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The Voidable Void Marriage in Wisconsin

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THE VOIDABLE VOID MARRIAGE IN WISCONSIN

I. INTRODUCTION

Tile XXIII of the Wisconsin Statutes is a revised code on marriage and divorce which has been in effect in Wisconsin since January 1, 1960.[1] It is entitled The Family Code and it specifies the procedures and requirements which must be met to contract a valid marriage in Wisconsin. Certain marriages which do not meet these procedures and requirements are declared void. However, many of the allegedly void marriages are not in fact absolute nullities, a seemingly incongruous result in light of section 245.002(3) which states that, "In this title 'void' means null and void and not voidable."[2]

In exact language, "void" is equated with that which is an absolute nullity; it has a meaning separate and distinct from "voidable." Applying these terms to the marriage contract, they are in a sense antonymous; and when they are not used precisely, they tend to obscure the legislative intent. This has in fact happened in The Family Code where certain marriages specifically declared void by one section are made merely voidable by another. As will be shown, this legislative failure to dichotomize these terms permits the existence of possible inequities. It is the purpose of this comment to point out these inequities by examining the allegedly void marriages and by considering the questions which the Code leaves unanswered regarding the status of the parties to these marriages.

II. AVOIDANCE OF THE MARRIAGE IS CONTROLLED BY STATUTE

Any examination of the marriage laws of a jurisdiction of necessity requires a consideration of both the statutory law and the case law of the jurisdiction. Therefore, before proceeding further, it is necessary to place these referents in their proper perspective.

In Wisconsin, the action for annulment is the proper remedy to set aside a void marriage.[3] Of annulment the court has stated:

> [W]e deem it proper to say that we can see no valid reason for holding otherwise than that the jurisdiction and power to annul is . . . exclusively of statutory creation and neither rest upon nor can be extended by resort to the general equitable powers inherent in the circuit court as a court of equity.[4]

The courts will look exclusively to the statutes in determining the basic question of whether a marriage can be annulled. It is not the function of the court to do equity between the parties; it is instead their func-

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[1] WIS. LAWS 1959, Ch. 595.
[2] WIS. STAT. §245.002(3) (1963). Unless otherwise stated, all subsequent statutory references will be to the 1963 Wisconsin Statutes.
[3] Lyannes v. Lyannes, 171 Wis. 381, 177 N.W. 683 (1920).
[4] *Id.* at 392, 177 N.W. at 687.

tion to construe the existing statutes and apply them to the individual cases. As stated in *Kuehne v. Kuehne*:

> In this state it is held that the jurisdiction of a court to annul a marriage is statutory, and that such a judgment may be entered only for the reasons authorized by statute.[5]

The *Kuehne* case is patently clear on this point. The court may annul a marriage only if there exists one of the statutory grounds for annulment—*expressio unius est exclusio alterius.*

Consistent with this rule, where a ground for annulment does exist, the court must then grant the annulment. As stated in *Eliot v. Eliot,* an action for annulment in which the statutory conditions for annulment were present:

> [H]ad the legislature intended other restrictions upon the right of action, it would have expressed the same in the statute. . . . In our opinion it is not permissible for the court to interpolate conditions and exceptions and restrictions upon the right of action, not expressed therein. . . .[6]

It is of interest to note that these rules will be applied regardless of the equities that exist between the parties. In *Eliot,* the plaintiff was allowed to assert the invalidity of a fact which he had previously fraudulently misrepresented to the defendant and upon which the defendant had reasonably relied to her substantial detriment. This result is supported on the basis of public policy, the rationale succinctly stated in *Kitzman v. Kitzman* as follows:

> The state has the right to control and regulate by reasonable laws the marriage relationship of its citizens, and the wishes and desires, or even immediate welfare, of the individual must yield to the public welfare as determined by the public policy of the state.[7]

In substance, the state declares the marriage laws to promote the public welfare; and the laws as so declared bind the courts.

As stated earlier, annulment is the proper action for setting aside a void marriage. However, this applies only to a direct attack upon the status of marriage. The marriage may also be attacked collaterally and the court can declare the marriage void when rights incident to marriage are in question in other actions. For example, in *State v. Grengs,*[8] a criminal action charging adultery, a marriage entered into within one year of the divorce of one of the parties was declared invalid by the court. In *Estate of Tufts,*[9] contestant was held not to be

[5] 185 Wis. 195, 196, 201 N.W. 506, 507 (1924).
[6] 81 Wis. 295, 299, 51 N.W. 81, 82 (1892).
[7] 167 Wis. 308, 316, 166 N.W. 789, 792 (1918). Cited also as Kitzman v. Werner.
[8] 253 Wis. 248, 33 N.W. 2d 248 (1948).
[9] 228 Wis. 221, 280 N.W. 309 (1938).

the widow of the deceased, the court declaring their marriage void.

The introductory language of section 247.02 recognizes this right of collateral attack. It states that, "No marriage shall be annulled or held void except pursuant to judicial proceedings."[10] By use of the disjunctive "or" the legislature is clearly making a distinction between annulment and avoidance. The importance of this distinction will become apparent later.

III. Definitions of Void and Voidable

At this point it is essential that we define the terms "void" and "voidable." Of the term "void," the courts have stated that it is often used in the statutes and decisions in a misleading way.[11] In exact language, it is applied to a thing which has no legal force or effect and is an absolute nullity incapable of ratification or confirmation.[12] In a less strict sense, it may refer to that which is merely unenforceable or voidable. In this sense it is used prospectively to refer to a final condition which will exist after the invalidity is disclosed and judicially declared.[13] Stated another way, that which is voidable is capable of being either avoided or confirmed.

Turning to Wisconsin case law, it was stated in *Land, Log and Lumber Company v. McIntyre*:

> [F]ew, if any, words are more inaccurately used . . . than the word "void." Sometimes it means void absolutely, and sometimes void conditionally, and the courts are necessarily compelled, in order to carry out the real purpose of the lawmakers, to determine as to each statute where the word occurs what was the thought in the minds of such lawmakers. . . .[14]

The court then quotes with approval the rule of statutory construction that "where a statute declares a contract void . . . and where public policy requires a strict construction, the word should always receive its natural force and effect."[15] This rule was similarly expressed in *Good v. Starker* where the court, after discussing certain statutory sections in which the term "void" appeared, stated:

> Whenever from the nature of the transaction prohibited and the purpose of its enactment such intent may reasonably be read into such statute, the word "void" will be construed as so meaning.[16]

It is apparent from the foregoing judicial expressions that the court will look to the intent of the legislature in construing the term "void."

[10] Wis. Stat. §247.02 (1963).
[11] 92 C.J.S. 1021.
[12] *Ibid.*
[13] 92 C.J.S. 1023.
[14] 100 Wis. 245, 252, 75 N.W. 964, 967 (1898).
[15] *Id.* at 253, 75 N.W. at 967.
[16] 216 Wis. 253, 255, 257 N.W. 299, 300 (1934).

Where (a) the public policy so requires, or where (b) such intent can reasonably be read into such statute, "void" will be given a strict construction.

Relating these concepts to the marriage contract, it is clear that "void" should be strictly construed; both of the elements which individually require a strict construction are met. Recall that the right of the state to declare the laws affecting marriage has as its basis the public welfare. The exercise of that right, therefore, results in a public policy determination binding upon the courts. This meets the requirement of (a) above. Also recall the clear expression of legislative intent in section 245.002(3), cited previously ("In this title 'void' means null and void and not voidable."). Even the less discerning or sagacious reader would find difficulty in misconceiving the intendment of this statute. Thus, (b) above relating to intent is also satisfied.

That "void" should be strictly construed when applied to the marriage contract is supported in part by the case law. In *Lyannes v. Lyannes* the court stated:

> In the void marriage the relationship of the parties, so far as its being legal is concerned, is an absolute nullity from its very beginning and cannot be ratified. It may be questioned at any time during the life of both, and, with some statutory exceptions . . . after the death of either or both, and generally whether the question arises directly or collaterally.[17]

In the first sentence the *Lyannes* case correctly states that the void marriage is an "absolute nullity," however, this statement is limited by the unfortunate language of the following sentence. These limitations are in conflict with the requirement that "void" be strictly construed, a requirement founded upon statutory language. As such, the limitations expressed in the *Lyannes* case cannot, under present law, be supported. The void marriage is, therefore, one which is an absolute nullity and will be used in this sense in this article.

Having now established the definition of void, it becomes a simple matter to define voidable. This is done by negative inference. As Wisconsin recognizes only three classes of marriage—void, voidable and valid—by defining "void" and "valid" we finitely limit the term "voidable." The valid marriage having previously been stated to be a marriage in accordance with the Family Code, the voidable marriage becomes the broad class of marriages remaining which are neither valid nor void. Referencing this to the above quoted passage from the *Lyannes* case, a marriage which may be ratified, or which may not be collaterally attacked, or which may not be attacked after the death of one or both of the parties is, therefore, voidable. This is the sense in which "voidable" will be used in this article.

[17] 171 Wis. 381, 390, 177 N.W. 683, 686 (1920).

However, although one section of the statutes declares a marriage void, another section may except it from the void status making it merely voidable. In such cases, a conflicting legislative intent is expressed. If the court were to take the most recent legislative expression it would require that the marriage be considered void as dictated by section 245.002(3).[18] But, by the general rule of statutory construction, where two provisions are susceptible of a construction that will give operation to both, it is incumbent on the court to reconcile them so that both may be given force and effect if at all possible.[19] In our case this is not possible because the conflicting intents are founded upon the antinomous concepts of "void" and "voidable." In this case the court would be forced to make a choice between the two; and, as will be shown later, this is often a choice between Scylla and Charybdis.

IV. Marriages Declared Void Under Wisconsin Law

As stated in section 245.21, "All marriages hereafter contracted in violation of ss. 245.02, 245.03, 245.04 and 245.16 shall be void. . . ."[20] These sections include underage marriages, bigamous marriages, consanguineous marriages, marriages in which one of the parties lacks capacity to consent, marriages contracted within one year of a divorce, and marriages in violation of the procedural requirements of The Family Code. Section 245.10 requiring court permission to marry also declares void a marriage in violation of its provisions. Each of these marriages will be considered individually except those void for failure to comply with procedural requirements. This will be considered only incidentally.[21] Section 245.04 is Wisconsin's marriage evasion statute. As the scope of this paper is limited to marriages contracted in Wisconsin this section will not be examined.

A. Court Permission to Marry

Section 245.10 requires court permission to marry where one of the parties is supporting children of a prior marriage not in the custody of that party. It was enacted in 1961[22] and a marriage in violation of this section is not made merely voidable by any conflicting language in other sections of the Family Code. However this section was construed by the court in *Estate of Ferguson*,[23] to have no extra-territorial application, nullifying any important effect it might have had.[24] The

[18] Created by Wis. Laws 1961, Ch. 505.
[19] State *ex rel.* Thompson v. Gibson, 22 Wis. 2d 275, 292, 125 N.W. 2d 636, 644 (1963).
[20] Wis. Stat. §245.21 (1963).
[21] These marriages are void under §245.16 but may be validated by remarriage in compliance with §§245.02 to 245.25. See particularly §§245.22 and 245.23 making certain §245.16 void marriages merely voidable by permitting validation by passage of time.
[22] Wis. Laws 1961, Ch. 505.
[23] 25 Wis. 2d 75, 130 N.W. 2d 300 (1964).
[24] But *cf.* Estate of Van Schaick, 256 Wis. 214, 40 N.W. 2d 588 (1949), which

reasoning of the case is obscure and no benefit could be derived from considering it further here.[25] Also, the decision of this case may have been rendered ineffective by reason of the recent legislative change of section 245.10 and related sections of the Code.[26]

B. Underage Marriages

> 245.02(1) Every male person who has attained the full age of 18 years and every female person who has attained the full age of 16 years shall be capable in law of contracting marriage if otherwise competent.
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> (2)If either of the contracting parties is under the age of 21 years if a male, or between the age of 16 and 18 years if a female, no license shall be issued without the consent of his or her parents or guardian. . . .[27]

Any marriage contracted by a male who is under 18 years of age or a female who is under 16 years of age is in violation of this section and is declared void by section 245.21. This is true also of a marriage in which the male is between 18 and 21 years of age or the female between 16 and 18 years of age if the requisite consent is not first obtained. However, section 245.21 in addition to making the marriage void, provides for validation of an underage marriage. It states that, "The parties to any such marriage declared void under s. 245.02 . . . may, at any time, validate such marriage by complying with the requirements of ss. 245.02 to 245.25."[28] But what is compliance with the requirements of sections 245.02 to 245.25, and is there compliance merely by reason of the parties reaching the requisite ages or obtaining the necessary consent subsequent to the marriage? Probably not. It is more likely that a new ceremony will have to be had.[29]

In support of this contention, we must consider section 245.16 which provides that a marriage may be validly contracted in Wisconsin only after a license has been issued therefor. Taking this in conjunction with section 245.12 which authorizes a license to issue only after compliance with section 245.02, where the parties were in violation of this section, no license could validly be issued and where no license had is-

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applies the marriage evasion provision to the form of the marriage. This case was not considered in the *Ferguson* opinion although its principal should apparently be applicable to a §245.10 violation to give such a violation extra-territorial effect as was clearly the legislative intent.

[25] See 49 MARQ. L. REV. 169 (1965).

[26] WIS. LAWS 1965, Chs. 121 and 480.

[27] WIS. STAT. §245.02(1) (1963).

[28] WIS. STAT. §245.21 (1963).

[29] See note to §247.02(6) et seq., Wisconsin Legislative Council General Report Vol. V (1959) confirming this position. Former §§247.02(6) and (7) specified that the underage marriage could be annulled by a party unless the party confirmed the marriage after arriving at the statutory age. This provision was amended by ch. 595, Laws of Wis., 1959, effective January 1, 1960, to now require validation by compliance with ch. 245 before the right of annulment is denied.

sued no marriage could be contracted. So, even though the parties, by passage of time or by securing the necessary consent, comply with the age provisions, there would still have been no valid license issuance without which there could be no valid marriage.

However, this reasoning is circular and, without more, would be extremely weak authority for the proposition that a second ceremony would have to be had. Further support is available though. As stated in *Lanhan v. Lanhan*:

> [W]here cohabitation is illegal in its inception, the relation between the parties will not be transformed into marriage by evidence of continued cohabitation, or by any evidence which falls short of establishing either directly or circumstantially the fact of an actual contract of marriage after the bar has been removed.[30]

The underage marriage falls squarely within this rule. It is meretricious in its inception and would, therefore, require a second complete ceremony. Also note that the underage marriage can be annulled even after the parties have reached the requisite age.[31] This would seemingly preclude validation of such marriages merely by cohabitation after reaching the age of consent, which was the rule at common law, because this would prematurely terminate the right of annulment without legislative authorization. Consequently, section 245.21, providing for validation of the void underage marriage, in actuality is satisfied only by a second ceremony. This does not validate the void marriage or make it merely voidable.

But further consideration must be given to section 247.02 specifying the causes for annulment. It indicates that the marriage may be annulled:

> (6) At the suit of the wife or her parents . . . when she was under the age of 16 at the time of the marriage. . . .
> (7) At the suit of the husband or his parents . . . when he was under the age of 18 at the time of the marriage. . . .
> (8) At the suit of the parent . . . of a party marrying without the consent of said parent . . . where such consent is required by s. 245.02, provided the action is commenced before said party reaches the age of 21 years if male or 18 if female and within one year after the marriage.[32]

Subsections (6) and (7) deal with marriages in which the parties are under the marriageable age and give the right to annul to both the parties and their parents. There is no time limitation placed upon the right of annulment by these subsections as long as the marriage is not validated by compliance with Chapter 245 which, as concluded above, would require a completely new ceremony. However, under section 247.03(2), a 10-year limitation is imposed upon the right of action. It requires that

[30] 136 Wis. 360, 369, 117 N.W. 787, 789 (1908).
[31] WIS. STAT. §247.03(2) (1963).
[32] WIS. STAT. §247.02 (1963).

the action for annulment be brought within 10 years from the time the cause of action arose, this undoubtedly being the date of the marriage. Subsection (8) deals with marriages in which the parties failed to secure the necessary consent and it gives the cause of action to the parents only. Also, it limits the right of action to one year or less.

On the basis of sections 247.02 and 247.03 it is clear that the underage marriage, void by reason of section 245.02, may not be subject to annulment. The marriage can be annulled only by the parties or their parents and then only for a limited period of time. However, as previously stated, the introductory sentence of section 247.02 states that, "No marriage shall be *annulled or held void* except pursuant to judicial proceeding." (Emphasis added.) Therefore, although the statute of limitations has run on the action for annulment, this does not mean that the marriage is valid. It could still be attacked collaterally and held void.

Suppose the parties were married 11 years so that the marriage could no longer be annulled and that one of the parties then died. If there were no children, it would be to the advantage of the parents of the deceased, if the deceased had any property which passed by intestacy, to set aside the marriage. Under the language of Chapter 245, it would appear that even though the parent's right to annul the marriage had expired, as the marriage was void, they could still attack the marriage collaterally in the administration proceeding. This argument would be just as valid if the attack was made 50 years after the marriage. Consider also the similar situation of a guardian-ad-litem representing a minor child of the parties who might increase the child's inheritance by avoiding the marriage and thus eliminating the supposed wife's right to a statutory share of the estate.

However, the inherent inequities of this result provide a basis for questioning the validity of this construction of the statutes. It is only reasonable to assume that the courts would look for some grounds to validate the marriage. This, as previously stated, would require as its foundation, an expression of legislative intent. This intent might be found in either section 247.02 or section 245.21. In regard to section 247.02, where the legislature has taken away the right of annulment after a certain period, it might be construed as an indication that the legislature intended to validate these marriages after such period. However, in this case, a marriage annullable for 10 years could still be held void in a collateral attack nine years after the supposed marriage. Imagine the benefit a creditor could make of this construction of the Family Code where, for example, he could eliminate the homestead right of a pretended spouse of a deceased debtor. In this instance the inequity would still exist.

In regard to section 245.21, it provides that the underage marriage

may be validated by compliance with sections 245.02 and 245.25. If instead of construing this to require a new ceremony it was taken to mean only the attaining of the requisite statutory age, the marriage would be validated at this time. This, as pointed out earlier, would be inconsistent with much of the language of other sections of the Code.[33]

It is submitted that because of the inequities that could result from a strict construction of the voidability of underage marriages, that this was probably not the intent of the legislature and would not be so considered by the courts. The preferable way to handle this type of marriage is to consider it merely voidable after the parties reach the age necessary for compliance with the provisions of section 245.02 without requiring a further ceremony. Although it would then not be subject to collateral attack, the right of annulment would still exist.[34] This, of course, could be accomplished only by a statutory change.

To conclude our examination of underage marriages, it is necessary to briefly consider the case law on the subject.

The case of *Eliot v. Eliot*[35] involved a boy who, when only 15 years of age ,represented himself to be 19 years old and induced the defendant to marry him. Before reaching the age of consent which at this time was 18 years, he brought suit for annulment. Section 2350 in effect at this time declared that:

> [T]he marriage shall be void from such time as shall be fixed by the judgment of a court of competent authority declaring the nullity thereof.[36]

In commenting on the meaning of this section, the court stated:

> This marriage is not an absolute nullity. It is only annulled from such time as shall be fixed by the judgment of the court. Sec. 2350. That time may, and in many contingencies should, be fixed at a later date than that of the marriage. During the time intervening the marriage is valid. It is, so to speak, a marriage on condition subsequent, the condition being its disaffirmance by a party thereto and annulment thereof by the court from the time named.[37]

So, at this time the marriage, although it could be annulled, was held to be valid until it was annulled. This was due solely to the peculiar language of section 2350. This language was not retained in subsequent statutes and as a result *Eliot* is no longer authority on this point.

The above quoted provision of the *Eliot* case was discussed in *Swenson v. Swenson.*[38] However, the case was apparently decided without

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[33] See note 29.
[34] If this construction was adopted it might also require an addition to §247.245 if complete equity is to be done between the parties in all cases.
[35] 77 Wis. 634, 46 N.W. 806 (1890).
[36] *Id.* at 639, 46 N.W. at 807.
[37] *Supra* note 35 at 641, 46 N.W. at 808.
[38] 179 Wis. 536, 192 N.W. 70 (1923).

conscious appreciation of the issue under consideration. In *Swenson,* the court stated:

> The present statute and sec. 2350, construed in [the *Eliot* case] are alike in that the marriage of persons under the age of consent is *voidable* and not void.[39] (Emphasis added.)

So, the *Swenson* decision concludes that the court in *Eliot* found the underage marriage voidable. This appears unfounded in as much as the *Eliot* case specifically declares such marriages *valid* until annulled and not *voidable.* For our purposes, however, it is sufficient to note that at the time of the *Swenson* decision, the underage marriage was voidable.[40] The "present statute" referred to in the above quote presumably is section 2351[41] discussed in the opinion. No case has considered this problem since the passage of section 245.002(3) which, it could be strongly argued, was intended to change the status of the underage marriage from voidable to void as is specifically stated by the statute.

C. Incestuous Marriages

> 245.03(1) No marriage shall be contracted . . . between persons who are nearer of kin than second cousins excepting that marriage may be contracted between first cousins where the female has attained the age of 55 years. Relationship under this section shall be computed by the rule of the civil law, whether the parties to the marriage are of the half or of the whole blood.[42]

By reference to section 245.21, a mariage in violation of this section is void; and unlike the underage marriage, section 245.21 contains no qualifying provision for validation. Therefore, relying solely on Chapter 245, the incestuous marriage would be void and not merely voidable.

This was supported in *Dicke v. Wagner,*[43] the court concluding, "As Ida was the daughter of the testator's own sister, it is conceded that his marriage to her was, under the statutes, an absolute nullity." This case permitted the avoidance of a marriage in a collateral attack after the death of one of the parties. The statutes referred to were, in substance, comparable to our current statute. The same conclusion was also reached in an opinion of the Attorney General,[44] the rationale supported on the basis that because incest is a crime it would be inconsistent to

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[39] *Id.* at 540, 192 N.W. at 72.

[40] See State v. Cone, 86 Wis. 498, 57 N.W. 50 (1893); and 17 OP. ATTY. GEN. 351 (1928), supporting the proposition that the underage marriage was voidable only. Also *cf.* note 29. Until 1960 the underage marriage could be confirmed by a party after arriving at the age of consent without a second ceremony. This automatically places the underage marriage within our definition of voidable.

[41] WIS. STAT. §2351 (1921).

[42] WIS. STAT. §245.03 (1963).

[43] 95 Wis. 260, 263, 70 N.W. 159, 160 (1897). See also State *ex rel.* De Puy v. Evans, 88 Wis. 255, 60 N.W. 433 (1894).

[44] 5 OP. ATTY. GEN. 227 (1916).

permit the incestuous marriage any validity. As incest is still a crime, this rationale would be appropriate today.

However, by reference to section 247.02, it appears that the incestuous marriage is in fact merely voidable. Section 247.02(2) states as a cause for annulment:

> Consanguinity where the parties are nearer of kin than second cousins as computed by the rule of civil law, whether of the half or of the whole blood, at the suit of either party except as provided in s. 245.03(1); *but when any such marriage has not been annulled during the lifetime of the parties, the validity thereof shall not be inquired into after the death of either party.* (Emphasis added.)

As the validity cannot be challenged after the death of either party, the mariage is merely voidable. Notwithstanding this, it is clearly the legislative intent that in all other cases, the incestuous marriage should be considered void.

However, on the basis of section 247.02(2), only the parties can annul the mariage and then, by reference to the 10 year statute of limitations provision of section 247.03(2), only if the action is commenced within 10 years after the cause of action arose. This means that even the parties cannot annul the marriage after 10 years. Of course, this result could be avoided by holding that there is a continuous arising of the cause of action but this would certainly be a strained construction of section 247.03(2).[45] So, although the parties cannot annul their marriage, they are prohibited from living together as man and wife. Their only solution is to attack the marriage collaterally, for, as in the case of the underage marriage, such marriage may still be declared void. But by what action of the parties is this effected?

Section 247.03(1) lists the "actions affecting marriage." Recalling the maxim, *expressio unius est exclusio alterius,* if we are to have the marriage judicially declared void as required by section 247.02 we must look to section 247.03(1) for our action. The only two actions questioning the validity of the marriage are (a) to affirm marriage, and (b) annulment. The annulment under (b) of course would fail because of the 10 year statute of limitations. This assumes that "annulment" is limited to annulment and does not include avoidance; however, this assumption is seemingly sound in light of section 247.02 which specifically distinguishes them.

Considering subpart (a), such action, like annulment, is limited by

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[45] *Cf.* Witt v. Witt, 271 Wis. 93, 72 N.W. 2d 748, 52 A.L.R. 2d 1158 (1955); and Ginkowski v. Ginkowski, 28 Wis. 2d 530, 137 N.W. 2d 403 (1965). In these two cases which involve the marriage of an insane person and a bigamous marriage respectively, the statute of limitations extinguished the right to annulment 10 years after the date of the marriage.

the 10 year statute of limitations in section 247.03(2). It is also further limited by section 247.04 which declares:

> 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.* . . . (Emphasis added).

By this section, in an action to affirm mariage, the court can either annul the marriage or declare it valid. These are the only two alternatives given. In light of this section, even supposing the 10 year statute of limitations had not run on the cause of action to affirm, where the right of annulment has expired the court could only affirm the marriage, a dilemmic position for the court in the case of an incestuous marriage.

Certainly this situation does exist in fact. Certainly it is the intent of the legislature and the court would so hold that in an action to affirm by one of the parties to the incestuous marriage the court could declare the marriage void; however, it is difficult to place this supposed result within the language of the Family Code.[46] It is therefore respectfully submitted that the Code would be more complete if, during the lifetime of the parties, the incestuous marriage was excepted from the 10 year limitation on the right of action for annulment as is the bigamous marriage.[47]

D. Mental Incapacity

> 245.03(1) A marriage may not be contracted if either party has such want of understanding as renders him incapable of assenting to marriage whether by reason of insanity, idiocy or other causes.[48]

Again by reference to section 245.21, a marriage in violation of this section is void. However, when considered in conjunction with Chapter 247, these marriages, like the underage and the incestuous marriages, cannot always be annulled. They are subject to the 10 year statute of limitation period of section 247.03(2), and, they are also subject to the further restriction in section 247.02(5) which limits the right to annul to the parties or to the guardian of the incapacitated party. Section 247.02(5) further states that if the incompetent confirms the marriage subsequent to regaining reason the marriage cannot be annulled. Under these circumstances, the legislative intent would seemingly be to validate such marriages even without a subsequent ceremony.

This would make the right of avoidance coextensive with the right of annulment. Although this would make the marriage merely voidable

[46] *Cf.* Ginkowski v. Ginkowski, *supra* note 45, involving an action for annulment of a void bigamous marriage in which the statute of limitations had run on the right of annulment and the court denied any relief to the plaintiff-husband.
[47] WIS. STAT. §247.03(2) (1963).
[48] WIS. STAT. §245.03(1) (1963).

(the marriage being capable of validation), it would appear to be in accord with the legislative intent. This construction (making the right of avoidance coextensive with the right of annulment) would be acceptable if it was applied selectively; for example, to underage marriages or marriages not against the public policy of the state. However, if such a construction was applied generally to all types of marriages, making the marriage valid after the right of annulment has expired, the consanguineous marriage would be made valid after 10 years. Thus, this concept cannot be applied generally, and as there is no legislative expression authorizing a selective application of this construction, it must necessarily be limited to marriages of incompetents.

Turning to the case law, it was held in *Kuehne v. Kuehne:*

> Although it is provided in sec. 2330, Stats., that no insane person shall be capable of contracting marriage, the annulment of such a marriage is not authorized at the suit of the public or upon grounds of public policy. It may be annulled only at the suit of one of the parties thereto. . . .[49]

With regard to the 10 year statute of limitations, it was held in *Witt v. Witt*[50] to bar the annulment. In this case the parties had married on October 14, 1930. The wife was granted a divorce on April 20, 1939, which was vacated in 1946 because she was found to have been insane at the time of the divorce. Then, in 1951, twenty-one years after the marriage but within 10 years of discovery of the fact of insanity, the husband brought an action for annulment which was denied. The court held that the cause of action arose on the date of the marriage and that the statute ran from this date, not from the date of discovery. The husband was, therefore, unable to annul the marriage.

The fact remains that such marriage is declared void under section 245.21 and that as such it could be attacked collaterally. There is no validation provision, however questionable, as in the case of the underage marriage, nor is there any prohibition against questioning the validity of the marriage after the death of one of the parties as in the case of a consanguineous marriage. Therefore, the same inequitable consequences as those discussed in relation to the underage and consanguineous marriages could result. But if the consequences were unconscionable, as well they might be, would they be supported by the court? It seems reasonable to suppose they would not. However, to state a possible basis for such a holding would be speculation. There are no Wisconsin cases considering the point.

E. Bigamous Marriages

> 245.03(1) No marriage shall be contracted while either of the parties has a husband or wife living. . . .

[49] *Supra* note 5 at 197, 201 N.W. at 507.
[50] 271 Wis. 93, 72 N.W. 2d 748, 52 A.L.R. 2d 1158 (1955).

> (2) It is unlawful for any person, who is or has been a party to any action for divorce in any court in this state, or elsewhere, to marry again until one year after judgment of divorce is granted. . . .[51]

To the reader unfamiliar with Wisconsin divorce law, the inclusion of section 245.03(2) as a bigamous marriage might seem strange as the words "judgment of divorce" connote a severance of the marital relationship. However, this is not true of the Wisconsin divorce; although the decree is complete it defers severance of the bond for a period of one year. Section 247.37(1)(a) states:

> When a judgment of divorce is granted it shall not be effective so far as it affects the marital status of the parties until the expiration of one year from the date of the granting of such judgment. . . .

In construing this section, the court stated in *White v. White:*

> Until at least the year had gone by from the entry of the judgment in this case . . . the parties hereto were still bound by the marital tie. [citation omitted] Until such year elapsed there was in existence no absolute judgment of divorce, and consequently, no absolute severance of the marital relationship.[52]

Consequently, within one year of the judgment of divorce, the parties thereto are still bound by the marital tie; they still have a husband or wife. Therefore, a marriage other than a remarriage during this period would be bigamous.

Turning to the question of the status of the bigamous marriage, we see in the language of the early cases that such marriages were considered absolutely void. In *Zahorka v. Geith,*[53] which involved a collateral attack on the marriage after the death of the husband, the court stated that if the wife had not been divorced from her first husband before she married the deceased then such mariage was absolutely void. The *Zahorka* case cites as authority *Williams v. Williams,*[54] which held that if one of the parties to a marriage already has a lawful spouse, such marriage is a nullity and is void *ab initio.*

The statute pertinent to annulment of these marriages is section 247.02(3) which provides for annulment "when such marriage was contracted while either of the parties thereto had a husband or wife living, at the suit of either party." So we have our first limitation; the action for annulment of a bigamous marriage may only be brought by a party. Although the right of action for annulment is generally limited to 10 years by section 247.03(2), there is an exception in the case of a biga-

[51] WIS. STAT. §245.03 (1963).
[52] 167 Wis. 615, 620, 168 N.W. 704, 706 (1918).
[53] 129 Wis. 498, 109 N.W. 552 (1906).
[54] 63 Wis. 58, 23 N.W. 110 (1885).

mous marriage. Section 247.03(2) provides that the action "may be commenced at any time while either of the parties has a husband or wife living."[55] Thus, a second limitation that the right of annulment terminates upon the death of one of the parties.

However, the right of annulment may be extinguished prior to this time. By section 245.24, where a bigamous marriage was entered into in good faith on the part of at least one of the parties, then the parties to such marriage, though bigamous in its inception, are held to be legally married from and after the removal of the impediment. No subsequent ceremony is required. This means that the marriage can be validated and, as such, is merely voidable and not void. Conversely, where both parties were aware of the fact that the marriage was illegal, the marriage is not validated by section 245.24. In this situation, they could never validate the marriage and it could be attacked collaterally and declared void. The cases have allowed collateral attack.[56]

In light of section 245.24, the status of the bigamous marriage turns upon the question of good faith. Where the marriage was entered into by one of the parties in good faith it is voidable only as by passage of time it may be validated. Where the marriage was instead entered into by both parties with knowledge of its illegality it cannot be validated. This marriage, therefore, is void absolutely. Although it cannot necessarily be annulled, it can never be validated and can be attacked collaterally both before and after the death of the parties.

V. Conclusion

In conclusion, it is apparent that many of the marriages specifically declared void by one section of the statutes are made merely voidable by another section. These include the bigamous marriage where one of the parties to the marriage acted in good faith; the incestuous marriage; and, marriages declared void by reason of insanity, idiocy, or other cause rendering one of the parties thereto incapable of assent to the marriage. However, not only in these instances, but also in the case of the other marriages discussed, the right to an annulment may be extinguished. Where this occurs, and where such marriages are still void, serious inequities can result.

An excellent example of this is the recent case of *Ginkowski v. Ginkowski*.[57] The parties to this action married within one year of a prior divorce of one of the parties with knowledge of the prohibition against such marriage. Consequently, the marriage was not validated upon removal of the impediment. Furthermore, the statutes expressly declare such marriage void which would make it subject to collateral attack.

[55] Wis. Stat. §247.03(2) (1963).
[56] Estate of Tufts, 228 Wis. 221, 280 N.W. 309 (1938); Estate of Van Schaick, 256 Wis. 214, 40 N.W. 2d 588 (1949).
[57] 28 Wis. 2d 530, 137 N.W. 2d 403 (1965).

However, over 10 years, had elapsed since the date of the marriage and the court held that the right of annulment was thereby extinguished denying relief to the plaintiff-husband.[58]

But again, as in the *Ferguson* case,[59] the court failed to consider all of the pertinent case law. For example, in *Hutschenreuter v. Hutschenreuter,*[60] the court stated that the issue of the validity of the marriage is always before the court. The *Hutschenreuter* case involved a divorce, however, there is no rational basis for limiting this concept to divorce and denying its application to an action for annulment. It is submitted, therefore, that if this concept (that the issue of the validity of the marriage is always before the court) was not impliedly overruled, it was not the prerogative of the court to deny consideration of the validity of the marriage. This would have dictated a different result.

The result here is that the plaintiff-husband is left to continue as a party to a void marriage subject always to collateral attack. Of the two actions which he might bring to attack the validity of his void marriage, annulment has been denied leaving only an action to affirm. But in an action to affirm, the court may only annul or affirm, a result of questionable desirability to the plaintiff-husband. The only apparent solution is for the husband to leave the state and enter into a second marriage. He could then commence an action to affirm the second marriage which could not be denied on the basis of his first marriage because his first marriage could not constitute a prior existing valid marriage. This would certainly be an undesirable result. However, the problem now appears to be solved by the exception of the bigamous marriage from the 10 year statute of limitations expressed in section 247.03(2) eliminating the inequities and uncertainties inherent in the *Ginkowski* decision.

Of course, to effect any remedy for this problem or for the other problems posed above requires cooperation of both the legislature and the judiciary with the burden falling more heavily on the legislature. It is their duty to declare the marriage laws by which the court is bound. That there is a need for elimination of these problems is patently apparent. Because the legislative intent controls in the field of family law, the elimination can only be accomplished by an elimination of the ambiguities currently present within the code. This can only be accomplished by a clear expression of legislative intent. It is this clarity of legislative intent, therefore, which is the alum necessary to dissolve the obscurring cloud of ambiguity and purify the code of its inequities.

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[58] The court applied the 10 year statute of limitations provision of §330.18(4) instead of §247.03(2) because the right of annulment expired prior to the passage of §247.03(2).

[59] See note 24.

[60] 23 Wis. 2d 318, 127 N.W. 2d 47 (1964).