

# SILENT PARTNER

## MARRIAGE AND ANNULMENT

*INTRODUCTION: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.*

### GENERAL OVERVIEW

There are two types of marriage -- ceremonial marriages and common law marriages. The requirements for a valid ceremonial marriage include, in all states, a marriage license. A physical exam is not a requirement in all states, but this is needed in most states.

The capacity to marry involves both age and "general capacity." The age for marriage varies from state to state. In Alabama and South Carolina, for example, a female may marry as early as age twelve with the consent of a parent. The majority of states allow marriage at age 18 (or at age 16 with the consent of a parent).

"General capacity" simply means the ability to enter into a contract. The marriage contract must be entered into by one who is able to understand the meaning of the marriage relationship and who really agrees to become married. Thus knowledge and voluntariness are the two aspects of "general capacity."

Another requirement of marriage, although not often cited as such, since it is a "negative requirement," is the absence of a living spouse. One cannot enter into a marriage contract if one's current spouse is alive. The existence of a living spouse renders a purported marriage void as a matter of law in several states; the purported marriage is voidable in the rest of the states.

Also listed as a requirement for marriage is that the parties are unrelated by blood for marriage. There is a universal band on intermarriage by members of "nuclear families" (brothers and sisters, parents and children, etc.) and grandparents/grandchildren. Beyond that, the rules vary according to the state. Some jurisdictions bar marriages between first cousins. Others bar marriages between aunt and nephew or uncle and niece. Several states bar marriages between adopted children or between step-relatives.

Other requirements for a valid marriage include "intent to marry" as well as solemnization by an authorized official which may include (according to state law) a clergyman or civil official, as well as a certain number of witnesses.

Finally, it should be noted that "consummation" is not a prerequisite for a valid marriage. There is nothing in the civil law of states that requires sexual relations by the marriage partners in order to make the marriage valid.

What happens if a person fails to comply with the statutory requirements for matrimony? In a few states, the failure to obtain a license means that the marriage is void. In most jurisdictions, however, the marriage will still be held to be valid. For example, in *Yun v. Yun*, 908 S.W.2d 787 (Mo. Ct. App. 1995). The Yuns lived in Missouri but married in a church in Kansas in November 1986. No evidence of a license. In February 1990, Mr. Yun obtained a Kansas marriage license and filed it 26 June 1990 alleging marriage date of 3 June 1990. Mrs. Yun filed for divorce in 1993; Mr. Yun sought to avoid dissolution, property settlement and child support by alleging there was never a marriage. Court recognized the marriage.

In another case, *Lambertini v. Lambertini*, 655 So.2d 142 (Dist. Ct. Of App. FL 1995). Parties obtained a Mexican divorce for Mrs. Lambertini from her first husband and a Mexican marriage license -- 30 years later Mrs. Lambertini files for divorce and Mr. Lambertini asserts no marriage (and therefore no alimony or property division) because the license was not valid and therefore the marriage was void ab initio. The court recognized the marriage.

What if the license was obtained, but it was somehow defective, invalid or improperly obtained? The usual rule in these cases is that the marriage is still valid, but criminal sanctions may be applied for fraudulently obtaining a marriage license (although there are seldom any prosecutions for this offense). Likewise, failure to obtain a physical when one is required will not usually invalidate a marriage, and a marriage performed by an unauthorized solemnizing person would likewise probably not invalidate the marriage unless the parties knew of this disability.

What is the rule about recognizing the validity of a marriage? The general rule is that a marriage which is valid under law of the jurisdiction where it is "celebrated" (that is, where the marriage ceremony is performed) or where it occurs (in the case of a common law marriage) is valid everywhere. Also remember that neither party need be a domiciliary of the jurisdiction where the marriage is performed.

In general, a state will hold to be void those marriages which involve polygamy or marriages between persons who are too closely related. Voidable marriages are those where insufficient age, fraud, duress, sham ceremony, physical disability (disease or incurable impotence), or mental disability taint what appears to be an otherwise valid marriage. If a marriage is voidable, then it must be "avoided" (or challenged in court) by the one whose disability causes the problem at some point in time before the listing of the disability. Otherwise, avoidable marriage may "cure" into a valid marriage.

## **COMMON LAW MARRIAGE**

There are really two types of common law marriages. The "traditional" common law marriage is one which is entered into without formalities. This type of marriage is usually defined as the intent to be married combined with living together and holding one's self out to the world as married. States which recognize the "traditional" form of common law marriage include (as of 1998) Alabama, Colorado, District of Columbia, Georgia, Idaho (only if before 1-1-96), Iowa, Kansas, Montana, Ohio (only if before 10-10-91), Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas.

A different kind of common law marriage is represented by the situation where a valid marriage is formed from an invalid marriage after the impediment is lifted. For example, a party might be underage at the time of the marriage. Continued cohabitation as husband and wife after the underage party attains majority, however, results in the marriage ripening into validity where this form of common law marriage is recognized. Note that the courts may be reluctant to find a

valid marriage when the parties have entered into a relationship knowing it to be polygamous, even after the impediment to marriage has been terminated.

In those states which recognize "traditional", common law marriage, there are several requirements for the formation of such a marriage. The first is the express mutual consent and intent to be married. In addition, parties must hold themselves out to the world as being married or "must openly and professedly live as husband and wife" in most of these jurisdictions. While intent may certainly be proven by words, the incidence of "swearing contests" between parties who dispute whether or not there was an intent to be married have induced the courts to rely on parties actions and conduct at least as much as there were in trying to resolve this issue. Was there a joint bank account? Was the name on it "Mr. & Mrs."? How did the lease read -- "Mr. & Mrs."? By the evidence of the common law marriage involves examining documents such as these to divine the intent of the parties. There is no specific length of time recognized generally as a requirement for the formation of the common law marriage.

Even if the state does not recognize common law marriages itself, it will usually recognize one that was formed in a state which does recognize common law marriages. In addition, most states will recognize a common law marriage if the parties at some time during their period of living together resided in a state that allows the formation of common law marriages. Even if the parties begin living together in a state that does not allow the formation of common law marriages, they can inadvertently form a common law marriage, so long as the requisite "holding out," intent and cohabitation are present, if they move to a state that allows common law marriages. On the other hand, a temporary visit to a state that allows the formation of a common law marriage, so long as the parties are domiciled in another state which does not recognize them, usually will not result in a valid common law marriage.

## **MISCELLANEOUS RULES**

There are some issues that sometimes arise when analyzing family law matters involving marriage:

A "putative marriage" is a legal fiction that is designed to escape the harshness of a void marriage where at least one of the parties didn't know of the impediment that prevented the formation of a valid marriage. For nearly all purposes, the innocent spouse ("putative spouse") will be entitled to the legal rights normally accruing to a valid spouse.

Marriage by proxy is a marriage ceremony in which an agent acts on behalf of one or both parties during the solemnization of the marriage, based upon a power of attorney. The most common incidents involving marriage by proxy are marriage ceremonies which occur during war time. Its recognition depends on the interpretation of state law -- does state law seem to require that both parties be present to apply for a license or to give their consent at the ceremony?

A wife is often allowed to retain her maiden name even after marriage. The trend in recent years is toward women having this choice. The only reason that a woman might not be able to use a name different from her husband is if the other name were used for purposes of fraud.

## **ANNULMENT**

As opposed to divorce, which is the dissolution of a valid marriage, an annulment is a judicial declaration that the "marriage" never existed. In such instances, marital property and marital obligations (such as alimony) do not exist.

The grounds for an annulment must have existed at the time of the marriage ceremony (or "purported marriage"). Here are some of the grounds that are generally recognized for annulment:

Polygamy.

When this occurs, a formal annulment is usually not necessary since this defect renders the marriage void in the first place.

Incestuous marriage.

Once again, most jurisdictions consider that this renders the marriage void and thus an annulment should not be necessary.

Under age partner.

An under age party to a marriage can have the marriage annulled, at least until he or she reaches majority, and this defect in some jurisdictions may render the marriage void in the first place.

Impotence.

This usually means that a party is physically incapable of normal sexual relations and it must be incurable.

Disease.

This usually means venereal disease.

Duress.

This must be sufficient to overcome a contractual notion of consent; ordinarily it must amount to violence or threats of violence that lead to "consent" to the marriage ceremony.

Mental incapacity.

This means feeble-mindedness, insanity or mental weakness creating an incapacity to enter into a contract.

Fraud.

This generally must relate to some aspect of the marital relationship and it must "be material" or "substantial." In some states, a higher standard will be applied if the marriage has already been consummated by sexual relations. A common example of fraud as a ground for annulment is when a woman conceals her pregnancy by another man. In addition, some states recognize that misrepresentation that the husband is the father of the unborn child is sufficient fraud for an annulment. A false assertion of pregnancy, however, is not a ground for annulment.

Limited-purpose marriage.

A marriage for a limited purpose, such as obtaining a VISA, may result in a voidable, but not void, marriage.

Refusal to have children.

The implied purpose of marriage is for procreation, absent some agreement otherwise. If a party never intends to have children (and if this can be proven), then this usually constitutes fraud sufficient to justify an annulment. The "victim" spouse, however, may be held to have waived the issue by continued cohabitation with the one who refuses to have children.

Denial of conjugal rights.

This is not a ground for annulment in itself, but it may constitute fraud in those cases where the party never intended to have sex after the marriage.

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