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This is the final portion in a four-part study of the Wyoming Marriage Statutes. In this, Part IV, Professor Rames proposes a draft of legislation to replace the statutes presently in force. Each specific section of the proposed statute is followed by comments from the draftsman.

AN ANALYSIS OF WYOMING MARRIAGE STATUTES, WITH SOME SUGGESTIONS FOR REFORM--PART IV

*John O. Rames**

INTRODUCTION

THIS is the fourth and final installment of a series of articles on the above subject. In Part I²⁰⁸ Sections 20-1 to 20-5 of the Wyoming Statutes of 1957²⁰⁹ were analyzed in depth, both as to form and substance, certain problems which they present were identified, and various deficiencies were noted. This process was continued through Section 20-21 in Part II.²¹⁰ Analysis of the remaining Wyoming statutes which deal directly with the subject of marriage (including those relating to annulment) was completed in Part III.²¹¹ This final installment consists of a draft of legislation which may be proposed as a result of the study, together with draftsman's comments on what will hereinafter be called "the proposed revision".

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208. Rames, *An Analysis of Wyoming Marriage Statutes, With Some Suggestions for Reform—Part I*, 2 LAND & WATER L. REV. 177 (1967).

209. All references to sections of the Wyoming Statutes are to the 1957 Statutes unless otherwise specified.

210. Rames, *An Analysis of Wyoming Marriage Statutes, With Some Suggestions for Reform—Part II*, 3 LAND & WATER L. REV. 129 (1968).

211. Rames, *An Analysis of Wyoming Marriage Statutes, With Some Suggestions for Reform—Part III*, 5 LAND & WATER L. REV. 113 (1970).

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At the outset it should be noted that about the time of publication of Part III of this study, the National Conference of Commissioners on Uniform State Laws (hereinafter called "the Commissioners") promulgated the Uniform Marriage and Divorce Act,²¹² which will hereinafter be referred to as "the proposed Uniform Act". Work on such an Act had begun in 1965, and it was the product of considerable effort and expense. Obviously it must be regarded as a proposal of major importance. It will be carefully considered in the draftsman's comments in this Part IV.

The Family Law Section of the American Bar Association, hereinafter called "the F.L.S.", manifested considerable disagreement with certain provisions of the proposed Uniform Act.²¹³ Such disagreement is not surprising, since reasonable minds can differ a great deal as to the policy and language of marriage and divorce laws. The F.L.S. agrees that a uniform marriage and divorce law is desirable, and has itself devoted much time and thought to such legislation. The F.L.S. recommended that the proposed Uniform Act not be approved by the A.B.A. House of Delegates in its present form, but that a revision be considered by representatives of both bodies—the Commissioners and the F.L.S. Accordingly, the House of Delegates will be asked to defer consideration of the proposed Uniform Act until its February, 1972, meeting. Meanwhile, representatives of the Commissioners and of the F.L.S. met together in New Orleans on April 3 and 4, 1971, and reached at least tentative agreement on major points of difference.²¹⁴ Thus, at the present writing, the proposed Uniform Act cannot be said to be in final form.

Much of the disagreement between the two groups revolved about the divorce provisions of the proposed Act. The

212. Approval and recommendation for enactment in all the states was given at the annual meeting of the Commissioners held from August 1-7, 1970. *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 108 (1970) (The text of the Act and comments appear at pp. 176-222 of this handbook. However, specific references to sections of the Act will hereinafter be cited to 5 *FAMILY L. Q.* (1971)).

213. For example, in the 1971 Midyear Report and Recommendation of the F.L.S. to the A.B.A. House of Delegates it was stated: "Many sections of the Act require clarification. Portions of the Act should be deleted, language should be changed, and policy decisions should be reconsidered."

214. Almost the entire June, 1971 issue of the *Family Law Quarterly*, which is published by the F.L.S., is devoted to developments with respect to the proposed Act. What has been said above is a partial situation summary, derived from that issue.

Commissioners (and presumably the F.L.S.) consider that the latter are severable from the marriage provisions. In its Prefatory Note the Commissioners said:

[T]he draft presents a unified proposal for a code of marriage and divorce. However, it is realized that local statutory structure, or varied views as to policy, may lead some legislatures to prefer to deal with the two subjects in separate bills. The structure of the Act in separable parts facilitates such a separation.²¹⁵

Since the present study does not extend to divorce, we shall not consider those portions of the proposed Uniform Act which relate thereto. This will leave us with Sections 101 through 211—14 sections in all.

A knowledge of the general philosophy underlying these provisions will aid in understanding them. The Commissioner's Prefatory Note puts it this way:

Without undermining the state's interest in the stability of marriages, the Act greatly simplifies premarital regulation. In addition, the list of 'prohibited' marriages has been greatly reduced. Most important, the Act changes the traditional sanctions applied to such marriages. At present most state regulatory statutes enforce marriage prohibitions by permitting one of the parties (or a parent, in case of youthful marriage) to a prohibited marriage to seek an annulment. It has long been recognized, however, that annulments are sought for personal or family reasons typically having nothing to do with the purpose the marriage prohibition was designed to serve. The marriage prohibitions therefore serve mainly to provide a legal device alternative to divorce under appropriate conditions. But because annulled marriages are considered 'void ab initio,' annulments have retroactively deprived spouses of financial support and status. An even harsher sanction, the designation of some prohibited marriages as 'void,' often deprives innocent spouses of social insurance benefits, workmen's compensation claims, wrongful death recoveries, and the financial benefit of property passing as part of the deceased spouse's estate. This Act has eliminated completely the notion of 'void' marriages; has minimized the number of

215. 5 FAMILY L. Q. 205, 208 (1971).

prohibited marriages; and, while permitting a declaration of invalidity in circumscribed cases, has created a procedure which permits courts to refuse to make the decree retroactive. The Act's simplified marriage regulations and circumscribed annulment doctrines require most spouses who desire the termination of their marriage to proceed under the dissolution provisions of the Act rather than the invalidity provisions. This result is proper: if the complaint is that the marriage is no longer viable, termination rather than a declaration of invalidity is the appropriate remedy.²¹⁶

We do not have at hand a detailed specification of the F.L.S. objections to the proposed Act, but to the limited extent revealed in the June, 1971 issue of the *Family Law Quarterly* we shall discuss the F.L.S. attitude toward each section of the proposed Act on which there is disagreement.

Let us then proceed to the proposed revision, with draftsman's comments.

STATUTORY DEFINITIONS

Section 1. This Act shall be known and may be cited as "The Wyoming Marriage and Annulment Act of 1973".

Comment

In the interest of complete identification it seems desirable to specifically include annulment in the title. The proposed Uniform Act in Section 101 uses the customary "short title" section contained in all Uniform State Laws.

Section 2. As used in this Act, unless the context otherwise requires or unless otherwise specifically provided:

(a) "alimony" means continuing allotments of money payable to an existing or former wife, at regular intervals in the future, for her support;

(b) "celebrant" means the person or persons who perform or officiate at a marriage ceremony;

(c) "common law marriage" means a type of marriage created solely through mutual agreement of the parties, in

216. *Id.* at 206-7.

words of the present tense, to be husband and wife, with or without subsequent cohabitation or reputation as husband and wife, depending upon the law of particular jurisdictions. At the time of the arrangement the parties must have been legally competent to contract marriage;

(d) "de facto marriage" means a relationship between a man and a woman who are living together as husband and wife, in pursuance of an agreement to be such, and which would constitute a valid, lawful marriage except for the existence of one or more legal impediments; the term includes a void marriage, or a voidable marriage prior to a judicial declaration of its nullity;

(e) "husband" means the male party to a marriage, including a de facto marriage;

(f) "marriage" means a civil contract, made in due form, by which a man and a woman agree to take each other for husband and wife during their joint lives, unless the relationship is sooner dissolved by divorce or annulment, and to discharge towards each other the duties imposed by law upon such relation; the status of being married. Unless the context otherwise requires, or unless otherwise specifically provided, the term "marriage" includes de facto marriages;

(g) "wife" means the female party to a marriage, including a de facto marriage;

(h) Unless the context indicates otherwise, the masculine gender includes the feminine and words expressed in the singular include the plural.

Comment

A definition section is always useful in a comprehensive Act. There is nothing unusual about the above definitions, which are derived primarily from law dictionaries. They help to clarify possible uncertainties in meaning and to eliminate the necessity of repeating long phrases.

We have ignored the recently advanced notion that there can be a marriage between two people of the same sex.

The proposed Uniform Act does not contain a definition section. It does contain in Section 102 (the second section) a

declaration of legislative intent, plus a statement as to the manner in which it is to be construed. Declarations of legislative intent have met with disfavor in the Wyoming legislature, and the language employed for this purpose in the proposed Uniform Act does not seem significant. Likewise, it does not seem necessary to direct the Wyoming courts to construe the Act "liberally". For these reasons we are not recommending a counterpart to Section 102 of the proposed Uniform Act.

The next section of the proposed Uniform Act (section 103) consists of the customary statement as to uniformity of application and construction which appears in all Uniform State Laws. With the following section, numbered 201, the substance of the proposed Uniform Act begins.

MARRIAGES PERFORMED IN WYOMING

Section 3. When performed in Wyoming, marriage can be lawfully entered into only in accordance with the provisions of this Act, as presently existing or as it may be subsequently amended. This Act shall not affect the status of marriages performed in Wyoming prior to its effective date. Common law marriages are void if their validity depends, in whole or in part, upon things done and things said (or either of them) in Wyoming.

Comment

Section 3 makes it clear that the proposed revision is not to be retroactive. It codifies the holdings of the Wyoming Supreme Court in *In re Roberts Estate*²¹⁷ and *In re Reeves Estate*²¹⁸ that common law marriages attempted in Wyoming are void; yet it leaves open a possible holding that common law marriages valid in another state where formed would be valid in Wyoming.

The corresponding provision of the proposed Uniform Act is Section 201, which reads as follows: "A marriage between a man and a woman licensed, solemnized and registered as provided in this Act is valid in this state." It is sub-

²¹⁷. 58 Wyo. 438, 133 P.2d 492 (1943).

²¹⁸. 58 Wyo. 432, 133 P.2d 503 (1943).

mitted that Section 3 comes closer to "covering all the bases" than does Section 201.

Section 4. (a) The following requirements of this Act concerning the formalities of marriage are mandatory, and failure to comply with any one or more of them shall render an attempted marriage void:

(1) the making of written application to a County Clerk for the issuance of a marriage license, as provided in Section 8 of this Act or any amendments thereto;

(2) the issuance of a marriage license by the County Clerk, as provided in Sections 9 and 10 of this Act or any amendments thereto;

(3) the performance of a marriage ceremony by an authorized celebrant, as provided in Sections 11 and 12 of this Act or any amendments thereto, which ceremony must include at least the minimum formalities described in Section 12 last mentioned.

(b) All of the other requirements of this Act concerning the formalities of marriage are directory only. Failure to comply with any one or more of them shall not render the attempted marriage void, but such marriage shall be either voidable or entirely valid, as hereinafter specified. In addition, failure to comply with a directory requirement of this Act may subject the person or persons so failing to criminal penalties, as hereinafter specified.

Comment

At this point we enter one of the areas of greatest controversy: should the void-voidable-valid philosophy traditionally embodied in marriage statutes and court decisions be continued, or should it be abandoned? Section 4 stays with tradition and with existing Wyoming statutes, reflecting the belief that the concept of void marriages is sound and useful.

In Part I of this study we devoted considerable space to a discussion of this problem.²¹⁹ Section 4 embodies the conclusions there reached. A voidable marriage is one which is legally imperfect, but whose imperfections are not so great

219. Rames, *supra* note 208, at 179-193.

as to offend strong public policy. It is subject to annulment through judicial proceedings, but, if no such proceedings are instituted during the lifetimes of the parties, the death of one (or both) of them renders it immune from attack. The same effect can be produced by the expiration of periods of time allowed for judicial attack—the running of statutes of limitations, and the attainment of marriageable age. In some instances voidability may arise as the result of the fault of one of the marriage partners which results in injury to the other, e.g., fraud going to the essentials of the marriage. In other instances voidability may arise because of violation of public policy not major in character, as illustrated by underage marriages. Such violations should not be condoned by recognizing the resulting marriage as entirely valid, yet they are not so serious (as in the case of bigamy) as to render the marriage entirely void. Criminal penalties alone are not adequate deterrents. The concept of voidable marriages gives the adversely affected marriage partner an option to ratify or to get out from under. Judicial action, in the form of an annulment suit, is necessary only if the latter alternative is chosen. Some legal imperfections in marriages are of such slight significance that their existence should not affect the validity of the marriage at all, and these do not even make the marriage voidable.

On the other hand, a void marriage is a nullity, and gives rise to no rights or responsibilities except such as may be created by the legislature in the exercise of a benevolent equity. It requires no judicial decree to determine its status, although such a decree is usually desirable. It can be attacked collaterally as well as directly, and either during the marriage or subsequent to the death of a party. It cannot be ratified, and mere lapse of time does not improve its character. The legislature may provide (as we strongly recommend) that the offspring of such unions shall not be deemed illegitimate, and that upon a judicial decree of annulment of a void marriage there may be an equitable division between the spouses of property acquired during the existence of the union, and a restoration of property which each brought into the marriage; but beyond that we feel this Act should not go.

As hereinabove noted, the Commissioners rejected the concept of *void* marriages entirely, saying in their Prefatory Note that "This Act has eliminated completely the notion of 'void' marriages,"²²⁰ Their reasoning was that

the designation of some prohibited marriages as 'void' often deprives innocent spouses of social insurance benefits, workmen's compensation claims, wrongful death recoveries, and the financial benefit of property passing as part of the deceased spouse's estate.²²¹

The F.L.S. evidently favors the retention of the concept of void marriages. In its report of the New Orleans meeting between representatives of the two groups, the F.L.S. stated that

[t]he Committee [representing the Commissioners] rejected proposed changes in these sections [207 and 208 of the proposed Uniform Act] which would have retained [the] traditional distinction between 'void' and 'voidable' marriages.²²²

Clark seems to support the void-voidable distinction in general, but points out difficulties in defining "void marriages," saying, "The term 'voidable marriages' is clear enough and causes no trouble. But what is meant by 'void marriage'?"²²³

This proposed revision chooses to retain the traditional void-voidable-valid philosophy, for reasons already indicated, and seeks to supply the deficiencies in definition which disturb Clark. Thus we embrace the F.L.S. view and reject that of the Commissioners. We agree (as the Commissioners point out) that the designation of some prohibited marriages as void may deprive innocent spouses of social insurance benefits, workmen's compensation claims, wrongful death recoveries, and the financial benefit of property passing as part of the deceased spouse's estate, but we believe that the decision as to who shall be entitled to benefits of that sort should be made by the legislature separately as to each such benefit, and in legislation specifically pertaining to that par-

220. 5 FAMILY L. Q. 205, 206 (1971).

221. *Id.*

222. *Id.* at 126.

223. CLARK, DOMESTIC RELATIONS § 3.4, at 133 (1968).

ticular benefit. For example, if the legislature deems it desirable to include survivors of de facto marriages in the definition of "dependent" in a Workmen's Compensation Act, we would welcome its decision to do so; but we do not consider the Wyoming Marriage and Annulment Act the proper vehicle for the redress of all the injustices which may have been done in the past to innocent participants in prohibited marriages. It is submitted that no legislation can, or should be expected to "take all the gamble out of marriage." If certain requirements connected with ceremonial marriages are deemed to be of *major* importance, either from the standpoint of public policy or as protections against injustice to a party to a marriage, there seems nothing unfair in denominating them as mandatory and providing that a marriage without them is void. Most such pitfalls can be avoided by reasonable diligence on the part of the contracting parties. To excuse their lack of diligence by validating their union nonetheless, is to subscribe to the philosophy that "laws are made to be broken." If the requirements are not of major importance, then their non-observance should at most render the marriage voidable, or should not affect its validity at all. By contrast, the proposed Act takes a large step in the direction of abolishing the distinction between annulment and divorce.

Section 4 of the proposed revision identifies three of the requirements of a ceremonial marriage as mandatory, and provides that the failure to comply with any one or more of them shall render the marriage void. In this, the proposed revision adopts what appears to be the existing Wyoming statutory law, as interpreted by the Wyoming Supreme Court.²²⁴ Subsection (b) provides that the remaining ceremonial requirements shall be directory only, and previews the problem as to the effect of non-compliance with the directory requirements.

Section 5. Failure to comply with any one or more of the following directory requirements of this Act shall render an otherwise valid marriage voidable, but it shall be valid for all purposes unless and until annulled by a decree of a court of competent jurisdiction within Wyoming or elsewhere.

224. See the extensive discussion in Rames, *supra* note 208, at 180-193.

(a) Compliance with the marriageable age requirements specified in Sections 8 and 10 of this Act or any amendments thereto.

(b) Obtaining the consent of a parent or guardian of a minor, as required by Section 8 of this Act or any amendments thereto.

(c) Obtaining judicial approval of the issuance of a marriage license and marriage certificate forms by the County Clerk, as required by Section 10 of this Act or any amendments thereto.

Comment

So far as formal requirements for a ceremonial marriage are concerned, it is submitted that these are the only three which should render the marriage voidable in cases where they are required but not obtained.²²⁵ The substance of these requirements will be hereinafter discussed.

Section 6. Failure to comply with any one or more of the following directory requirements of this Act shall not in anywise affect the validity of an otherwise valid marriage.

(a) The performance of a marriage ceremony in accordance with the rites and customs of a religious society or religious assembly, as permitted by Section 11 of this Act or any amendments thereto.

(b) The issuance to the parties or either of them of a certificate of marriage, as provided by Section 14 of this Act or any amendments thereto.

(c) The recording of a certificate of marriage in one or more public offices in Wyoming, as provided in Section 15 of this Act or any amendments thereto.

Comment

This section rounds out the definition of mandatory and directory requirements for ceremonial marriages with respect to the effect of non-compliance on the ensuing marriage.²²⁶

225. For a discussion of subsections (a) and (b) see Rames, *supra* note 208, at 180-193.

226. *Id.*, at 190-193.

Thus far we have not exhausted the definition of void and voidable marriages, but have merely classified the *formalities* in terms of void, voidable and valid marriages. Such procedure seems quite desirable, but it is a matter which has been entirely ignored in the proposed Uniform Act.

Section 7(a). The State Bureau of Vital Statistics shall prescribe the forms for the application for a marriage license, the marriage license itself, the marriage certificate, and the parents' or guardians' consent to marriage. The Bureau may change any or all of these forms from time to time without prior notice.

(b) The form for the application for a marriage license shall include, as a minimum, the following information:

(1) the name, age, sex, residence address, social security number (if any), date and place of birth of each party to the proposed marriage;

(2) if either party has previously been married, his or her married name or names, and the dates, places and courts in which the marriage or marriages were dissolved or declared invalid, or the date and place of death of former spouse or spouses. In the event that one or more divorces or annulments are reported, such applicants shall upon request produce for the inspection of the County Clerk a certified copy of such divorce or annulment decree;

(3) the name and residence address of the parents (if living) or guardian of each party;

(4) whether the parties are related to each other, and, if so, their relationship.

Comment

Section 7 follows with minor modifications Section 202 of the proposed Uniform Act. The only modification of substance is the addition, in Subsection (b)(2), of the requirement that an applicant who has been divorced, or whose former marriage has been annulled, shall upon request produce a certified copy of the annulment or divorce decree for the Clerk's inspection. This addition was a recommendation

of the F.L.S., which otherwise approved Section 202,²²⁷ and would help to identify impediments to a proposed marriage.

The State Bureau of Vital Statistics was chosen as the promulgator of forms because no other State office seemed any more appropriate, and because this Bureau performs an important function as a clearing house for information on births, deaths and other vital statistics. Under existing law it is geared into marriage statistics, since the Wyoming Statutes²²⁸ require the County Clerk to forward a copy of the marriage certificate to the Bureau, where presumably it is filed. It would be anticipated that the Bureau would consult the County Clerks before making material changes in forms, e.g., in asking for medical history.

The next section of the proposed revision (Section 8) sets out the mechanics governing the application for and issuance of the license. Sections 7 and 8, taken together, represent a fairly radical departure from the present Sections 20-3, -5 and -6.²²⁹

Section 8. When an application for a marriage license has been completed and signed by both parties to a prospective marriage, and at least one party has appeared before the County Clerk of any Wyoming county, and has paid the license fee prescribed by law, the County Clerk shall file the application in a book to be kept for such purpose and shall issue a license to marry and two marriage certificate forms, upon being furnished:

(a) satisfactory proof that each party to the marriage will have attained the age of eighteen (18) years at the time the marriage license becomes effective; or will have attained the age of sixteen (16) and has either the written consent to the marriage of both parents or guardian, or judicial approval as provided by Section 10 of this Act; or, if under the age sixteen (16) years, has both the written consent to the marriage of both parents or guardian, and judicial approval; and

(b) satisfactory proof that the marriage would not be void or voidable under the laws of this State.

227. 5 FAMILY L. Q. 133, 145 (1971).

228. WYO. STAT. § 35-70 to -72 (1957).

229. For a discussion of sections 20-3, -5, -6 see Rames, *supra* note 208, 193-198, and Rames, *supra* note 210, at 129, 130.

Comment

This section closely follows Section 203 of the proposed Uniform Act. It differs substantially from Section 20-2 of the Wyoming Statutes, which sets the marriageable ages at 18 for men and 16 for women, and from Section 20-3, which requires the consent of parents whenever a party to the prospective marriage is under 21. The draftsman of the proposed Uniform Act justifies dispensing with parental consent from age 18 on by pointing to the recent lowering of federal voting age from 21 to 18—a trend of which we are fully conscious in Wyoming. It is contemplated that the age of majority for all purposes will soon be reduced to 18.

The F.L.S. disagrees. It would fix the marriageable age at 18 for both sexes, but require parental consent up to 21.

We are siding with the Commissioners on this point, believing that they are riding “the wave of the future”—in fact it is almost the wave of the present. Treating both sexes alike harmonizes with current ideas re non-discrimination on the basis of sex. Section 8 would require *either* parental consent *or* judicial approval. Normally a judge would be very hesitant to approve the marriage of a person under 18 in the face of parental objection, but there could be circumstances in which parental objections would be unreasonable and not in the best interests of the young couple and/or unborn child. Moreover, the provision for judicial approval would be helpful when the parents disagree or when the whereabouts of one or both of them are unknown. Finally, this language gives the mother’s feelings as much weight as those of the father, in line with current thought.

If an applicant is under 16, the section requires *both* parental approval *and* judicial approval, which seems sound if we accept the preceding reasoning.

Present Wyoming Section 20-2 is rigid; no license if the male is under 18 or the female under 16. The result is sometimes falsification about age, or an inducement to sexual immorality.

As to other considerations involved in Section 8, it will be noted that both parties must sign the application for the

license, but that only one need present it to the County Clerk—a good solution to the problem discussed in Part I of this study, at pages 195-198. Whether the application would include an affidavit would rest with the Bureau of Vital Statistics under Section 7. This feature should probably be retained as some protection against falsification. The requirement of “satisfactory proof” of age would permit the County Clerk to insist upon seeing a birth certificate, if the circumstances raised suspicion, and the same can be said as to “satisfactory proof” that the marriage would not be prohibited under Wyoming law.

Section 203 of the proposed Uniform Act includes as a possible addition to the material to be presented to the County Clerk, a certificate of a medical examination, such as required by existing Wyoming Sections 20-7 through -9. This problem was discussed at some length in Part II of this study²³⁰ and the conclusion was reached that the requirement should be deleted. The draftsman of Section 203 of the proposed Uniform Act agrees, opining that such requirement is “both avoidable and highly inefficient” and that it “provides very little service to the prospective spouses themselves.”²³¹

Section 9. When the County Clerk issues a marriage license, he shall date it (and it shall become effective) five (5) days from the day on which it is issued, unless the District Court of the county wherein the application for the license was made for good cause orders that the license shall be effective from and after the time it is issued. Marriage licenses shall be valid throughout the State of Wyoming, and shall expire sixty (60) days after the date of issuance.

Comment

Section 9 is an adaptation of Section 204 of the proposed Uniform Act. The latter contains a waiting period of 3 days, and provides that the license shall expire 180 days after date of issuance. The F.L.S. apparently agreed to the 180 day expiration, but recommended that the waiting period be 10 days, as per a recent New York enactment.²³² Section 9

230. Rames, *supra* note 210, at 130-134.

231. 5 FAMILY L. Q. 209, 212 (1971).

232. 5 FAMILY L. Q. 133, 144-45 (1971). A so-called “gin marriage law”, in which the waiting period was 5 days, was in effect in Wyoming from 1931 to 1935. See annotation to WYO. STAT. § 50-106 (1945).

strikes in between the two views as to the length of the waiting period, but adopts a much shorter period for the effective life of the license. Sixty days should be ample time for arranging a wedding, and if a marriage license is good indefinitely there may be opportunities for fraud.²³³ Since we propose lowering the ages at which marriage without parental consent is permissible, and since one of the purposes served by a waiting period is to discourage impetuous youthful marriages, it would seem wise to reinstate the provision for a waiting period which formerly existed in Wyoming.

Section 10. The District Court of the county wherein an application for a marriage license has been made may order the County Clerk of the county to issue the license, and when so ordered the County Clerk shall issue the license, under the following conditions:

(a) the court has made a reasonable effort to notify the parents or guardian of any party to the prospective marriage who is under the age of eighteen (18) of the time and place of a hearing upon the application for the marriage license; and

(b) the court finds that a party aged sixteen (16) or seventeen (17) has no parent or guardian, or has no parent mentally capable of consenting to his marriage, or whose parent or guardian has not consented in writing to his marriage; or

(c) the court finds that a party under the age of sixteen (16) years has the written consent of both parents, or guardian, to his marriage; and

(d) the court finds that the underage party or parties are capable of assuming the responsibilities of marriage, and that the marriage would serve their best interests. The existence of pregnancy shall not alone establish that the best interests of the parties would be served by the prospective marriage.

Comment

In essence this is Section 205 of the proposed Uniform Act. It ties in with Section 8 hereinabove. It purposely gives

²³³. The point is briefly discussed in Rames, *supra* note 210, at 142.

the District Judge broad discretion, and is purposely free from detailed procedural requirements. The F.L.S. expressed the opinion that "[t]his section needs redrafting and rewording particularly with reference to [the] subsection . . . which states 'pregnancy alone does not establish that the best interests of the party would be served'."²³⁴ We are not given anything more definite as a basis for the criticism. In the above draft the "best interests" language has been expanded to include both parties rather than, as in the proposed Uniform Act, an underage party only.

Section 11(a). Marriages may be solemnized by any of the following classes of persons and by none others: judges of all courts, whether of record or not of record; justices of the peace; court commissioners of both district and county courts; licensed or ordained ministers of the gospel; and religious societies or religious assemblies.

(b) A marriage solemnized by a religious society or religious assembly shall conform to the requirements of the next succeeding Section 12 of this Act or any amendments thereto. With this exception, it shall be lawful for any religious society or religious assembly to join together in marriage such persons as are members of such society or assembly and who are otherwise legally qualified to be married, by any rites and customs adopted by such society or assembly for that purpose. Subsequent to the solemnization of a marriage under the provisions of this subsection, the clerk or keeper of the minutes, proceedings, or other book maintained by such religious society or religious assembly—or, if there be no such clerk or keeper of the minutes, then the moderator or person presiding over such society or assembly—shall complete and transmit to the County Clerk by whom the marriage license was issued, a certificate of marriage. The terms "religious society or religious assembly" shall include, but not be limited to Indian Nations and Tribes.

Comment

Section 11 combines existing Wyoming Sections 20-10 and 20-20 with a portion of Section 206 of the proposed Uniform Act. The latter includes the phrase "Native Group", and the

²³⁴. 5 FAMILY L. Q. 133, 149 (1971).

draftsman explained that this would include certain aboriginal cultural groups found in Alaska and Hawaii. For Wyoming purposes "Indian Nations and Tribes" should suffice. The only enlargement of the classes of celebrants enumerated in Section 20-10 is the addition of court commissioners of county courts. (The county court system will not be in operation prior to January 1, 1975.)

Until 1967 Section 20-20 was limited to "religious societies". In that year the statute was amended to read "religious society or religious assembly" for reasons unknown to this writer. Section 11 has incorporated the 1967 language. Deficiencies in the wording of Sections 20-10 and 20-20 were discussed in Part II, of this study,²³⁵ and we have attempted to rectify these in phrasing Section 11. Requiring ceremonies conducted by religious societies or assemblies to conform to the ceremonial requirements of Section 12 represents a change of heart from the preliminary conclusions in Part II of the study.²³⁶

The F.L.S. does not like the "Native Group" terminology, believing that it "would conjure up images of 'hippie communes' and engender hostility". It suggested "any religious or cultural denomination, sect, or society"²³⁷ The issue is so miniscule as to be a tempest in a teapot.

Section 12(a). The parties to a prospective marriage shall deliver the marriage license to the person or persons who are to solemnize the marriage. In the solemnization of marriage no particular form shall be required, except that (subject to the provisions of subsection (b) of this section) the parties shall declare in the physical presence of the celebrant, and of at least two attending witnesses, that they take each other as husband and wife.

(b) If one party to a marriage is unable to be physically present at the solemnization, he may, in writing sworn to before a person authorized to administer oaths in the place where the oath is taken, authorize a third person to act as his proxy at the marriage ceremony; and a proxy marriage solemnized under the provisions of this subsection shall be

235. Rames, *supra* note 210, at 134-136.

236. 5 FAMILY L. Q. 133, 149 (1971).

237. *Id.*

as valid as if solemnized under the provisions of subsection (a) of this section.

Comment

The proposed Uniform Act contains no provisions comparable to Section 12(a), but such provisions seem desirable and are in line with Section 20-11 of the present Wyoming Statutes.²³⁸ The proposed Uniform Act includes authorization of proxy marriages in Sections 205(b) and 206(b), but does not require that the proxy be given under oath. In Section 206(b) it is provided that if the person solemnizing the marriage "is not satisfied" that the absent party is unable to be present, and that he has consented to the marriage, the celebrant may petition the court for an order permitting the marriage to take place by proxy. This seems unnecessary and undesirable; the requirement in Section 12(b) that the proxy be given under oath should go a long way to prevent fraud. Why "make a federal case out of it" by providing that if the celebrant is not satisfied, he can petition the court?

The study devoted considerable attention to the subject of proxy marriages²³⁹ and concluded that it is desirable to authorize them. The F.L.S. is opposed.²⁴⁰ We stay with the Commissioners on this one.

Section 13. Marriages solemnized before persons professing to be celebrants duly authorized by the law of this State to perform marriages shall be valid despite any lack of legal qualification, jurisdiction or authority of such person, provided that both or either of the individuals so married had no knowledge, prior to the ceremony, of such lack of legal qualification, jurisdiction or authority, and provided that both or either of the individuals so married had at the time of performance of the ceremony a bona fide belief that they had been lawfully joined in marriage thereby.

Comment

There is no corresponding section in the proposed Uniform Act. It seems desirable, as discussed in Part II of the study.²⁴¹ Section 13 is much like the present Section 20-16.

238. Rames, *supra* note 210, at 135, 136.

239. *Id.*, at 136-142.

240. 5 FAMILY L. Q. 133, 148 (1971).

241. Rames, *supra* note 210, at 145.

Section 14. After having performed a marriage ceremony, the celebrant and two witnesses to the ceremony shall forthwith complete and sign two forms of marriage certificate. Each of the certificates shall specify the names, ages and places of residence of the parties to the marriage, the places of residence of the witnesses, the fact that a ceremony uniting such parties in marriage was performed, the city, town or other locality where the ceremony was performed, the county wherein the license authorizing the marriage was issued, and such additional identifying statistical information as may be specified in the form by the State Bureau of Vital Statistics. One such marriage certificate shall thereupon be delivered by the celebrant to the parties, and the celebrant shall within ten (10) days following the performance of the ceremony deliver the second certificate (hereinafter called "the official marriage certificate") to the office of the County Clerk who issued the marriage license and shall retain the marriage license for at least five (5) years after its date of issuance.

Comment

This section sets out mechanics which are important in terms of evidence of a marriage and the assembly of records and statistics. As in the case of the preceding section, there is nothing in the proposed Uniform Act which is comparable. This and the succeeding Section 15 refurbish existing Sections 20-12 and 20-13.²⁴²

Section 15. Upon receipt of the official marriage certificate from the celebrant, the County Clerk shall make a photocopy of the certificate, certify it as a copy of a record in his office, and file the original in the records of his office following the application for marriage license to which it pertains. On or before the first day of the month following the receipt by the County Clerk of the official marriage certificate, the County Clerk shall transmit the accumulated certified photocopies of official marriage certificates to the State Bureau of Vital Statistics, where they shall be filed and kept as permanent official state records.

242. Renovation of the last mentioned statutes is discussed in Rames, *supra* note 210, at 142-144.

Comment

This section rounds out the mechanics concerning the records of marriages. The County Clerk will have on record the originals of the application for license and the marriage certificate, so that anyone wishing certified copies to prove the facts recited therein will be able to obtain them from the County Clerk. One seeking evidence of a marriage would be inclined to inquire first at the State Bureau of Vital Statistics unless he knew where the license had been applied for. That office would have on record a photocopy of the official marriage certificate, which would (as per Section 14) disclose the name of the county where the license was issued. In turn this would lead the inquirer to the proper County Clerk's office. The matter could be handled in reverse, i.e., the original records could be in the Bureau of Vital Statistics and photocopies in the County Clerks' offices, but this would involve photocopying the marriage license application as well as the marriage certificate; and the more records are sent from one office to another the greater the chance of loss or error. On the whole it seems better to make the County Clerk the official repository of the records, with the State Bureau of Vital Statistics having a photocopy of the marriage certificate as an index to the marriage, so to speak. These proposed mechanics should, of course, be submitted to the County Clerks for comments and suggestions prior to enactment into law. Sections 14 and 15 also incorporate existing Sections 35-70 to -72, which, as indicated in Part II of the study,²⁴³ seem out of place in their present location.

Section 16. The duplicate original of the marriage certificate, completed and signed as required by Section 14 of this Act, and any duly certified copy of the official marriage certificate shall be received in all courts and places in Wyoming as presumptive evidence of the fact of such marriage and of the contents of such marriage certificate or certified copy thereof.

Comment

This is an adaptation of existing Section 20-14.

243. Rames, *supra* note 210, at 143, 144.

Section 17. The following kinds of marriages, if performed or attempted within Wyoming from and after the effective date of this Act, are null and void:

(a) marriages which fail to comply with one or more of the mandatory formality requirements for a valid marriage specified in this Act or subsequent amendments hereto;

(b) when either party to the marriage has a husband or wife living at the time the marriage ceremony is performed;

(c) when the parties to the marriage stand in the relation to each other of parent and child, grandparent and grandchild, brothers and sisters of the half as well as of the whole blood, uncle and niece, aunt and nephew, and first cousins. This subsection does not include any persons not related by consanguinity, but does include illegitimate as well as legitimate children and relations;

(d) common law marriages, as defined in this Act;

(e) marriages resulting from the performance of a marriage ceremony which either or both parties entered into in jest, and without intention to become husband and wife;

(f) if for any reason at the time of the marriage ceremony there is lack of valid mutual consent of the parties to enter into a valid marriage, as the law defines it, and both of the parties possess requisite mental capacity to enter into the marriage contract.

Comment

The corresponding section of the proposed Uniform Act is Section 207, which is headed "prohibited marriages". As already noted, the proposed Uniform Act rejects the concept of void marriages. The draftsman states that there has been a recent legislative trend toward permitting first cousin marriages, and the proposed Act follows this trend, but forbids uncle-niece and aunt-nephew marriages unless they are "permitted by the established customs of aboriginal cultures."²⁴⁴ The F.L.S. is no more enthusiastic about "aboriginal cultures" than it is about "Native Group" in Section 206.

²⁴⁴ 5 FAMILY L. Q. 209, 215 (1971).

Section 17 follows the prohibitions of existing Section 20-32 of the Wyoming Statutes with these exceptions: (1) marriages where one or both of the parties lack mental capacity are classified in the next succeeding Section 18 as voidable rather than void;²⁴⁵ (2) subsections (a), (d), (e) and (f) are additions to existing Section 20-32. The first one is self-explanatory in the light of what has already been said in these Comments. Subsections (d) and (e) codify existing law, and Subsection (f) represents a policy decision as to the validity of "limited purpose" marriages.²⁴⁶

The F.L.S. believes that "adoptive siblings and ancestors and descendants should be barred from marriage for social and psychological reasons".²⁴⁷ This refinement has not been included in Section 17.

Section 18. The following kinds of marriages, if performed or attempted within Wyoming from and after the effective date of this Act, are voidable:

(a) when either party, at the time the marriage ceremony is performed, lacks mental capacity to consent to entering into the marriage contract—by which is meant the capacity to understand the nature of the marriage status and the duties and responsibilities which it entails;

(b) when at the time of the marriage ceremony either of the parties is under the minimum marriageable age defined in Section 8 of this Act or any subsequent amendment thereto, and has not or cannot obtain parental consent, or judicial approval as provided in Section 10 of this Act or any subsequent amendment thereto;

(c) when the marriage is the result of duress exerted upon either party to the marriage by some other person or persons, or by force of circumstances, to such an extent that the party affected by the duress at the time of the ceremony did not consent to the marriage of his own free will. Duress, within the meaning of this Act, consists of physical force or the threat of physical force against a party to the marriage,

245. For a discussion on this point see Rames, *supra* note 211, at 114-116.

246. Rames, *supra* note 208, at 178, 179 discusses common law marriages. Marriages entered into in jest, and "limited purpose" marriages are discussed in Rames, *supra* note 211, at 132-137.

247. 5 FAMILY L. Q. 133, 150 (1971).

or against someone bearing such a close relationship to the party that such duress overcomes the will of the party. Threat of arrest or prosecution of a party shall not be deemed duress sufficient to render a marriage voidable unless such threats are made maliciously and without good cause;

(d) when, prior to the marriage ceremony, either party has knowingly misrepresented to or concealed from the other party material facts which go to the essentials of the marriage relationship, or which constitute gross fraud, and the injured party continues in ignorance of such misrepresentations or concealments until after the marriage ceremony;

(e) when at the time of the ceremony either of the parties is incurably sexually impotent. Such impotency may result from either physical or psychological causes, and may either be known to the impotent party—and concealed or misrepresented—or unknown, at the time of the ceremony;

(f) when at the time of the ceremony either of the parties is afflicted with venereal disease in an infectious stage, or of a character such as can be transmitted to offspring. Such venereal disease may either be known to the party afflicted—and concealed or misrepresented—or unknown, at the time of the ceremony.

Comment

This section continues to express the philosophy of defining and classifying marriages as valid, voidable or void, thus deviating from the proposed Uniform Act which treats marriages as either valid or prohibited. Much of Section 18 codifies existing law, in some instances, hopefully, clarifying it.

We have already mentioned Subsection (a). Subsection (d) adds gross fraud to fraud going to the essentials, a minority position but one which seems fair and just. Subsection (e) includes impotency whether fraudulently concealed or unknown to the impotent party, which codifies existing law, but requiring the impotency to be incurable goes beyond existing law. Perhaps Subsection (f) is unnecessary (except that it includes non-fraudulent V.D., if there is any such thing)

but is psychologically desirable because of the elimination of the requirement for V.D. tests as a prerequisite to the issuance of a marriage license. In view of the controversy over epilepsy²⁴⁸ no provision concerning it has been included in Section 18, contrary to the conclusion reached in the study.

Section 19. All ceremonial marriages performed in Wyoming and evidenced by a certificate of marriage (or certified copy thereof), as provided in this Act or any subsequent amendments thereto, shall be presumed to be valid. No voidable marriage shall be rendered void unless and until it is declared so, and annulled, by a decree of a court of competent jurisdiction within or without the State of Wyoming. Judicial annulment of a void marriage is permissible, but not essential to a determination of its status.

Comment

There is a modicum of authority to the effect that the parties to a voidable marriage can render it void by their own acts and without a judicial decree. Section 19 will remove all doubts on this score, and is consistent with existing Section 20-32 as to void marriages.

Section 20. Every person who shall knowingly participate (as a party, celebrant, or official witness) in a void or voidable marriage performed in Wyoming after the effective date of this Act, and every person who shall knowingly aid and abet, counsel, encourage, hire, command or otherwise procure the performance in this State of a void or voidable marriage after the effective date of this Act, shall be guilty of a misdemeanor; and upon conviction shall be fined not less than fifty dollars (\$50) nor more than two hundred dollars (\$200).

Comment

Although criminal sanctions are probably not very effective to deter violations of marriage statutes, it seems desirable to include a provision such as Section 20. Existing Section 20-15 can be compared. There is no similar provision in the proposed Uniform Act. Public officials have not been included.

248. Rames, *supra* note 211, at 129-132.

**MARRIAGES PERFORMED, CONTRACTED OR CREATED
OUTSIDE WYOMING**

Section 21. All marriages performed, contracted or created outside the State of Wyoming, and which were valid according to the law of the place where and at the time when performed, contracted or created, shall be valid in all courts and places in Wyoming, unless any such marriage be deemed contrary to the strong public policy of Wyoming, in which event they shall be void in this State. Without intending this reference to be exclusive, all marriages denominated void by the statutes of Wyoming if performed or attempted in Wyoming shall be deemed contrary to the strong public policy of Wyoming, with the exception of common law marriages and marriages between first cousins, uncles and nieces, and aunts and nephews. All marriages performed, contracted or created outside Wyoming which would be void by the law of the place where and at the time when performed, contracted or created shall be void in all courts and places in Wyoming; and all such marriages which would be voidable by the law of the place where and at the time when performed, contracted or or created shall be voidable in Wyoming.

Comment

Section 21 is the "conflict of laws" section of the proposed revision. It continues the so-called orthodox conflict of laws rule of existing Section 20-21. It will cover marriages which have occurred in foreign countries as well as sister state marriages. The terms "contracted or created" are designed to include common law and de facto marriages; the former can hardly be described as having been "performed". This section will tie together Sections 4 (on mandatory ceremonial requirements), 5 (on directory ceremonial requirements), 18 (on void marriages) and 19 (on voidable marriages). The conflict of laws problem was discussed at length in Part II of the study,²⁴⁹ and Section 21 reflects the views there espoused. Section 21 is an expanded version of Section 210 of the proposed Uniform Act, which seems to leave many questions unanswered. The F.L.S. completely rejected Section

249. Rames, *supra* note 210, at 147-151.

210, and recommended in its place Section 283 of the *Restatement*, which reads as follows:

(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in Section 6.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.²⁵⁰

We recognize the dominant influence which the "most significant relationship" test is currently exerting in the field of conflict of laws, but prefer the simplicity of the valid-where-performed-valid-everywhere test which characterizes the so-called orthodox conflict of laws rule in the marriage area. Moreover, we submit that in the nature of things the *lex loci contractus* should logically exert a major influence where the validity of marriages is concerned. Next to the *lex loci*, or perhaps alongside of it, the *lex fori* should have great importance because of public policy considerations. There is really no room for any other State to have a more significant relationship to the spouses!

It will be noted that under the language of Section 21, the validity of marriages between first cousins, aunts and nephews, and uncles and nieces is left for the decision of the Wyoming courts when such marriages have occurred outside Wyoming. The Wyoming Supreme Court might well decide, as other courts of last resort have decided, that although such marriages would be void if attempted in Wyoming, they should not be considered against the *strong* public policy of Wyoming. With these exceptions, marriages which would be void if performed in Wyoming are denominated against the strong public policy of Wyoming by Section 21. We believe that Section 21 will go far to clarify the status of marriages contracted outside Wyoming when their validity is questioned in a Wyoming court.

250. RESTATEMENT (SECOND) OF CONFLICTS § 283 (1971).

DECLARATORY JUDGMENT DETERMINING
VALIDITY OF MARRIAGE

Section 22. When either party to a marriage or an alleged marriage shall deny or doubt the validity or legal status thereof, the other party may file against him an action seeking a judicial determination of the status and validity of the marriage, whether performed, contracted or created in Wyoming or elsewhere. Such action shall be instituted under and be governed by the Uniform Declaratory Judgments Act of Wyoming now existing or as may be hereafter amended. The defendant in such action shall be the party to the marriage, or alleged marriage, who denies or doubts its validity. Upon due proof of the validity of the marriage, the court shall enter its decree declaring the legal status of the marriage; and such decree, unless reversed on appeal, shall be conclusive upon all persons concerned. In the event the court determines that the marriage is voidable, the statute of limitations for the institution of an action to annul the same shall begin to run from the date of the decree entered in the declaratory judgment action. In the event the court determines that the marriage is void, it shall enter a decree annulling the same, and shall have power to grant such further relief as may be available in an action for the annulment of a marriage.

Comment

Section 22 is an adaptation of existing Section 20-37. It clarifies a number of questions which the latter leaves unanswered.

ANNULMENT OF MARRIAGE

Section 23. The provisions of this Act relating to annulment shall apply to all marriages (including common law and de facto marriages) performed, contracted or created whether within or outside the State of Wyoming and which are either void or voidable under the provisions of this Act and any subsequent amendments hereto.

Comment

As to marriages performed in Wyoming, we identified those which are void (Sections 4 and 17) and those that are voidable (Sections 5 and 18). Through Section 21 we identified marriages performed, contracted or created outside Wyoming as valid, voidable or void. Section 23 then provides a logical and brief statement as to the kinds of marriages which may be annulled in a Wyoming court.

The proposed Uniform Act in Section 208 specifically enumerates the kinds of marriages which are subject to a "declaration of invalidity". This is another way of skinning the cat, except that (as we have already said) the proposed Uniform Act rejects the traditional valid-voidable-void approach. Section 208 additionally describes who may be parties plaintiff, and sets up statutes of limitation. The F.L.S. reported concerning this section that "[i]t was unanimously agreed that this section needs further study and is unacceptable in its present form."²⁵¹ The latter group wished to add fraud and duress as grounds for a declaration of invalidity, disagreed on some of the time periods specified in the statutes of limitation, and advocated the addition of actions to affirm a marriage, which the Commissioners have omitted. As subsequent sections of the proposed revision will reveal, we are in general agreement with the F.L.S. on these matters.

Section 24. The validity of void marriages may be judicially attacked at any time, either during the lifetimes of the parties to such marriage, or after the death of either or both of them, and may be attacked both directly and collaterally. Judicial attacks upon the validity of such marriages are not subject to any statutes of limitation. Void marriages cannot be rendered valid through attempted acts of ratification by the parties thereto, or through the lapse of time.

Comment

Section 24 codifies existing law.

Section 25. Voidable marriages are rendered immune from judicial attack upon the death of either or both of the parties to such marriage. Except as hereinafter provided, a

251. 5 FAM. & L. Q. 133, 150 (1971).

voidable marriage is subject to judicial attack only at the suit of one of the parties to such marriage, during their lifetimes, subject, however, to the following limitations:

(1) actions to annul a marriage voidable by reason of the lack of mental capacity of one of the parties at the time of the ceremony, to consent to entering into the marriage contract (whether by reason of mental infirmity, or the influence of alcohol, drugs, or other incapacitating substance), may be brought by either party to the marriage, or by the legal representative of the party who lacked capacity to consent, within one (1) year after the plaintiff obtained knowledge of the described condition;

(2) actions to annul a marriage voidable because a party to the marriage at the time of the ceremony was under the age of sixteen (16) years, and did not have the consent of his parents or guardian *and* judicial approval (as required by Section 8 (a) of this Act), or was aged sixteen (16) or seventeen (17) years and did not have the consent of his parents or guardian *or* judicial approval (as required by Section 8 (a) of this Act), may be brought only by the underaged party, or his parent or guardian, and prior to the time the underaged party reaches the age at which he could have married without satisfying the omitted requirement;

(3) actions to annul a marriage voidable by reason of duress existing at the time of the ceremony (as defined in Section 18(c) of this Act) may be brought only by a party whose apparent consent was obtained through such duress, and within one (1) year from the time such party became free from such duress;

(4) actions to annul a marriage voidable by reason of knowing misrepresentation or concealment of material facts which go to the essentials of the marriage relationship, or which constitute gross fraud (as defined in Section 18(d) of this Act) may be brought only by the party who was the victim of such misrepresentations, concealments, or gross fraud, and within one (1) year after the plaintiff discovered the true facts;

(5) actions to annul a marriage voidable by reason of the existence of the incurable impotency of one of the parties at

the time of the ceremony as defined in Section 18(e) of this Act) may be brought by either party to the marriage, within one (1) year after the discovery of such impotency by the plaintiff;

(6) actions to annul a marriage voidable because one of the parties was afflicted at the time of the ceremony with venereal disease in an infectious stage, or of a character such as could be transmitted to offspring (as defined in Section 18(f) of the Act) may be brought only by the other party to the marriage (unless both parties are so afflicted, in which event either party may bring the action), and within one (1) year after the discovery of such affliction by the plaintiff.

Comment

As we observed in Part III of the study,²⁵² the subject of statutes of limitations for the commencement of annulment suits has been almost entirely neglected by the Wyoming legislature. It is believed that Section 25 "covers all the bases" in this connection. In setting up limitations on the various grounds for annulment the section follows the order in which voidable marriages are described in Section 18. Section 5 is also involved, since it provides that the failure to comply with certain directory requirements for valid ceremonial marriages shall render the resulting marriage voidable. However, all of these requirements pertain to underage marriages—a subject covered also in Section 18(b), hence Section 25(2) covers everything voidable under Section 5. (Duplications are not generally desirable, but this one seems permissible for the reason that Sections 4, 5 and 6 are all logically required to dispose of the question, "What is the effect on the validity of a marriage of failure to comply with the various requirements for a Wyoming ceremonial marriage?" Section 18, which describes voidable marriages, would certainly be incomplete if underage marriages were omitted therefrom.)

Discussing in detail the limitations imposed upon the commencement of annulment suits by Section 25, it will be noted that a one year limitation has been chosen for all but the underage marriages. The thinking here was that if parties to

252. Rames, *supra* note 211, at 121-123.

a voidable marriage are permitted to seek its annulment, public policy favoring certainty of marital status should dictate that the period during which judicial attack is permitted should be relatively brief. Less than one year seems unnecessarily short to the writer, with the exception of underage marriages; if these are to be repudiated, then it ought to be done while the plaintiff is still underage, otherwise we get into questions of possible ratification after the attainment of marriageable age. The language of Section 25(2) is identical with Section 208(b)(3) of the proposed Uniform Act pertaining to this subject, tying it in with the provisions of that Act on underage marriages which we followed in our Section 8(a).

Should *both* parties to the marriage be permitted to sue for annulment, or should the remedy be limited to the "injured" party? To some extent this parallels the question as to whether the modern divorce-without-fault philosophy should be accepted, or whether, as in the past, divorce should be available only to an "innocent" party and against a "guilty" party. Section 25 has not adopted either of these concepts exclusively, preferring to approach each separate ground on the basis of what is best from the standpoint of fairness and public policy. There is no real consent, from a contractual point of view, when a party lacks the mental capacity to enter into a marriage—hence he, as well as the "innocent" party, should be able to obtain annulment. But if a person of marriageable age deliberately marries an underage person the former should not be heard to complain, hence annulment of underage marriages is limited to the underage party and his parents or guardian. The same is true when the marriage has resulted from duress. Of course it is recognized that sometimes *both* parties may have been subjected to the duress of a third person. In such a case, under the wording of Section 25(3) either party could institute the annulment suit. Such a suit would not be an adversary proceeding in the real sense, but the law makes no provision for one of the parties to a marriage suing a *third* person for annulment. As with underage marriages and those resulting from duress, only the victim of fraud should be entitled to bring an annulment suit. On the other hand, impotency (unless it is fraudulently concealed) is like lack of mental capacity: the impotent party

is not a wrongdoer and should not be barred from seeking annulment. The decision on the venereal disease ground is debatable. If it is misrepresented or concealed, it can come under fraud, but even if there is no fraud, V.D. is usually not contracted innocently, and to allow the afflicted person to take advantage of his own wrong by permitting him to annul his marriage would seem to place a premium on wrongdoing. This position may not seem fair to the occasional party who has V.D. of an infectious or transmissible character and doesn't know it—if there are any such—or to the person who contracted V.D. innocently and has not concealed it from his marriage partner. On balance we have put this ground under the rule that only the victim of wrongdoing should be permitted to seek relief from its results.

Section 26. No action to annul a voidable marriage shall be brought unless, at the time of commencement of the action, the parties to the marriage have separated and are no longer living together as husband and wife; *provided*, however, that this requirement shall not apply to annulment actions instituted by the parents of a party to a marriage who is under the age of eighteen (18) years and who has not complied with the requirements of law respecting valid marriages of such persons. Except for the attainment of ages which would validate a marriage otherwise voidable because of underage, no acts of or statements by the parties to a voidable marriage performed or made prior to the running of the statutes of limitations set out in this Act shall constitute ratifications of such marriage. Unless and until a voidable marriage is annulled by decree of a court of competent jurisdiction, it shall be presumed to be valid.

Comment

The only feature of Section 26 which should be open to serious debate is the provision concerning ratification. The time limits on bringing annulment actions are relatively short, and Section 26 dictates that such actions can be brought by the parties only if they have separated. The provision concerning ratification will prevent the haggling which sometimes occurs over whether there has been ratification of a

voidable marriage. Under the circumstances it seems justifiable.

Section 27. Subject to the limitations set out in this Act, either party to a void or voidable marriage may bring an action in the District Court of the county in this State in which he has been domiciled for at least sixty (60) days next preceding the commencement of the action, which shall be entitled an "Action to Annul a Marriage"; *provided*, however, that if the marriage was solemnized in this State, and the plaintiff has resided in the county in which the action is brought from the time of the marriage up to the time of bringing the action, he may institute the action at any time after the solemnization of the marriage and within the applicable statutes of limitation. Actions to annul marriages shall be deemed civil actions, and shall be governed by the Wyoming Code of Civil Procedure and the Wyoming Rules of Civil Procedure, insofar as the same are not inconsistent with the provisions of this Act. Jurisdiction over the subject matter of and the parties to such actions, and the procedure in such actions, including the rules of evidence, shall be the same as in actions for divorce in the district courts of Wyoming.

Comment

Beginning at this point, actions for annulment are to a large extent blended into divorce suits. By doing this, and by providing that annulment suits are civil actions governed by the Code and Rules of Civil Procedure, many questions are avoided which have been troublesome in the absence of such specific directions—for example, the question of whether there can be service by publication in an annulment suit. (This particular problem is covered by Rule 4(e)(9) of the Rules of Civil Procedure.) Section 27 adopts the residence qualifications pertaining to divorce actions, and this removes another uncertainty that would otherwise exist. By inserting the phrase "insofar as the same are not inconsistent with the provisions of this Act" we permit departures from the Code and the Rules where deemed necessary.

The proposed Uniform Act deliberately contains very little respecting procedure, evidently preferring to leave this aspect to the individual States.²⁵³

Section 28. (a) At the conclusion of an action for annulment the court shall make and enter its findings of fact and conclusions of law, and, if the court determines that the marriage involved in the action was either void or voidable, it shall enter its decree annulling the marriage; otherwise it shall declare the marriage valid. If annulment is granted, the decree shall specify whether the marriage was void, or voidable, and shall declare the marriage invalid as of the date upon which it was performed, contracted or created; *unless* the court finds, after consideration of all relevant circumstances including the effect of a retroactive decree upon third persons, that the interests of justice would be served by not making the decree retroactive—in which event the decree shall declare the marriage invalid only from and after the date on which the decree was made.

(b) In the event(but only in the event) that the decree determines that the marriage was voidable, and declares it invalid from and after the date on which the decree was made, the provisions of law applicable to divorce decrees respecting the property rights of spouses, and permanent alimony and support of spouses shall apply also to annulment decrees.

(c) Regardless of whether the court in the annulment decree determines that the marriage was void or voidable, and regardless of whether or not the annulment is made retroactive, the provisions of law respecting the temporary and permanent support and custody of children in actions for divorce shall apply to actions for annulment. In the event that the action to annul a marriage is brought by a husband against a wife, and the wife in good faith denies the husband's allegations of invalidity of the marriage, she may, in the discretion of the court, be allowed temporary support, counsel fees and suit money, in reasonable amounts, as in actions for divorce.

(d) Regardless of whether the court in the annulment decree determines that the marriage was void or voidable,

253. See the draftsman's comment to Section 205, in 5 FAMILY L. Q. 209, 213 (1971).

and regardless of whether or not the annulment is made retroactive, the court in the decree shall make an equitable division between the parties of property acquired by their joint efforts during the existence of their de facto marriage. In making such division the court shall apply the principles of law applicable to the division of property among partners upon the dissolution of a commercial partnership, insofar as the same are not inconsistent with the purposes of this Act. In addition, the wife shall be entitled to the whole (or such part as the court shall deem just and reasonable) of the real and personal estate that shall have come to the husband by reason of the marriage—or the court may award her the value thereof, to be paid by her husband in money.

(e) From and after the effective date of this Act, every child is the legitimate child of his natural parents, and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father if the father is married to another person other than his mother. No decree of annulment of a marriage shall in anywise affect the legitimacy of children.

(f) Nothing herein contained shall be deemed to affect the construction of any will or other instrument executed before the time this Act shall take effect, or any right or interest in property or right of action vested or accrued before the time this Act shall take effect, or to limit the operation of any judicial determination heretofore made containing express provision with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any order or orders entered in such adoption proceeding.

Comment

Section 28 will undoubtedly be the storm center of controversy over this proposed revision. It involves a number of problems which have led to great diversity of opinion.

Discussing these in order, if the court should find the marriage valid it will under subsection (a) enter a declaratory judgment to that effect. In such event all the ordinary inci-

dents of a valid marriage will attend. Traditionally, an annulment decree is retroactive and has the effect of making the marriage void *ab initio*. Subsection (a) gives the court discretion, under the guidelines specified, to make the annulment effective only from the date of the making of the decree. In this, the subsection has followed Section 208 (e) of the proposed Uniform Act. Such action by the court would legitimize children born of the marriage—although this would not be essential in view of subsection (e)—but its primary importance is that if the court found the marriage voidable it would permit the inclusion in the decree of provisions respecting the property rights of the spouses, permanent alimony and support, and temporary and permanent support and custody of children as if the action were for divorce, as provided in subsection (b).²⁵⁴ There is one difference: as previously noted, the proposed Uniform Act makes no distinction between void and voidable marriages. Also as previously noted, the position taken in this proposed revision is that there are certain kinds of marriages with such serious defects as to make them totally unacceptable, hence void. If we condone void marriages by saying, in effect, “Your marriage is completely defective, but nevertheless we will give you the same rights as if you had been validly married,” the result is to sweep away all of the requirements which in the past we have considered important, or to equate annulment with divorce. On the other hand, a voidable marriage is an imperfect marriage, and the parties thereto are justly entitled to at least some of the benefits of a valid marriage where the interests of justice seem to require it. This proposed revision does make two concessions to spouses of void marriages: in subsection (d) it is provided that in the annulment decree the court shall make an equitable division of property acquired through their joint efforts during the existence of the *de facto* marriage, applying principles of law applicable to the dissolution of a commercial partnership.²⁵⁵ It also allows a return to the wife of the property she brought to the marriage, as now provided by Section 20-64 of the Wyoming statutes on annulment. Except for these, there is no doubt that Section 28

254. See the draftsman's comment to Section 208, in 5 FAMILY L. Q. 209, 219 (1971).

255. The draftsman of the proposed Uniform Act notes respectable authority supporting this position in 5 FAMILY L. Q. 209, 219 (1971).

leaves out in the cold the "wife" who, in good faith, "married" a man with an existing wife without knowledge of her existence, and thereafter gave him the best years of her life. This seems to the writer to be an instance where "we can't have it both ways."

Subsection (c) is designed to protect children during the progress of an annulment case. Our existing statutes contain no provision for this.²⁵⁶ The language permitting qualified entitlement of a wife to temporary support, counsel fees and suit money finds support in some of the decisions.²⁵⁷

Section 28(e) will undoubtedly arouse a storm of protest, since it abolishes the concept of the illegitimacy of children. In the course of the study the writer has expressed his positive views on this subject.²⁵⁸ Contrary to the conclusion reached there, reflection has convinced us that the only fair and thoroughly satisfactory statute is the type which has been in force in Arizona for many years and which provides, simply, that every child is the legitimate child of his natural parents.²⁵⁹ Of this statute Clark says:

It is only by this form of statute that all the troublesome issues of construction raised by more limited statutes and discussed in this section can be eliminated. And it is only by this form of statute that ordinary justice can be achieved for all children regardless of the accident of their birth.²⁶⁰

Such a statute would not conflict with statutes relating to paternity proceedings. It would avoid the stigma of bastardy which the existing Wyoming statutes place upon the children of annulled marriages under many circumstances. It would admittedly conflict with existing statutes on inheritance of property, but this is not a battle we shall attempt to fight in this forum.

The F.L.S. wished to phrase the provision concerning legitimacy in somewhat different language than that of the Arizona statute. Its proposal was "that children born to parties who were married before or after the birth of such

256. Rames, *supra* note 211, at 142.

257. *Id.*, at 144.

258. *Id.*, at 148-51.

259. ARIZ. REV. STATS. § 14-206 (1956).

260. CLARK, *supra* note 223 § 3.4, at 135.

children be legitimate regardless of the validity of the marriage."²⁶¹ This seems to import the idea that there be some sort of "marriage," which is not required by the Arizona statute we have adopted. As an alternative, the F.L.S. suggested Section 24 of the New York Domestic Relations Law, which reads as follows:

§ 24. Effect of marriage on legitimacy of children.—1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.²⁶²

Then follows, as Subsection 2 of the New York statute, the language which we have adopted bodily, and without change, as Section 28(f) of the proposed revision.

The Commissioners were willing to go at least part way. Section 207(b) of the proposed Uniform Act provides that "[c]hildren born of a prohibited marriage are legitimate."²⁶³ Section 208(d) reads: "Children born of a marriage declared invalid are legitimate."²⁶⁴ These various alternatives are well worth considering.

Section 29. After an action to annul a marriage has been commenced, as in the case of commencement of an action for divorce, if it shall be made to appear probable to the court that either party is about to do any act that would defeat or render less effectual any order which the court might ultimately make concerning property or pecuniary interests, the court shall enter an order for the prevention thereof, and shall issue such legal or equitable process as it shall deem necessary or proper. Likewise, after the commencement of an action to annul a marriage, the court may at any time, on the petition of either party, prohibit the other party from

261. 5 FAMILY L. Q. 125, 127 (1971).

262. N. Y. DOM. REL. § 24 (McKinney 1964).

263. 5 FAMILY L. Q. 209, 215 (1971).

264. *Id.*, at 217.

imposing any restraint upon the personal liberty of the petitioner during the pendency of the cause.

Comment

These provisional remedies are allowed in divorce cases by existing Wyoming Sections 20-56 and 20-57, and it seems desirable to extend them to include annulment suits.²⁶⁵

Section 30. After an action to annul a marriage has been commenced, as in the case of commencement of an action for divorce, upon a showing of good cause the court may cause the attendance of the husband and compel him to answer under oath concerning his property, rights or interests, or money that he may have, or money due or to become due to him from others, and make such order thereon as shall seem just and equitable; and to enforce its orders concerning alimony (temporary or permanent) or property or pecuniary interests, the court may require security for obedience thereto, or may enforce the same by attachment, commitment, injunction or by other means according to the usages of courts.

Comment

This section is in essence the same as Section 20-59 of the existing statutes, which at present applies only to divorce. Although some of the objectives of Section 30 could be accomplished through discovery proceedings under the Rules of Civil Procedure, neither the Rules nor the Code appear to confer upon the court the extraordinary powers granted by Section 20-59; and these may be useful in a case which may result in a finding of a voidable marriage, with a non-retroactive decree, under Section 28(b) of the proposed revision.

Section 31. No decree annulling a marriage shall be based solely upon testimony by another person of declarations or admissions made by the defendant in an action to annul a marriage. The court shall in such instances require other evidence in its nature corroborative of such declarations or admissions before making a decree of annulment.

265. Rames, *supra* note 211, at 142.

Comment

Section 31 is a modification of the present Section 20-53, the language of which is often misunderstood as requiring corroboration of the plaintiff's testimony in *all* cases. *Dawson v. Dawson*²⁶⁶ gives Section 20-53 the meaning expressed in Section 31. The word "confessions", used in the existing statute, has been omitted as not appropriate to a civil case.

SUMMARY

The foregoing 31 Sections are offered as a complete revision of existing Wyoming statutes on marriage and annulment—with the realization that they do not embody perfect solutions to the many intriguing problems in these areas. One and perhaps two additional sections should be added. Section 32 should repeal the existing statutes, by number, *prospectively*; i.e., the new Act would apply only to marriages, annulments and declaratory judgments taking place or instituted subsequent to its effective date. Sections 3 and 28(f) partially take care of the questions of retroactivity. There should be a Section 33 if it seems advisable to provide that the new Act take effect at some time other than 90 days after adjournment of the 1973 legislative session.

Limitations of space prevent the inclusion of the following features which would be helpful if not indispensable to a comparison of the proposed revision with existing statutes: (a) A Table of Disposition of Statutes, showing the place or places where the latter appear in the proposed revision. If certain features of the existing statutes have been omitted from the proposed revision, such a table would identify these. (b) A summary of the major points of difference between the existing statutes and the proposed revision. Such a summary would note new features added by the proposed revision.

There are arguments pro and con as to the advisability of including a "separability section". It seems to the writer that on balance such a section is not desirable and should be omitted.

In several instances the proposed revision reflects changes of mind (or heart) as compared with conclusions

266. 62 Wyo. 519, 177 P.2d 200 (1946).

reached in Parts I, II and III of the study. An attempt has been made to indicate all such changes in the Comments, at appropriate places.

The results of the study, including the proposed revision, are being referred to the Wyoming Legislative Service Agency for such action as it may deem appropriate. Reactions of members of the Bench and Bar, County Clerks and other interested persons are invited.