 130 N.J. Eq. 11, 20 A.2d 325 (1941).

97. See cases cited note 96 supra.
sentation goes to the essence of the marriage.98 (Emphasis supplied.)

By calling for a "fraudulent act or representation," the Colorado act seems to require an affirmative falsehood as a condition for annulment. The language certainly can be read this way. In a relationship as personal as marriage, a failure to disclose may be just as damaging as an outright falsehood.99 Thus, if annulment is proper when a woman, prior to the marriage, informs the man that she is pregnant and falsely says that he is the father, it is also proper if, in similar circumstances, she fails to mention the fact of pregnancy at all. And the failure to disclose prior mental illness may be much a basis for annulment as a specific denial of a history of mental illness. The legislation suggested for New Mexico spells out the legislative understanding that fraud going to the essence may result from a failure to disclose as well as from an affirmative misstatement.100

The Colorado provision presents another and more difficult question. It restricts annulment based on fraud to cases where the fraud was practiced by one of the parties to the marriage. What of the case of a marriage entered into as the result of fraud practiced by a third person, either on both parties or on one of them? Thus, a doctor, at the urging of the girl's father, and in order to induce the parties to marry, falsely represents to them that the girl is pregnant; and in reliance, the parties marry immediately. This marriage should be as annulable as if the girl herself had practiced the fraud. Or the man may be induced to enter the marriage as the result of deliberate falsehoods of the girl's mother, falsehoods for which the girl is in no way responsible, and of which she is unaware. In neither case would annulment be available under the Colorado provision. I believe it should be. The annulment remedy is not penal in nature. Its function is not to punish but to give effect to the concept of marriage as requiring the real consent of the parties; and it recognizes the unlikelihood of a permanent relation growing out of marriage induced by fraud. The source of the fraud would seem to make little difference. New Mexico's law should, and as proposed does, take account of this problem.101

Even more difficult than annulment based upon a third person's misrepresentation, is the problem of annulment based upon a third person's failure to disclose certain facts. Should a third person, in some cases, be under a duty to disclose? And assuming the duty exists, should annulment be granted where the third person fails to discharge it? There are reported annulment cases where the fraud allegation is based upon the parents' failure to disclose their child's prior history of mental illness.102 But all of these cases, of course, also involve

99. See cases cited note 91 supra.
100. Section 10, p. 281 supra.
101. Ibid.
the child’s failure to disclose. The proposed statute, therefore, limits third party fraud cases to those involving affirmative misrepresentation.

It is difficult to detail the various kinds of fraud which permit annulment. New Mexico has no case experience in the marriage-fraud area. And in other states, no consistent pattern is found. Each case is treated as being almost unique. Illustrative of situations where annulments have been granted are the following:

1. Inducing a woman to participate in a civil ceremony on the false promise of going through a religious ceremony later, the marriage never being consummated;
2. Inducing a woman to marry on a false pledge of love when, in fact, the man entered the marriage solely for the purpose of obtaining preferential immigration treatment as the husband of an American citizen;
3. A woman’s failure to disclose the fact that she never intended to adopt her husband’s name, to reside with him, to acknowledge the marriage publicly, or to provide the husband with the “usual companionship inherent in the marital state”;
4. Woman agreeing never to use contraceptives and then refusing to have intercourse without them after the marriage;
5. Man entering the marriage for the sole purpose of defrauding the woman out of her property, he being twenty-eight and she fifty-eight at the time of the marriage;
6. Inducing a man to enter marriage by representing that he was the father of her unborn child, when in fact another was the father;
7. Inducing a man to enter marriage by saying he was responsible for her pregnancy when in fact she was not pregnant.

In all of these cases, annulment was granted. On the other hand,

583, 135 A.2d 232 (1957); Friedman v. Friedman, 187 Misc. 689, 64 N.Y.S.2d 660 (Sup. Ct. 1946).
103. Ibid.
104. Section 10, p. 281 supra.
110. See cases note 3 supra.
112. See also, e.g., Hyslop v. Hyslop, 241 Ala. 223, 2 So.2d 443 (1941); Fraud based on husband’s lack of intention to consummate marriage; Douglass v. Douglass, 148 Cal. App.2d 867, 307 P.2d 674 (2d Dist. Ct. App. 1957): Fraud based on husband’s misrepresentation “that he was an honest, law abiding, respectable and honorable man” p. 675; Watson v. Watson, 143 S.W.2d 349 (Mo.App. 1940): Wife’s concealment of fact that she had syphilis; Jerosolimski v. Jerosolimski, 8 App. Div.2d 301, 188 N.Y.S.2d 272 (1959).
annulment has been denied in many cases involving rather similar allegations, and often, proof.\textsuperscript{113}

In at least one area, the failure to disclose a prior history of insanity, there has been a sharp division among the courts. This split is described in a Maryland case, \textit{Holland v. Holland,}\textsuperscript{114} as follows:

\textsuperscript{113} E.g., Williams v. Williams, 268 Ala. 223, 105 So.2d 676 (1958): Annulment denied on allegation that the wife, while vowing love, fidelity and obedience, married the man merely to secure his allotment check; Maslow v. Maslow, 117 Cal.App.2d 237, 255 P.2d 65 (2d Dist. Ct. App. 1953): Allegation of misrepresentation by the husband of his desire to have children, with a majority of the court sustaining the lower court's finding of lack of fraud; the dissenting judge felt that the woman had made out "a complete case by clear, positive and creditable evidence, untainted in any respect.

\textsuperscript{114} For cases supporting the views expressed in \textit{Holland v. Holland}, see, e.g., Keyes v. Keyes, 22 N.H. 553 (1851); Friedman v. Friedman, 187 Misc. 689, 64 N.Y.S.2d 660 (1946). For cases contra, see, e.g., Robertson v. Roth, 136 Minn. 501, 204 N.W. 329 (1925); Houlaheen v. Horzepa, 46 N.J.Super. 583, 135 A.2d 232 (1957): Throughout the country there is a difference of view as to the concealment of mental condition as a ground for annulment of marriage. One view is that concealment of insanity or diseased mental condition is not such ground. The theory for this view is that concealment or misrepresentation with respect to mental condition is of the same nature as misrepresentation of social status, temperament, or disposition, and does not go to the essence of the marriage. Furthermore, it is reasoned in support of this view, the law does not guarantee to every husband or wife a rational mental standard for the mind of the other spouse. This view is consistent with the declared law of our State which requires that the particular fraud go to the very
There are considered to be two main lines of decision on whether misrepresentation as to or concealment of insanity prior to marriage is fraud which will justify an annulment. Most States have been slow to find concealment of prior insanity a sufficient ground for dissolution of the marital status, some classing it as the category of misrepresentation as to social status, fame, fortune, temperament or disposition, and so as not going to the essence of the contract, although the decisions often turn actually on absence of fraud on the facts or ratification by cohabitation after knowledge of the facts. Other States, including New York, California and New Hampshire, take the position that the concealment of past insanity or a diseased mental condition may be such fraud as goes to the essence of the matter and may be ground for annulment. ... Generally in the States which recognize that concealment of prior insanity may constitute actionable fraud, the outcome depends on the facts—whether there was knowledge on the part of the afflicted spouse of the actual condition and its seriousness, and an intent to deceive, and no ratification by the innocent spouse after the facts are learned.¹¹⁵

We think the sound view is that concealment of prior insanity may amount to fraud invalidating a marriage.¹¹⁶

Misrepresentation by concealment of prior mental instability should be a proper basis for annulment in certain cases. In drafting proposed legislation for New Mexico, a decision had to be made whether to include specific reference to fraud resulting from the hiding of prior mental illness or to leave the matter to the good judgment of the courts. Because of the uncertainty concerning the specifics of annulment on this basis, the statute as drafted leaves the matter open. In the unlikely event that the courts equate misrepresentation concerning prior mental illness with false statements about social or financial status, the legislature can act to remedy the situation.

Due to the very complexity of the problem, Section 10, the fraud provision of the proposed act, refrains from spelling out the details of fraud required

¹¹⁵ Horzepa court seemed to distinguish between mere silence and affirmative misrepresentation, saying at page 235: "The decision did not, nor must this one, turn on the question of defendant's health, for the complaint was grounded on the fact that defendant fraudulently concealed her condition. The jurisdiction to relieve for fraud must be founded in deceitful suppression of the truth; the suppression must be wilful, with intent to deceive, and must go to the essential of the marriage relation. The defendant of her own volition made no statement as to her physical or mental condition, nor did the plaintiff request any information concerning the same. No proof was produced from which it could be concluded that defendant deceitfully concealed her prior confinement. Silence resting in honest belief of things false is not actionable at law or in equity."; Allen v. Allen, 85 N.J. Eq. 55, 95 Atl. 363 (1915).

for annulment. It follows the pattern established in other states and leaves the development of the concept to the courts as they deal with concrete cases.

(b) Contractual Purpose

(i) Jest or Dare

Consent to marriage, as the Australian statute provides, must be "real consent." If the parties participate in a marriage ceremony as a joke or on a dare—neither party seriously intending to enter a permanent relationship—society gains nothing by insisting that the marriage is valid. Certainly, a permanent relation is unlikely to result. And if the parties do not carry their "joke" to completion by consummating the marriage, the courts should be permitted to annul it at the request of either party. Colorado is the only state specifying the "jest-dare" case as a statutory ground for annulment. Other states permit annulment of "jest-dare" marriages as a part of the case-law development.

Colorado provides for annulment, in the absence of later condonation, where "one or both of the parties entered into the marriage as a jest or dare." Where both parties participate in the jest or dare, it seems clear that either should be permitted to obtain a nullity decree. The case is not all as clear, however, when only one of the parties is joking. Under general contract theory, if, on the basis of the objective manifestations, the non-jesting party is not unreasonable in believing the other to have acted seriously, the contract is deemed valid.

119. E.g., Davis v. Davis, 119 Conn. 194, 175 Atl. 575 (1934); Annulment granted; "The essential claim of the plaintiff is that the parties never were in fact married despite the ceremony which was performed because of the lack of real consent on the part of either to enter into that relationship."; McClurg v. Terry, 21 N.J. Eq. 225,227(1870): Annulment granted; "Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse company and themselves. If this is so, there was no marriage."; Meredith v. Shakespeare, 96 W.Va. 229, 122 S.E. 520 (1924) : Syl. by court: "Courts of equity, independently of statutes relating to divorce and separation, have inherent power and jurisdiction to annul marriages entered into in the spirit of jest or joke with no intention of the parties of becoming husband and wife or of assuming the duties and obligations or of acquiring any of the rights pertaining to that status."; Syl. by court: "And the fact that one of the parties to such marriage may afterwards elect to treat the marriage as valid and claim the benefits thereof will not deprive the other party to the agreement of his or her right to have the marriage set aside." See United States v. Lutwak, 195 F.2d 748,753,754 (7th Cir.), aff'd, 344 U.S. 604 (1952). Contra, Hand v. Berry, 170 Ga. 743, 154 S.E. 239,240 (1930): "A proper construction of the pleadings show that although the marriage was agreed upon and took place in a spirit of levity and joke, nevertheless there was no fraud on the part of either party as against the other. The pleaded facts of the case, therefore, fail to disclose any informality or any other cause for setting aside the marriage."
121. E.g., Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516 (1954). "Expressions in promissory form that are intended only as a jest or banter and that either are in fact so
"[T]he law will . . . take the joker at his word, and give him good reason to smile." 122 Where the non-jesting party is unreasonable in believing the other serious, general contract law would operate to release the jesting party from the contract. 123 Is this distinction valid as applied to marriage contracts?

When one party to a ceremonial marriage reasonably believes the other to be serious, it would seem that the marriage should be held valid if the non-jesting party so wishes. But since the serious party, in most cases, would not have participated in the ceremony had the jesting attitude of the other been known, a strong argument can be made to the effect that the serious party should be permitted to obtain an annulment if he or she desires it. Such an option, however, carries with it the possibility of fraudulent collusion between the parties. If a party is reasonable in believing the other serious, the objective manifestations will be such as to indicate a lack of jesting to the court. Proof of the jest, therefore, in large part will be based upon the subjective feelings of the jesting party. And if both parties desire the annulment, collusion may result, based upon false admissions of jesting. Marriage is too serious a business to permit annulment on the basis of testimony concerning a party's subjective feelings. Despite the danger, however, I believe the courts competent to deal with such attempts at fraud. As proposed, therefore, the non-jesting party is given an option to hold the other to the marriage or to obtain an annulment. The problem of proof is left to the courts' discretion.

Applying general contract theory to the case of a jesting party whom the other unreasonably believes serious, annulment would be available on the petition of either party. Such a result seems proper. One party is joking. The other is unreasonable in thinking he is serious. The unreasonable party should not be permitted to hold the other merely because the former is unable to comprehend the joke. The jesting party is not really consenting to the marriage and the other should understand this. Either party should be permitted to bring the action.

Under the Colorado statute, the jest or dare is termed a "condition" existing at the time of marriage, 124 and the party seeking the annulment "must be aggrieved by the condition." 125 The application of this provision to the jest cases discussed is unclear. Where both parties are jesting, is either "aggrieved" by the jest? Where one party jests and the other reasonably believes him serious, I assume the "aggrieved" party would be the non-jesting party—although this is not wholly clear. And where one jokes and the other unreasonably believes him serious, it may be that the jesting party is the only one "aggrieved." The Colo-

understood or would be so understood by a reasonable person are not operative as either an offer or an acceptance. It is otherwise, however, if the jesting element is so well concealed that the expression is reasonably understood to mean what it appears to mean." 1 Corbin, Contracts § 34 (1950).


123. See note 121 supra.


rado provision, whatever construction finally is given it, leaves too many unanswered questions to permit its use as a model for New Mexico. The suggested statutory section details the proper parties as follows:

Section 8(A). A marriage is annulable in an action brought by either party 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 thereafter live together as husband and wife.

(B) A marriage is annulable in an action brought by the party who entered the marriage with a serious contractual purpose if the other party entered the marriage as a jest or on a dare and this fact was not known, nor should it have been known, to the other party, provided the parties do not thereafter live together as husband and wife.

(ii) Intoxication or Drugs

The absence of real consent also may appear where one or both of the parties were so under the influence of drink or drugs as to be unaware of the identity of the other party, or even that a marriage was taking place. While Colorado is the only state with a specific provision for this case, couched in terms of inability to consent voluntarily, many states provide for annulment because of a "want of understanding" of one of the parties. The condition contemplated here is a "want of understanding" which is externally produced by alcohol or drugs.

In this area, as in others, the Colorado statute calls for annulment on petition.

126. The Australian Matrimonial Causes Act declares a marriage void where one of the parties "is mistaken as to the identity of the other party, or as to the nature of the ceremony performed." Act No. 104 of 1959, § 18 (d).


129. See Dobson v. Dobson, 86 Cal. App. 2d 13, 193 P.2d 794 (1948): Annulment ordered on the ground that plaintiff was so inebriated at the time of the marriage that "he did not understand or know the nature of the ceremony or its legal effects."; Mahan v. Mahan, 88 So.2d 545, 548 (Fla. 1956): Reversed lower court's refusal to grant annulment, saying that both parties "were so thoroughly and completely dethroned of their mental faculties by the use of alcohol that they were not conscious of what they were doing and that they were mentally incapable of forming the intent to enter into the contract which was essential to its validity." Christoph v. Sims, 234 S.W.2d 901 (Tex.Civ. App. 1950): Reversed lower court's granting of annulment because of lack of evidence showing necessary extent of intoxication; in setting up a test for such cases, the court
of the party "aggrieved" by the condition.\textsuperscript{130} The identity of the aggrieved party is as unclear here as in the jest-dare case. When both parties are under the influence of drink or drugs to the extent of being unaware of what is taking place, and the marriage is not consummated by later sexual intercourse, the marriage should be annulable on the initiative of either party. If one party is in full control of himself and realizes that the other is in the condition contemplated by the statute, the case clearly is one for annulment. I assume that the party under the influence of drink or drugs would be the "aggrieved" party under the Colorado provision. What of a petition by the sober party who realized that the other was unaware of what was happening? I doubt that such party would be considered "aggrieved." In essence, he tricked the other into marriage. Despite this, in the absence of ratification by consummation, it seems in the interest of society to end the marriage as quickly as possible. Punishment is not the goal and a permanent relationship is unlikely to result from such a marriage. Thus, the proposed statute permits such "non-aggrieved" party to petition for annulment.

Finally, the unlikely case may arise where one party was under the influence of drink or drugs to such an extent that he was unaware of the identity of the other party or the fact that he was participating in a marriage ceremony, while the other party was sober but unaware of the disability—whether reasonably or unreasonably. Here too, finding the "aggrieved" party would be most difficult. Because of the desirability of ending the relationship as rapidly as possible and the absence of any desire to punish, the proposed statute permits either party to petition for annulment.

(c) \textit{Duress}

If the father of the bride induces a man to marry his daughter by prodding him with a shotgun, there can be little dispute that such a marriage should be annulable, assuming, of course, that the happy couple does not consummate the marriage after the shotgun has been removed. And the same result should be reached where the bride herself carries the shotgun, or where the father threatens both parties. Real consent is obviously lacking in each of these cases. That a permanent family relationship will result is dubious.

Despite the apparent propriety of annulment where the pressure is applied by a non-party, \textit{i.e.}, the bride's father, there is some question whether physical

pressure exerted by a third person is sufficient to permit annulment. It is difficult to understand the basis of the distinction, for the lack of real consent is identical from whatever source the pressure is applied. The legislation proposed for New Mexico follows the Colorado pattern and makes it clear that duress will operate to permit annulment from whatever source it comes.

Most legislation merely refers to marriage induced by force and makes no attempt to define the extent of the required force. The court-developed test in the "shotgun" marriage seems to require "a great fear of bodily harm" coupled with the fact that the pressure "must clearly have dominated throughout the transaction to such an extent that . . . [the party] could not and did not act as a free agent."

131. "Under the general rule of the common law as applied to duress necessary to avoid a marriage, it is necessary that the duress be exercised by the other party to the marriage, or at least that such party be cognizant of the duress, and knew that the complaining party was acting under the fear induced by the duress." Shepherd v. Shepherd, 174 Ky. 615, 192 S.W. 658,660 (1917): "To constitute such duress as will vitiate the marriage, the influences must have been brought to bear by the other contracting party or with his procurement." Campbell v. Moore, 189 S.C. 497, 1 S.E.2d 784,792 (1939). For case of annulment based solely on third party duress, see Cannon v. Cannon, 7 Tenn. App. 19 (1928).

132. Section 7, p. 280 supra.


134. Phipps v. Phipps, 216 S.C. 248, 57 S.E.2d 417,420 (1950). See Owings v. Owings, 141 Md. 416, 118 Atl. 858 (1922): "The cases hold that the duress must exist at the time of the actual ceremony, so as to disable the one interested from acting as a free agent, and protest must be made at that time." p.859; "The violence or threats must be of such a character as to inspire a just fear of great bodily harm." p.860; Campbell v. Moore, 189 S.C. 497, 1 S.E.2d 784,792 (1939); Shepherd v. Shepherd, 174 Ky. 615, 192 S.W. 658,665 (1917): "[T]he appellee having had antenuptual sexual relations with the appellant and the cause of her pregnancy before he would be entitled to be relieved from the marriage . . . , it would be necessary to prove by very convincing evidence that he consented to the marriage solely from fear of bodily harm at the hand of appellant's father, because it is to be presumed that he entered into the marriage from the moral obligation resting upon him to repair the wrong he had done her . . . If there were no circumstances in evidence except the father of the appellant armed with a pistol, which he was carrying in his bosom, with his hand upon it, and staying with appellee until the marriage ceremony was performed, it might be inferred from that the appellee's consent to the marriage arose from bodily fear." The court, however, found that the appellee had not taken advantage of several opportunities to protest to third persons. See
Beyond physical duress, the field seems to be in utter chaos. The most common "duress" allegation aside from physical force involves pressure brought by threatened or actual legal action growing out of premarital sexual relations. "It has been held in numerous cases that a marriage entered into in order to avoid the consequences of threatened criminal prosecution growing out of pre-nuptual relations between the parties may not be annulled."135 Some courts add that annulment would be proper if the threatened legal action was maliciously asserted or completely without basis in fact.136 I have found only one case where an annulment was obtained on the sole ground of duress resulting from actual or threatened legal action. It involved a sixteen-year-old boy who was threatened with prosecution in a situation where he had never had intercourse with the girl.137 In view of this, and in view of the fact that most such cases involve the allegation of paternity of an unborn child—an allegation which, if untrue, permits annulment for fraud under the proposed statute—I suggest that New Mexico's statute exclude from the concept of duress anything but physical duress.138

(d) Lack of Capacity to Consent

Marriage being a consensual arrangement, an annulment may be obtained also, Fluharty v. Fluharty, 38 Del. 487, 193 Atl. 838 (1937), where an annulment was denied because the coercion fell short of physical force. Contra, Cannon v. Cannon, 7 Tenn. App. 19, 25 (1928): "It is not absolutely necessary that the duress or force must be exerted at the same moment the contract is entered into so long as 'an influence is exerted on one so as to overcome his will and compel a formal assent to an undertaking. . . .'" Here, the girl's father threatened to kill a twenty-year-old man afflicted with a nervous condition causing him to twitch. See also, Houle v. Houle, 100 Misc. 28, 166 N.Y. Supp. 67 (1917).

136. E.g., Smith v. Saum, 324 Ill. App. 299, 58 N.E.2d 248,249 (1944): "A marriage entered into by a man in order to secure his release from arrest on a charge of seduction or bastardy will not be annulled on the ground of duress, where the charge was not made maliciously or without probable cause."; Harrison v. Harrison, 110 Vt. 254, 4 A.2d 348 (1939). See also, Markley v. Markley, 189 S.W.2d 8,9 (Tex. Civ. App. 1945): "[I]t is well settled in this State that such threats to prosecute one admittedly guilty do not authorize judgment annulling a marriage."

137. Shoro v. Shoro, 60 Vt. 268, 14 Atl. 177 (1888). A New York court granted an annulment to a girl who married a man because of his threat to tell her father of certain liberties he had been permitted to take with the girl, liberties which apparently merely amounted to petting and did not include sexual intercourse. The girl's father suffered from a heart condition and she feared that the information would kill him. Warren v. Warren, 199 N.Y. Supp. 856 (Sup.Ct. 1923). New York, because of its restrictive divorce laws, is much more liberal than other states in granting annulment. For illustrative cases in which annulment was denied where the duress alleged involved threatened legal action, see Smith v. Saum, 324 Ill.App. 299, 58 N.E.2d 248 (1944); Day v. Day, 236 Mass. 362, 128 N.E. 411 (1920); Zeigler v. Zeigler, 174 Miss. 302, 164 So. 768 (1935); Rogers v. Rogers, 151 Miss. 644, 118 So. 619 (1928); Markley v. Markley, 189 S.W.2d 8 (Tex.Civ.App. 1945); Harrison v. Harrison, 110 Vt. 254, 4 A.2d 349 (1939). For an illustrative case where sufficient physical duress was found, see O'Brien v. Eustice, 298 Ill.App. 510, 19 N.E.2d 137 (1939).

138. Section 7, p. 280 supra.
if either party lacks the capacity to consent. The usual bases for annulment because of incapacity to consent arises (1) from the lack of age; and (2) from the lack of mental capacity. In the latter case, a very real inability to consent is present. Lack of capacity based on age, however, is a legal disability based on a fiction often having no connection to reality. On the day before reaching the age of consent, the parties are incapacitated. On the next day, they acquire capacity. While grouped under the single heading of incapacity, the two areas must be discussed and treated separately, for each presents entirely different problems.

(i) Incapacity Due to Age

Currently in New Mexico, a male under twenty-one and a female under eighteen must "obtain the consent of his or her parents, guardian or of the person under whose charge he or she is."\textsuperscript{139} The consent requirement may be satisfied by "the presence of those parties, or [by] . . . a certificate in writing, authenticated before a competent authority."\textsuperscript{140} Persons otherwise authorized to officiate at marriage ceremonies are prohibited from knowingly participating in a marriage in the absence of such consent where one of the parties is under the required age.\textsuperscript{141} And even where such consent is obtained, the marriage is not to be celebrated if the male party is under eighteen or the female under sixteen.\textsuperscript{142} Whatever the age of the parties, a marriage legally may be entered into if approved by the district court "in settlement of suits for seduction or bastardy" or where the female is pregnant.\textsuperscript{143}

Marriages involving an underage party who has not obtained the necessary consent currently may be annulled in an action brought "by the minor, by the next friend, by either parent or legal guardian . . . or by the district attorney."\textsuperscript{144} A party to such a marriage who is over the age of consent is prohibited from bringing an annulment action.\textsuperscript{145} If the parties to a marriage involving a minor party "live together until [the minor arrives] . . . at the age under which marriage is prohibited," the marriage is "deemed legal and binding."\textsuperscript{146}

Should a new annulment law change the basic scheme currently in force? The age requirements as they currently exist are consistent with laws elsewhere\textsuperscript{147} and no change seems called for. Beyond this, however, in order to

\textsuperscript{139} N.M. Stat. Ann. § 57-1-5 (1953).
\textsuperscript{140} Ibid.
\textsuperscript{141} N.M. Stat Ann. § 57-1-6 (1953).
\textsuperscript{142} Ibid.
\textsuperscript{143} Ibid.
\textsuperscript{144} N.M. Stat. Ann. § 57-1-9 (1953).
\textsuperscript{145} Ibid.
\textsuperscript{146} Ibid.
establish a rational statutory treatment of annulments, certain changes seem desirable. Currently, the consent requirement may be satisfied either by the presence of the proper party at the ceremony, or by an authenticated writing.\textsuperscript{148} Such consent, apparently must be given prior to the ceremony. I suggest that if a parent may consent prior to the fact, he should be given a similar power to consent after the marriage has taken place. Thus, if a twenty-one-year-old man and a seventeen-year-old girl run off and get married without the consent of the girl’s parents, the marriage is currently annulable unless the parties live together until the girl celebrates her eighteenth birthday. If her parents had consented before the marriage, there could be no annulment. But what if the couple return home immediately after the marriage and they receive parental blessing? This marriage should be no more annulable merely because the “blessing” or consent was given one day later. As proposed, the statute provides for such postnuptual validation by parental consent.\textsuperscript{149} To avoid problems arising in proving the fact of the later consent, the proposal requires that postnuptual parental consent be in writing and be authenticated.

Another suggested modification, a slight one, relates to the proper parties to bring the annulment action. Currently, the minor, a parent or guardian, the next friend or the district attorney may petition for annulment.\textsuperscript{150} In cases where the male is eighteen or over and the female sixteen or over, the district attorney would seem to have no proper role to play. Parental consent validates such marriages, and the petition for annulment should be left in the hands of the private parties involved—the minors, their parents, guardian or next friend. Since the state has granted the parents the right to consent, the state, in the person of the district attorney, should not be permitted to obtain an annulment against the wishes of both the minors and the parents.

Where the marriage involves a boy under eighteen or a girl under sixteen, a different problem is presented. Here the state does not permit the parents to consent,\textsuperscript{151} and the district attorney should be given the power to proceed to have the marriage annulled in order to prevent a flaunting of the state’s policy. But what of the marriage of a seventeen-year-old boy and a fifteen-year-old girl who live together until the boy is eighteen and the girl is sixteen? Here, again, the power to initiate the annulment proceeding should be left in the hands of the private parties involved and the district attorney should be excluded as a proper party. With these changes, and with the addition of a limitation period, existing law should be permitted to stand.

\textsuperscript{149} Section 12(B), p. 282 \textit{supra}.
\textsuperscript{151} N.M. Stat. Ann. § 57-1-6 (1953).
Throughout the country varying statutory phrases are used to describe the mental conditions which, if they exist at the time of the marriage, are deemed sufficiently serious to permit annulment. Lunacy, idio[152]cy, feeble-mindedness, imbecility, insanity[156] and other phrases are used.[157] Many statutes, including Colorado's,[158] refer to a mental incapacity to consent.[159] Others require only that the condition exist at the time of the marriage.[160] There are many models from which New Mexico can choose.

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Conceptually, where a marriage is annulled because of the mental condition of one of the parties, the absence of the legal ability to consent is the objectionable feature. Colorado points this up by its reference to mental incapacity to consent voluntarily. In reality, however, the reason for the annulment would seem to be the lack of ability to comprehend the nature of the marriage relationship. Section 14 of the proposed law, therefore, is couched in terms of a party being "mentally incapable of understanding the nature of the marriage contract." The phrasing would seem to accomplish approximately the same result as the Colorado consent provision. It is suggested only because it seems closer to reality than language couched in terms of consent. Under the proposed section, the court is free to exercise its judgment and discretion in dealing with the varying shades of mental incompetence.

In this area, as in others, Colorado permits only the "aggrieved" party to bring the annulment action. And again, its applicability is difficult to comprehend.
Certainly the party suffering from the mental disability, or a guardian acting for him, should be permitted to petition for annulment.\textsuperscript{165} If the other party was unaware of the lack of capacity, he, too, should be permitted to initiate annulment proceedings.\textsuperscript{166} And even a party who realized at the time of the marriage that the disability existed, while he should not be permitted to take advantage of the other, should be permitted to petition for annulment\textsuperscript{167} in the absence of any postnuptual intercourse. Nothing is gained by prohibiting an action by such a "non-aggrieved" party. The marriage is not one which society desires to perpetuate.

The incapacitated party, or his guardian, should be free to petition for annulment even after consummation unless the parties continue to live together as husband and wife at a time when the incapacitated party recovers to the point of truly understanding the nature of the marriage contract.\textsuperscript{168} The party who enters the marriage without being aware of the other's incapacity should also be permitted to request annulment after consummation if he leaves the other immediately upon discovering the incapacity. And, of course, a relatively short


\textsuperscript{166} Several states limit the right to bring the action by restricting the moving party to the incapacitated party or the guardian of such party. \textit{E.g.}, Alaska Comp. Laws Ann. § 56-5-5 (1949); Ind. Ann. Stat. § 44-106 (1952); Okla. Stat. Ann. tit. 12, § 1283 (1961); Ore. Rev. Stat. § 107.020 (1959); Wash. Rev. Code § 26.04.130 (1959). Statutes in California, Idaho, Montana and North and South Dakota, in addition to providing for an action by the "injured" party, specifically refer to an action by the incapacitated party or his guardian. Note 164 \textit{supra}.

\textsuperscript{167} See Del. Code Ann. tit. 13, § 1551(5) (1953): "Where the party compos mentis is the applicant, such party shall have been ignorant of the other's insanity at the time of the marriage..."; N.J. Stat. Ann. § 2A:34-1(d) (1952): "[W]here the party capable of consent is the applicant, such party shall have been ignorant of the other's incapacity at the time of the marriage..."; Wis. Stat. Ann. § 247.02(5) (Supp. 1962): "[P]rovided that where the party compos mentis is the applicant, such party was ignorant of the other's insanity or mental incompetence at the time of the marriage..."


time period after the marriage should be permitted for the bringing of the action by any but the incapacitated party or his guardian. Section 14 of the proposed act attempts to accomplish all of these goals.

**Impossibility of Performance**

Impotency, currently listed as a divorce ground in New Mexico, is a statutory ground for annulment in many states. Much of the legislation dealing with the impotency speaks in terms of a physical inability to perform the sex act incident to marriage. The emphasis on "physical" has raised some difficulty where the incapacity is very real but is based on mental rather than physical causes. Thus, a doctor may find no physical reason for the inability to copulate, but may find that the disability truly exists. In the few instances when the issue has come before the courts, they have accepted incapacity resulting from a mental condition as being embraced in the statutory reference to physical disability. To assure this recognition, for the incapacity is as real in the one


172. E.g., Rickards v. Rickards, 166 A.2d 425, 426 (Del. 1960); "We think this statutory ground for annulment of marriage is an incurable physical inability on the part of one spouse to copulate with the other. This being so, it follows that whether the inability stems from physical or mental defects, provided in either case that the resulting condition is incurable, the requirement of the statute is met. We think this conclusion inevitable as to the meaning of the statute, and we note that similar statutes in other states have been similarly construed."; Kaufman v. Kaufman, 164 F.2d 519, 520 (D.C. Cir. 1947); "The courts have long recognized the fact that impotence is frequently the result of psychogenic causes. Indeed one medical authority states that most cases of impotence seen by urologists are of the psychic type rather than the result of physical defects. The
case as in the other, the proposed statute for New Mexico specifies both.

Many states require that the disability be "permanent" or "incurable"—a prognosis a doctor rarely can make honestly. Colorado refers to the inability existing at the time of the marriage and makes no reference to its being either "physical" or "permanent." It seems obvious that the Colorado provision requires more than a temporary disability which will pass in a week or a month. Rationally, the concept of incurability must be taken to mean "unlikely to be cured" or "likely to be permanent." For New Mexico, I urge that the statute recognize the realities by describing impotency sufficient for annulment as being more than a temporary disability rather than as being incurable or permanent. The suggested phrase leaves the duration of the disability question to the discretion of the courts.

Either party to a marriage where one of them is impotent should be permitted to petition for annulment. If one or both is unable to perform the sex act, the marriage is doomed from the beginning and road blocks should not be put in the way of annulment. Here again, the Colorado "aggrieved" party test seems undesirable.

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same authority says that in some such cases individuals who have imagined and convinced themselves that they are impotent may by the force of such mental conviction be unable to perform the sexual act although in reality nothing but their state of mind prevents them from doing so. In diagnosing such a subjective condition the physician must necessarily rely largely upon the history and symptoms described to him by the patient. Accordingly it was proper for Dr. Klein to base his diagnosis as to the defendant's impotence upon the history and symptoms which the later related to him and the trial justice should have permitted him to answer the question propounded to him. Hiebink v. Hiebink, 56 N.Y.S.2d 394 (Sup. Ct.), aff'd, 269 App.Div. 786, 56 N.Y.S.2d 397 (1945).

173. See statutes in California, Delaware, Idaho, Montana, New Jersey, North and South Dakota, Texas, West Virginia and Wisconsin, Note 171 supra.


175. See Helen v. Thomas, 150 A.2d 833, 835 (Del.Super.Ct. 1959): "Although Dr. Ingram's testimony was not absolute in this respect, I believe it was as positive as a psychiatrist can be under the circumstances in this age of scientific achievement. The essence of his testimony is that the defendant should probably be classed as a physically incurable impotent, with the understanding, however, that while there is life, there is hope, and that from a doctor's viewpoint, no disease can be considered completely incurable."


Annulment of Foreign Marriages

Assuming proper jurisdiction, what standards should be applied in annulment suits involving out-of-state marriages? New Mexico, by statute, has adopted the widely accepted general rule that a marriage valid where contracted is valid everywhere. Section 57-1-4 of the 1953 Compilation reads as follows:

All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall likewise be valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.

Applying the statute, it is likely that New Mexico would recognize as valid an Alabama marriage involving an Alabama couple where the boy was seventeen and the girl fourteen, assuming their parents have consented as required in Alabama. By New Mexico law, parental consent could not validate the marriage of parties that young. Since the marriage is valid in Alabama, however, the statute would seem to call for the recognition of its validity. Would the same result be reached if a New Mexico couple of the same age and with parental consent, in order to avoid New Mexico's prohibition, went to Alabama and were married there? There is no New Mexico decision on point. In other jurisdictions having the same general rule, the courts, at times, have refused to accept such a marriage as valid. Whenever a local couple marries elsewhere and the marriage is valid where contracted but invalid locally, a difficult question of policy is raised.

Other problems may arise under the general statutory rule. The treatment of polygamous marriages, valid where contracted, is open to some doubt. New Mexico would be unlikely to accept the marriage as valid if the man and his several wives moved to New Mexico. A different result might be reached, however, if the question of property rights in New Mexico land was raised in settling the man's estate.


182. See In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953): An uncle-niece marriage took place in Rhode Island where such marriages between parties of the Jewish faith were valid; after the birth of six children the wife died and the question presented
marriage which was valid where contracted.\textsuperscript{183} Traditionally, the general rule enunciated in New Mexico's statute is limited by the concept that the out-of-state marriage valid where contracted will not be recognized if it violates some strong public policy of the forum.\textsuperscript{184} The extent of the public-policy limitation currently is an open question in New Mexico.

Another open question concerns the converse of the statute. Thus, will a marriage invalid where contracted necessarily be invalid in New Mexico? If first cousins are married in Arkansas where such marriages are prohibited,\textsuperscript{185} and the couple later moves to New Mexico, will the marriage be deemed invalid? And what of the case where a New Mexico couple, first cousins, leave the state, are married in Arkansas, and return to New Mexico immediately after the ceremony? Or the court might be faced with a case involving a Texas couple being married there in violation of the miscegination statute\textsuperscript{186} and then moving to New Mexico. Would New Mexico recognize the marriage or would it reject it?

Colorado, by statute, adopts the view that a marriage void where celebrated is void in Colorado.\textsuperscript{187} I would urge, however, that, whatever the current state of the law, New Mexico establish a statutory rule which accepts as valid any marriage, wherever performed, which would have been valid had it been performed in New Mexico. If the couple moves to New Mexico after the marriage, and the marriage satisfies New Mexico's requirements, the fact of its invalidity at the place of celebration seems irrelevant. And certainly a New Mexico couple married outside the state should be deemed legally married if there is no New Mexico prohibition, whatever the state of the law where the ceremony took place. If the Colorado approach were adopted, New Mexico first cousins who marry in Arkansas and immediately return home would be held to have entered an invalid marriage, a result which is inconsistent with New Mexico policy.

In addition to the new rule that a marriage will be treated as valid in New Mexico if valid by New Mexico law without regard to the law of place of cele-

\textsuperscript{183} See \textit{In re May's Estate}, 305 N.Y. 486, 114 N.E.2d 4 (1953).


ANNULMENT OF MARRIAGES IN NEW MEXICO

In conclusion, I suggest that the present statutory rule be continued and that marriages valid where performed be deemed valid in New Mexico whether or not valid by New Mexico law. Thus, the only out-of-state marriages deemed invalid in New Mexico will be those which are invalid where performed and which would be invalid if performed in New Mexico. Such a combination of legislative treatment of out-of-state marriages carries forward a policy of validating marriages when possible where such action is not wholly unreasonable. Section 16 of the proposed statute would accomplish this as follows:

Section 16(A). New Mexico recognizes as valid all marriages valid by the law of the place of contracting and all marriages which would have been valid had they been contracted in New Mexico, whatever their status at the place of contracting.

(B) A marriage entered into outside of New Mexico is deemed annulable in this state only if the marriage

(1) is invalid by the law of the place of contracting; and

(2) would have been invalid had it been contracted in New Mexico.

Miscellaneous

Several other problems are covered in the proposed statute. Following a pattern established in several other states,\textsuperscript{188} and enlarging on the policy expressed in New Mexico's current treatment of issue of incestuous marriages and those involving minors,\textsuperscript{189} all children of annulable marriages are declared legitimate.\textsuperscript{190} Certainly the children should not be made to suffer for their parent's misadventures. Further, Section 19 details the powers of the district courts as regards child custody and support and the division of marital property.\textsuperscript{191} No hard and fast rules are laid down. In all matters, the court is given discretion to solve the problems presented as seems most equitable in view of the circumstances of each case.

Finally, the jurisdictional sections are taken almost verbatim from an act passed by both houses of the New Mexico Legislature during the 1960 session.\textsuperscript{192} In large part, the bill carried out the views expressed by the writer in Part I of this series. Governor Mechem vetoed the bill on the stated ground that


\textsuperscript{190} Section 15, p. 284 \textit{supra}.


\textsuperscript{192} Twenty-Fifth Legislature, H.B. 299.
ex parte annulment proceedings would be unfair to the out-of-state party. In this respect, I would urge that ex parte annulments cannot be distinguished from ex parte divorces where substituted service has a long tradition. The settlement of the status of the parties would seem of sufficient importance to New Mexico to overcome any uneasiness concerning the fairness of out-of-state service. Everything reasonable must be done to give adequate notice. Constitutionally, the expansion of out-of-state service in cases traditionally considered in personam has been validated by the Supreme Court of the United States—an expansion which has been recognized in other areas by the New Mexico Legislature. I believe that the proposed jurisdictional sections are fair to all parties.

Conclusion

The purpose of both parts of this article has been to point up the deficiencies in New Mexico's annulment law and to suggest possible statutory solutions. That the deficiencies exist seems clear. That the suggested solution is proper is less clear. Whatever treatment accorded the proposed statute presented in this article, serious consideration should be given the problem of annulments in New Mexico and some form of legislative solution found.

193. Document of the Legislative Council, giving the Gubernatorial reason for vetoing House Bill 299: "Permits service on parties to a marriage without personal notification, which could result in serious hardship."


195. For an analysis of this expansion, see Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, 25 U. Chi. L. Rev. 569 (1958).