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Article 8

Annulment of Fraudulent Marriage Contract

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for requiring the will formalities in general, i.e., to avoid fraud, uncertainty, litigation, etc.[32] Some of these objections may be overcome by requiring proof establishing to the "highest degree of certainty that a mistake was, in fact, made."

The exception to the general rule created by this case is given two limitations by the opinion of the court. The proof must establish to the highest degree of certainty that a mistake was, in fact, made, and the mistake must be as to some detail of identification. As to the first requirement, the degree of certainty need not be absolute, because in the instant case there was a possibility that the testator intended the taxi driver as the beneficiary. Evidently more than a clear preponderance of the evidence is necessary; however, as to details of identification, the court only gives middle initials and addresses as examples. The prior cases cited cannot be used to help define the limits of the new test since they involved ambiguities. Once an ambiguity was shown, recovery was allowed, whether the mistake was in a detail of identification or not, and whether or not the proof of a mistake was established to the highest degree of certainty. The precise limitations of the new test will therefore have to await further cases for a more complete definition.

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Family Law—Annulment of Fraudulent Marriage Contract: Plaintiff was intentionally induced to marry defendant by her false representations of pregnancy based, in part, upon certificates executed by a reputable local doctor stating the fact of pregnancy. Following the ceremony and upon discovery that defendant was not pregnant, plaintiff discontinued marital relations with her, renounced her as his wife, left their residence, and commenced proceedings for annulment under Section 247.02(4) of the Wisconsin Statutes.[1] Reversing the lower court, the Supreme Court granted

[32] "The statute prescribing the manner in which wills shall be executed is in the nature of a statute of frauds. Perhaps no other legal document requires such solemnity in the manner of its execution. This is for the purpose of securing the highest degree of assurance that the testator's property will go as he wills it and to make it correspondingly difficult to divert it into other channels. To permit this judgment to stand would open up an alluring field for frauds and perjuries and neutralize to a great degree the safeguards which the statute throws about the estates of deceased persons. It would permit anyone having a claim against an estate of a deceased person, and being fraudulently disposed, to manufacture evidence, . . . and the estate of the testator would not go according to his written declaration executed in accordance with the solemnities required by the statute but according to parol testimony produced at a time when the testator cannot be present to refute it. While justice might be done in the instant case, a recognition of such a rule would point the way for contravention of a statute designed by the legislature to prevent the distribution of estates except in accordance with the will of the testator." Frieders v. Estate of Frieders, 180 Wis. 430, 433-34, 193 N.W. 77, 31 A.L.R. 118 (1923).

[1] WIS. STAT. §247.02(4) (1959):
"... A marriage may be annulled for any of the following causes: ...

the annulment. It reasoned that the representations of defendant were material as a matter of law, and that but for such inducement plaintiff would not have consented to the marriage.[2] *Masters v. Masters,* 13 Wis. 2d 332, 108 N.W. 2d 674 (1961).

The *Masters* decision represents a new development in Wisconsin law, for it is the first case decided by the Supreme Court allowing an annulment upon an oral representation of pregnancy, when in fact the woman was not pregnant. This decision is distinguishable from cases such as *Winner v. Winner,*[3] where defendant, who was pregnant, induced plaintiff to marry her in the belief that he was the father of the child who in fact was fathered by a stranger. There, the court reasoned that the materiality of the false representations went to the essence of the marriage contract and allowed the annulment under a statute similar to the one applied in *Masters.*[4]

Prior to the decision in the instant case, New York appeared to be the only jurisdiction that permitted a false representation of pregnancy to be sufficient grounds for an annulment. The *DiLorenzo*[5] case involved a fact situation similar to *Masters,* except that instead of showing certificates of pregnancy to plaintiff, the defendant exhibited a child and stated that plaintiff was its father.[6] The holding in *DiLorenzo* was that if plaintiff could prove that the misrepresentation of fact was an essential element in his consent and was of such a nature as to deceive an ordinarily prudent person, the court would grant the annulment.[7] It would appear that New York adopted a position whereby *any* false representation,[8] which is essential to plain-

(4) Fraud, force or coercion, at the suit of the innocent and injured party, unless the marriage has been confirmed by the acts of the injured party."

[2] Masters v. Masters 13 Wis. 2d 332, 341, 108 N.W. 2d 674, 679 (1961), ". . . the trial court has found that had the defendant's fraudulent representations not been made, the plaintiff would not have married the defendent. We deem the character of such false representations to be such as to be material as a matter of law, if they in fact caused the marriage to be entered into under circumstances that no marriage would have taken place absent such false representation. Therefore the plaintiff is entitled to a decree annulling the marriage."

[3] 171 Wis. 413, 177 N.W. 680 (1920).

[4] WIS. STAT. §2351(4) (1919) has been renumbered WIS. STAT. §247.02(4) (1959) and is verbatim the statute used in *Winner v. Winner.*

[5] DiLorenzo v. DiLorenzo, 174 N.Y. 467, 67 N.E. 63 (1903), approved in Garfinkel v. Garfinkel, 9 A.D. 2d 98, 191 N.Y.S. 2d 574 (1959). See also Cuneo v. Cuneo, 198 Misc. 240, 96 N.Y.S. 2d 899 (1950).

[6] Basing its decision upon *DiLorenzo,* the Wisconsin court made no factual distinction between that case and *Masters,* and presumably such a difference is immaterial.

[7] Di Lorenzo v. Di Lorenzo, *supra* note 5, 67 N.E. at 65. "If the plaintiff proves to the satisfaction of the court that the misrepresentation of some fact which was an essential element in the giving of his consent of the contract of marriage, and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage."

[8] *Ibid.* The New York court goes so far as to state in *DiLorenzo,* ". . . that the action for annulment of a marriage is governed by the same essential requirements as any other action in fraud to set aside a contract."

tiff's assent, constitutes a ground for annulment.[9] This broad ground for granting relief is qualified in *Masters* by the following language:

> We deem it advisable to point out that there may be situations of marriage induced by material fraudulent representations in which an annulment should be denied for policy reasons. An illustration of this would be a false representation of financial worth.[10]

The court reserves the right to deny annulments for fraudulent representations, even in factually similar cases, on grounds of public policy.

Judicial abhorrence of an "easy annulment" is well-illustrated by the great number of jurisdictions which refuse to grant an annulment even where the woman became pregnant by another man.[11] This prevailing split of authority would deny relief to a plaintiff under *Winner v. Winner*[12] facts, irrespective of whether or not the representation was a primary inducement to marry.

The various bases upon which such a denial is predicated are delineated into three distinct areas: (1) lack of reliance, (2) adherence to the equitable doctrine of "unclean hands", and (3) immateriality of the misrepresentation in light of the sacrosanct nature of marriage.

Indicative of the first position is *Crehore v. Crehore,*[13] where it was concluded that due to the plaintiff's premarital intercourse he had full knowledge of the woman's unchastity and should have been "put on his guard" as to possible other illicit relationships. The court, in effect, stated that the premarital intercourse does not ne-

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[9] This liberalism, borne out by more recent decisions in New York, is contrary to existing Wisconsin law which has denied annulment in the following false representation cases: Wells v. Talham, 180 Wis. 654, 194 N.W. 36 (1923) (religious beliefs); Varney v. Varney, 52 Wis. 120, 8 N.W. 739 (1881) (prior unchastity); Lyannes v. Lyannes, 171 Wis. 381, 177 N.W. 683 (1920) (age). New York has allowed annulment in the following false representation cases: Williams v. Williams, 194 Misc. 201, 86 N.Y.S. 2d 490 (1947) (religious belief); Siek v. Siek, 196 Misc. 165, 93 N.Y.S. 2d 470 (1950) (promises to provide a home); Pastore v. Pastore, 199 Misc. 435, 100 N.Y.S. 2d 552 (1950) (a promise to facilitate an alien's entry into the country); Madden v. Madden, 204 Misc. 170, 125 N.Y.S. 2d 384 (1953) (as to good moral character); Gambacorta v. Gambacorta, 285 App. Div. 62, 136 N.Y.S. 2d 259 (1954) (as to the reason for prior divorce). In all of the New York decisions cited, the marriages were consummated. The decisions vary in their reasoning and seem to be based upon the particular fact situation presented. The "but for" rule is pronounced in the *Gambacorta* case. A departure from the *DiLorenzo* case was noted in *Woronzoff-Daschkoff v. Woronzoff-Daschkoff,* 303 N.Y. 506, 104 N.E. 2d 877 (1952), in which a "vital" to the marriage contract rule was announced. The courts, however, in later cases do not seem to have adopted this rule but use a variety of reasons for granting or denying relief.

[10] *Supra* note 2, at 340, 108 N.W. 2d at 679.

[11] NELSON, DIVORCE AND ANNULMENT §31.40 (2d ed. 1945); 35 AM. JUR. *Marriage* §139 (1938); 55 C.J.S., *Marriage* §34 (1948).

[12] Winner v. Winner, 171 Wis. 413, 177 N.W. 680 (1920).

[13] 97 Mass. 330, 93 Am. Dec. 98 (1867).

gate the reliance of the plaintiff in fact, but that such reliance is superseded by the illicit intercourse.

Application of the doctrine of "unclean hands" summarily dismisses a plaintiff on the theory that premarital relations have made both parties ". . . equally filthy and abominable in the eyes of the law."[14] This was specifically rejected in the *Winner* case and again in the *Masters* case upon a consideration of the ultimate inequity of a forced marriage. The obvious disproportion between a fornication offense, a misdemeanor, and the penalty of possible lifetime incompatability substantiates a rejection of "unclean hands" in domestic relations. Furthermore, the court pointed out that if criminal penalties and the stigma attached to premarital intercourse fail to act as a deterrent, the more remote possibility of having to marry the defendant would be remedially ineffective.

With regard to materiality, the third reason for generally denying an annulment, the Wisconsin Court found as a matter of law that defendant's representation was material; it was established by the trial court that plaintiff would not have married her except for the alleged pregnancy. The court seems to state with some reservations, based upon the aforementioned qualifying language, that if the plaintiff's consent is induced by fraud, that fraud shall be material and relief shall be granted; whereas other courts base their denial upon the fact that the fraud is not material because it does not go to the essence of the marriage contract.[15] Prior to the *Masters* decision the latter was apparently the rule in Wisconsin. Consequently, the importance of the *Masters* case stems not only from the new fact situation presented to the Wisconsin Court, but also from the seeming departure from a long established rule of law. The test developed prior to the principal decision was that the fraud must go to the essence of the marriage contract in order for an annulment to be granted. This theory, although not the basis for decision, was stated with approval as early as 1881 in *Varney v. Varney*,[16] an action for annulment due to the alleged fraudulent representation of the woman as to her prior chastity. The annulment was denied because the fraud was not such as would support a judgment for annulment due in part to the public policy reason that a person should be allowed to reform and not be haunted by prior misdeeds. Annulment was granted in *C.... v. C...*,[17] not for the want of prior chastity but because the wife was at the time of marriage infected with a venereal disease. The court, in granting the annulment, based its decision on public policy reasons in that

[14] Fairchild v. Fairchild, 43 N.J. Eq. 426, 11 Atl. 426 (1887).
[15] Rhoades v. Rhoades, 10 N.J. Super. 432, 77 A. 2d 273 (1950).
[16] 52 Wis. 120, 8 N.W. 739 (1881).
[17] 158 Wis. 301, 148 N.W. 865 (1914).

no innocent person should be compelled to submit to such physical menace and indignity. Next in sequence of time came the case of *Lyannes v. Lyannes*,[18] involving fraud as to the age of one of the parties. Here the court denied relief because the fraud was not of such a substantial nature to declare this type of contract a nullity. Citing with approval the three above-mentioned cases, the Wisconsin court in *Winner v. Winner*[19] enunciated the rule that the fraud must be vital and go to the essentials of the marriage relation. It unambiguously reiterated this rule in *Wells v. Talham*,[20] a case of fraud as to religious belief, wherein relief was denied. These cases illustrate Wisconsin's adoption of the so-called "Massachusetts" rule[21] rather than the rule prevailing in the New York courts. The present departure from this established rule seems to be in favor of a new "but for rule," i.e., "but for" such inducement plaintiff would not have consented to the marriage.

The departure in the law of annulments due to fraud in the inducement must be predicated upon statutary interpretation for in each case the relief, denied or granted, was based upon a statutory ground.[22] In all of the cases the statute was the same from the earliest decision, *Varney v. Varney*,[23] to the latest, *Masters v. Masters*.[24] The statute which existed prior to the *Masters* case was adopted verbatim into the new Family Code.[25]

With regard to statutory interpretation it is generally established that if the legislature adopts a prior statute without change, then the prior case law is also adopted and approved.[26] The court did not discuss this aspect but merely stated that the statutory language conveyed no limitation so none would be implied. The legislature therefore must have approved of the "essence of the marriage contract" test in annulment for fraud cases. The departure from the approved test in the *Masters* case becomes more apparent in light of the court's language related to the wording of the statute.

Although the court did not specifically overrule decisions such as *Winner v. Winner* which applied the "essence of the marriage contract" test, neither did they conform to it in the principal case. If the

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[18] 171 Wis. 381, 177 N.W. 683 (1920).
[19] *Supra* note 12.
[20] 180 Wis. 654, 194 N.W. 36 (1923).
[21] The rule prevailing in Massachusetts is that the fraud must not only be material but go to the "essence of the marriage contract" before an annulment will be granted. This rule has been followed since its inception in *Reynolds v. Reynolds*, 3 Allen 605, 85 Mass. 605 (1862).
[22] *Supra* note 1.
[23] Varney v. Varney, 52 Wis. 120, 8 N.W. 739 (1881).
[24] *Supra* note 4.
[25] WIS. STAT. chs. 245, 247, 248 (1959).
[26] Milwaukee County v. City of Milwaukee, 210 Wis. 336, 246 N.W. 447 (1933); State v. Hackbarth, 228 Wis. 108, 279 N.W. 687 (1938).

court's decision is based only upon the particular fact situation presented and the "essence of the marriage contract" rule is not thereby overruled, does it remain the Wisconsin test, or is some new rule being promulgated by the court? The court does not specifically answer the question and necessarily, therefore, leaves it open for interpretation. In not overturning previous decisions it would seem that fact situations similar to those previously presented for adjudication would remain grounds for the granting or denial of relief under the rule of *stare decisis*. Under this rule the court would allow annulments for misrepresentations as to the presence of a venereal disease, pregnancy by another, and pregnancy when no pregnancy exists, and deny annulments for misrepresentation as to religious belief, age, prior chastity and financial status (the latter being set out specifically in the principal case). In the same vein it is likely that any different, new, or distinguisable fact situations may be adequate grounds for relief under the "but for" rule stated in the principal case. This analysis envisions the use of two rules, an inherently inconsistent procedure in the law.

It would therefore, be more logical to pick one of the following interpretations: (1) that when the fraud is deemed material as to the induced consent the court will adopt the new "but for" rule and make all previous decisions reviewable, with the possibility of a denial for public policy reasons; in essence the court would decide such issues on a case by case basis, or (2) that the "but for" rule may only be applied to facts similar to those in the instant case to circumvent a seeming injustice, and the rule that the alleged fraud must go to the "essence of the marriage contract" remains the test in Wisconsin.

The most logical conclusion is that the court has now adopted a two-step plan for deciding these cases. First, the fraud must be material and, second, if it is material they will apply the new "but for" rule. The "essence of the marriage contract" rule, pursuant to this reasoning, must be regarded as overturned, and the fact situations decided under that rule are reviewable. Due to the qualification in the principal case that relief in some fact situations may be denied on public policy grounds, it seems that the court shall proceed in this area on a case by case basis, that is, a balancing of the equities in each instance to determine the just solution for each problem presented.

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Torts—Municipal Corporations—Abolition of the Doctrine of Immunity: A widow brought an action against the city for the death of her husband, a mover, resulting from a fall down an elevator