

# PARAS APY & REISS

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## **Annulment: Antediluvian Relic or Sleeping Giant**

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Annulment, like divorce, creates a statutory exit route from a marriage or civil union. However, that is where the similarity ends. A judgment for annulment creates the legal fiction that the marriage never existed and its record can be excised from the government registry. The focus, in annulment actions, is on establishing the cause of action, which, except under very limited circumstances, must be done by clear and convincing evidence. It is noteworthy that civil annulment and religious annulments are completely unrelated and it is not necessary to have a civil annulment in order to obtain an annulment from an ecclesiastical tribunal. Civil annulment provides no statutory property or support rights, although, historically, equitable arguments have prevailed to afford a litigant certain remedies. Passage of the proposed statute requiring that pre-marital agreement be in writing could have a significant impact on the viability of such equitable claims.

Our legislature has a strong policy favoring marriage. Accordingly, annulment is frowned upon. Pursuant to N.J.S.A. 2A:34-1, a cause of action is established under the following limited circumstances:

- a. Bigamy, or in the case of civil union, one of the parties has a spouse or another domestic partner.
- b. The parties were related by one of the degrees prohibited by law.
- c. At the time of the marriage, either of the parties knew, but failed to disclose, that they were incapable of having children and, upon such disclosure, the parties did not ratify the marriage (not available in civil union cases).
- d. Either of the parties lacked the capacity to marry due to a “want of understanding” of marriage, because of a mental condition or being “under the influence of intoxicants, drugs or similar agents; or a lack of mutual assent to the marriage relationship; duress; or fraud going to the essentials of the marriage; and the marriage was not subsequently ratified.
- e. Either party was under the age of 18 at the time of the marriage, and the marriage was not confirmed once that party reached the age of consent.
- f. Allowable under the general equity jurisdiction of the Superior Court.

In the case of bigamy, courts have accepted proof by a preponderance of the evidence where records of a prior marriage may be unavailable. All other elements require proof by clear and convincing evidence. “Clear and convincing evidence” is defined as “proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations... [evidence] so weighty and convincing as to enable the fact finder to come to a clear conviction

without hesitancy..." State v Hernandez, 170 N.J. 106 (2001) Since the standard of proof is so exacting actions for annulment are rare, particularly in modern times, and annulment judgments even more infrequent.

New Jersey also distinguishes between marriage which are void, and to which there is no viable defense to the annulment claim, and those which are voidable and the annulment claim can be defeated by proof that the party seeking the relief subsequently learned of the act constituting the conduct underlying the cause of action, but continued in the relationship, thus ratifying the marriage. This distinction is reflected in the statute. Annulment is also subject to defenses such as laches and unclean hands.

On occasion, an angry spouse will use a claim of fraud to defeat an adulterous or mentally ill spouse's claim for alimony and equitable distribution. Such claims have rarely been successful, especially in recent times. The jurisdiction of the court to grant an annulment on the basis of fraud must 1) be founded in deceitful suppression of the truth; 2) the suppression must be willful; 3) with intent to deceive, and 4) be of an "extreme" nature and must go to the essential of the "marital relation." Houlahan v. Horzempa, 46 N.J. Super. 583 (Ch. Div. 1957) at 589; Akrep v. Akrep, 1 N.J. 268 (1949); Posciatta v. Buccino, 22 N.J. Super. 114 (App. Div. 1952). These elements must be proven by the applicant by *clear and convincing evidence* and not subject to the availability of other inferences. Bilowit v. Dolitsky, 124 N.J. Super. 101, 304 A.2d 774 (Ch.Div.1973). Patel v. Navitlal, 265 N.J. Super. 402, 408 (Ch.Div. 1992).

In Rhodes v. Rhodes, 10 N.J. Super. 432 (E. & A. 1950) the court emphasized that "a court should not annul a marriage on the ground of fraud except in *extreme* cases, where the particular fraud goes to the *very essence* of the marital relation, ... especially where....the marriage has been fully consummated and the parties have actually assumed all of the mutual rights and duties of the relation." In such a case considerations of public policy intervene, and our courts are loath to annul a marriage. Id. at 438 (emphasis added). This is because an executed contract for marriage creates a status which society is interested in maintaining. Id. citing Marshall v. Marshall, 300 Pac. 816 (Cal. Sup. Ct. 1931). While divorce may terminate a contract, it does not render it void *ab initio*. There continues to be a recognition that a partnership existed and statutory obligations that flow therefrom.

For a court to grant an annulment based on fraud, there must be a deliberate misrepresentation, which could not have been discovered had due diligence been exercised, and the misrepresentation must go to the essentials of the marriage. The "essentials of the marriage" is a subjective standard. Costello v. Porzlet, 116 N.J. Super. at 383-385. More recent decisions have noted that "this is as it should be" because "what is essential to the relationship of the parties may be of considerably less significance in another. A determination of whether a fraud goes to essentials of the marriage must rest upon the allegations and background facts in each case. V.J.S. v. M.J.B. 249 N.J. Super. 318 (Ch. Div. 1991) at 320, Ysern v. Horter, 94 N.J. Eq. 135, 139 (Ch. Div. 1922) .

In Rhodes v Rhoades, *supra.*, the wife lied to the petitioner and told him that she had become pregnant with his child several years earlier, and had given birth to the baby which she gave away. Petitioner asserted that the plaintiff made this affirmative, fraudulent misrepresentation for the purpose of inducing him to marry her, which he did. He also

stated that had his wife told him prior to the marriage ceremony that she had never given birth to his child, he would not have married her.

The court specifically held that the wife's representations that the husband had fathered a child with her were fraudulent. Nonetheless, the court found that even this fraudulent representation, though it was relied on by the husband, did not amount to the "species of fraud contemplated by the New Jersey Rule." *Id.* at 437.

In Costello v. Porzlet, 116 N.J. Super. 380 (Ch. Div. 1971) the court held that concealment of a criminal record alone, is not sufficient to warrant an annulment. In the instance of a request for an annulment based on the suppression of a mental or physical condition, the focus is not on the health of the accused party, but "in deceitful suppression of the truth; the suppression must be willful, with intent to deceive, and must go to the marital relation. Buechler v. Simon, 140 N.J. Eq. 572 (Ch. Div. 1929); Allen v. Allen, 85 N.J. Eq. 55 (Ch. Div. 1915) *aff'd* 86 N.J. Eq. 441 (E. & A. 1916); Houlahan v. Horzepa, 46 N.J. Super. 583 (Ch. Div. 1957).

In Buechler, *supra*, the court found that concealment of incarceration in an asylum by itself was no grounds for annulment. There, it was discovered by the husband that his wife had been hospitalized for a mental condition 19 years before the marriage. She did not on her own make any statement as to her physical or mental condition, nor did her husband request any information regarding same. Thus, the court refused to find that she deceitfully concealed her prior confinement.

In Storf v. Papalia, 24 N.J. Misc. 145 (Ch. Div. 1946) the court applauded the holding of Buechler, and found that a wife's fraudulent concealment of her prior commitment to an insane asylum did not constitute a fraud that went to the "essence of the marriage."

In that contract of marriage which forms the gateway to the marriage status the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from an accident, or, in general, from fraudulent practices, in respect to the character, fortune, health, or the like, does not render void what is done. *citing* 1 Bishop on Marriage, Divorce and Separation, at 459.

The court continued:

The nature of marriage forbids its validity to rest on any stipulations concerning these accidental qualities. Should the man, in words, agree with the woman to be her husband only on condition of her being so rich, so virtuous, so wise, so healthy, of such a standing in society; yet, should he then celebrate the nuptials on her representing herself to possess those qualities, while in truth she did not; still in the act of marriage he says to her, in effect and in law, "I take you to be my wife whether you have the qualities or not, and whether you have deceived me or not." *In other words, he waives the condition.* (emphasis added) To carry such a condition into the marital relation would void its spirit and purpose, and be contrary to all good morals. Therefore, no

misconception as to the character, fortune or health or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. *These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation exists.*

In Houlahan v. Horzepa, 46 N.J. Super. 583 (Ch. Div. 1957), the husband petitioned for an annulment based on the allegation that the defendant wife, who had not before the marriage ceremony disclosed that she had a history of institutionalization in two mental hospitals four years apart (the latter of which she was discharged from only nine months prior to the marriage ceremony), had fraudulently concealed her mental illness from him, and that her mental illness constituted a condition which goes to the essential of the marriage.

In denying the defendant husband's petition for annulment, the court relied on the holding of Buechner and Storf and found that 1) since wife made no affirmative representations as to her mental condition, there was no concealment; and 2) even presuming that there was fraudulent concealment, it is apparent that it does not go to the essential of the marital relation, as her mental illness is an "accidental quality"; and 3) plaintiff husband took no steps to ascertain the truth of statements made to him by his mother-in-law and brother-in-law that the plaintiff wife had suffered from a nervous breakdown in the past. The court found the defendant husband guilty of "blind credulity, from the consequence of which the law will not relieve him. He had knowledge of facts sufficient to put a reasonable man on his inquiry." Id. at 593-594.

New Jersey cases have consistently held that premarital licentious sexual acts, or failure to disclose prior illegal activity is not a justification for an annulment. Tobon v. Sanchez, 213 N.J. Super. 472 (Ch. Div. 1986) (holding that the defendant's failure, before the marriage, to disclose that he had fathered two out-of-wedlock children, "though hardly an admirable act," did not go to the "essentials" of the marriage and could not on its own be grounds for annulment); Gerard v. Gerard, 84 N.J. Super. 396 (Ch. Div. 1964) (holding that the defendant's failure, before the marriage, to disclose her prior marriage to her first cousin is not a basis for an annulment); Rhoades v. Rhoades, supra (holding that plaintiff's lie, before the marriage, to defendant that she had given birth to his child after engaging in sexual intercourse with him did not amount to proof of fraud sufficient to annul the consummated marriage). This is so even in cases of sexual behavior that is violative of both moral and legal norms. In Lindquist v. Lindquist, supra, the court reversed the annulment granted to the husband based on the fact that, even in the face of her husband's request for a full disclosure, the wife concealed facts about her relations with two men in the past. In one instance she misrepresented that she was pregnant with the man's child, for the purpose of inducing payments of money and in the other she knowingly engaged in a bigamous marriage. Id. 13.

While the court did not elaborate on the details of the woman's premarital lifestyle (not disclosed to her husband prior to the marriage ceremony), it was described as "devoid of adherence to the conventions," and "characterized by a frequent disregard of *legal and moral* precepts in matters related to sex." (Emphasis added) The husband maintained that these concealed facts did "not only seriously mar his standing in the business and social

world,” but would also render the wife unfit for “the rearing of [the husband’s] children by a former marriage.” Id. Importantly, in *Horzepa* and *Linguist* the court specifically imposed a duty of diligent inquiry on the party alleging the fraud.

It is important to distinguish the cases cited above from the highly unique situations in which annulments have been granted. In *Bilowit v. Dolitsky*, 124 N.J. Super. 101 (Ch. Div. 1973), the plaintiff wife, a deeply religious Orthodox Jew, married the defendant husband in reliance on his representation that he too was a practicing Orthodox Jew. After the marriage was consummated, the husband confessed to the plaintiff that he did not in fact adhere to the tenets of the Orthodox Jewish religion and had misrepresented his religious convictions because he was in love and knew that his wife would not marry him otherwise. The wife then immediately sought an annulment on the ground of fraud, which was granted.

The court reiterated agreed with many other holdings that “[t]here ought always be an indisposition in every court to weaken the force and sacredness of the marriage tie, “ a marriage should only be granted null and void where “[t]he fraud was so gross and far-reaching, as to avoid the consent.” Ibid. at 104. Nonetheless, the court found that the facts of this case warranted an annulment only because:

[to] plaintiff the religious beliefs and convictions of her husband were *essential* to her marriage. She could not have properly performed the duties of a wife and mother, following the rules and teachings of her faith, without the support of her husband holding the same beliefs. Defendant, *having substantially and knowingly misrepresented the same to her, and plaintiff having relied thereon in entering into the marriage*, this court holds the fraud to which plaintiff was subjected to be “gross and far reaching,” within the meaning of Carris. Id. (Emphasis added).

It was evident to the court that the husband knew that her religious practices were at the core of the wife’s way of organizing and operating her day-to-day life and that it was critically important to her that that this be true of her husband as well; that he had no intent of having these practices govern his behavior and that he nevertheless deceived his wife. Notably, this was a short marriage and the Wife sought an annulment shortly after she discovered that she had been deceived.

In *Costello v. Porzelt*, 116 N.J. Super. 380 (Ch. Div. 1971) the court granted an annulment to the wife on the grounds that the husband’s concealed his long-standing heroin addiction. There, the parties married after a courtship of only a few weeks. The husband did not admit that he was a heroin addict. However five weeks after the parties were married he looted the marital residence and sold household items to buy drugs. The wife admitted evidence, including her husband’s arrest record, and testimony that the husband was a narcotic addict as of the date of his marriage to the plaintiff. Id. at 383.

In determining that the husband’s concealment of heroin addiction is a premarital fraud which goes to the essentials of the marital relation, such as to warrant the granting of an annulment, the court relied on the fact that our

courts have specifically held that narcotic addiction creates “an incapacity to discharge the marital duties” DeMeo v. DeMeo, 110 N.J. Super. 179, 180 (Ch. Div. 1970) The court cited formidable medical authorities including that: 1) authorities recording objective scientific observation generally confirm the relation between drug addiction and sexual indifference and rejection (which were charged by the Plaintiff in that case) and there are only individual exceptions to those findings; marriage in the life of a narcotics addict - - if it takes place at all - - is a very transitory episode; and 4) the narcotics addict is possessed of only one fervent objective- - the ways and means of obtaining his next shot of heroin. Costello v. Porzelt, *supra*. 116 N.J. Super. (Ch. Div. 1971) at 387. Such a condition makes it impossible for the narcotics addict, because of the chemical dependence, incapable of participating in the marital partnership in any meaningful way, including the creation and raising of children. Relying on the opinions of medical professionals to the New Jersey Judges Conference, as well as other cited research, the court reasoned that “unlike diseases like tuberculosis and syphilis, which may be arrested or cured, there is no known cure to heroin addiction.” Id.

Each of these cases is fact sensitive. The shorter the marriage and the fewer products of the marriage relationship the more sympathetic a court is likely to be to the annulment claim. By contrast, in longer relationships where the parties have parented children and acquired assets, such assertions are likely to be subject to greater scrutiny. Nevertheless, judges are granted broad discretion in their factual findings. So long as they can make findings of facts which they determine to constitute clear and convincing evidence of fraud that goes to the essentials of the marriage, a judgment for annulment is likely to withstand appellate review.

In this regard, the proposed amendment to the Statute of Frauds, which requires that cohabitation agreements be in writing may create an incentive for a bitter litigant to seek an annulment. Equitable claims in for support in annulment matters are typically based on either a promise to support or services rendered during the marriage. If the marriage is rendered void and promises have to be in writing, equitable claims in annulment actions are largely eliminated.

There have been no published decisions addressing the causes of action for annulment since the Supreme Court decided Mani v Mani , 183 N.J. 170 (2005) which virtually eliminates consideration of fault in the court’s determination of economic issues in a divorce. This decision reflects the strong public policy that marriage creates a partnership to which each party is presumed to have contributed and that conduct which led to a party’s desire to exit the marriage is irrelevant to issues of support and the distribution of the fruits of the marital partnership. Thus, where fault in divorce is largely irrelevant in fault in an action for annulment completely drives the economic issues by eliminating statutory entitlements to alimony and equitable distribution. The public policy expressed in Mani demands the utmost scrutiny of factual allegations purporting to establish a cause of action for annulment and it is imperative that counsel stress the requirement that each element of the cause of action requires proof by clear and convincing evidence. Similarly, in defending an annulment claim counsel should not hesitate to raise defenses such as laches, failure to exercise due diligence and unclean hands.