"IF I GET MARRIED, I WANT TO BE VERY MARRIED." THE GODFATHER OF SOUL, RICHARD PRYOR, AND OTHER POST-DEATH CHALLENGES TELL US: HOW MARRIED YOU ARE DEPENDS ON THE STATE

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I. INTRODUCTION

"If I get married, I want to be very married."
-Audrey Hepburn.

Ms. Hepburn's sentiment is an understandable one. However, since marriage is a creature of state law, whether a person is married (very or not) is not always an easy question to answer. The status of what seems to be a very married couple can be upset by claims of bigamy, polygamy, lack of capacity, undue influence, and fraud. Whether the claims will be sustained to upset an apparently-valid marriage often will depend upon the state laws that may apply, as well as on the views of the courts applying those laws.

The purpose of this article is not to conduct a 50-state survey but to highlight how the different approaches of the different states can affect the outcomes of marriage contests and the rights of a purported spouse to inheritance.

We begin with two cases involving James Brown, the godfather of soul—a dissolution case and a probate case—because they present the question: Was the final probate result dictated by the statute, or did the court have its own clear views about the proper outcome?

II. "AIN'T IT FUNKY NOW"? BIGAMY IN THE HOUSE OF THE HARDEST WORKING MAN IN SHOW BUSINESS.

In 2001, James Brown, the "Godfather of Soul," married back-up singer, Tomi Rae Hynie, in South Carolina. In the process, Ms. Hynie signed a marriage license application stating under oath that she had never been previously married.[01] In 2004, Mr. Brown filed to annul the marriage on the basis that Ms. Hynie had never divorced her first husband, Javed Ahmed, whom she had married in 1997.

Ms. Hynie responded to Mr. Brown's claim in South Carolina by seeking an annulment of her marriage to Mr. Ahmed as void *ab initio*.[02] She served Mr. Ahmed by publication. He made no appearance. The trial court accepted Ms. Hynie's unchallenged testimony that Mr. Ahmed had admitted after-the-fact that he had three wives in Pakistan at the time of the marriage and had married her solely to obtain a Green Card that would allow him to stay in the United States. She also stated that the marriage had never been consummated. The court granted the petition for annulment on the grounds that the marriage was void *ab initio* because it was bigamous and thus Mr. Ahmed lacked capacity to marry, because he fraudulently induced the marriage, and because the marriage was never consummated.[03]

Mr. Ahmed was allegedly lying in 1997. I would think Ms. Hynie was certainly lying in 2001.

marriage is "declared void" before the second marriage.[57] The court explained that the statute is static focusing on a single point of time, the contracting of the second marriage, and thus looks to the status of the parties only at that point in time.[58] The court further explained that the policy behind the static nature of the statute is to promote the accuracy of marriage records by requiring the record to be clear before a second marriage is contracted.[59]

The court acknowledged that there is authority that provides that a marriage void ab initio is void ab initio whether or not a court declares it so.[60] But the court disagreed that the South Carolina statute should be interpreted accordingly based upon public policy concerns for the need for a judicial declaration:

> While we acknowledge there is some authority for the proposition that a marriage that is deemed void ab initio by statute need not be declared so by a court, we believe, a civil statute, contemplates an orderly procedure for this determination that precludes a party from unilaterally and privately concluding a prior marriage is defective. Without a formal declaration that a marriage is void by a competent court, the public record will continue to show an existing marriage. Moreover, it is possible that a party could falsely claim (or mistakenly believe) that a marriage is bigamous, so requiring this point to be established in a formal setting with admissible evidence provides a verifiable method for ascertaining the parties' marital status.[61]

What was left unexplained is what the difference is between "void" and "voidable" if void really only means voidable, i.e., a marriage is valid in the records of the South Carolina government unless and until it is declared invalid. It appeared to conflate the concepts of "void" and "voidable" in order to reach its desired result, which was that the Brown-Hynie marriage could not stand. It used the need for accurate marriage records at the time they are made as its rationale.

It explained that a rule that promotes certainty, i.e., that a prior marriage must be terminated by judicial decree prior to a successive marriage is needed. Indeed, the court explained, the uncertainty surrounding Ms. Hynie's status was precisely the situation the statute was supposed to avoid.

Finally, returning to a theme in its prior opinion in the Brown estate matter, in which it reversed the approval of the settlement, the court lamented the cost of proceedings that diminished the assets of the estate that Mr. Brown intended to benefit charity. However, the court did not mention whether the settlement it declined to approve might have ultimately proved financially more desirable for the charities, even if not what Mr. Brown might have intended.

III. THE VITAMIN KING'S TOXIC WORLD, OR "WHAT HAPPENS IN VEGAS, STAYS IN VEGAS"

In December, 2010, in Las Vegas, Gerald Kessler ("Gerry"), the founder of Nature's Plus vitamin company, married Meadow Williams ("Meadow"), a much younger woman. At his death, Gerry's trust left virtually his entire estate to Meadow. As could be expected, the plan generated a complaint. Surprisingly, amongst other allegations, the complaint alleged that Meadow's marriage to Gerry was bigamous, and that she defrauded Gerry into the marriage and the estate plan, all the while intending to remain married to her first husband, her childhood sweetheart from Tennessee.

Meadow and her first husband, Mark Spadafino, thought that they had been divorced for more than 20 years. They had been filing tax returns as single for the entire period. Meadow had gone to a free legal clinic, somewhere around the Beverly Center in Los Angeles, where she obtained the divorce forms and was told that if the two of them filled them out and filed them, they would be divorced. In 1993, when Meadow filed her petition for dissolution and Mark filed his response indicating "no contest," there was a special procedure called a "summary dissolution." If you were married but had no marital assets, there was a procedure pursuant to which you could file papers and the divorce would be automatic after a period of six months. But the forms Meadow and Mark filed were the regular old divorce forms, not the forms for summary dissolution. It turned out that in 1993 there was a clinic near the Beverly Center in Los Angeles that offered free legal and women's health services to clients who could not afford private professionals. No doubt, the clinic gave correct information, that Meadow and Mark Spadafino could obtain a "summary dissolution" simply by filing papers in court, but handed an unsuspecting Meadow the wrong forms.

The difficulty is that the law does not recognize ignorance of the law, or even bad legal advice, as an excuse. The court will only correct its records nunc pro tunc if it made a clerical error. Meadow took the chance anyway, hoping the story would resonate with the judge, but it was a big ask to suggest to the court that it should conclude that the court should correct its records and enter divorce, even though the court had not made any error at all. The contesting family members ("Kesslers") sought to intervene in the dissolution action. The court granted the request and entered a divorce retroactive to 1993, 22 years earlier. The Kesslers appealed unsuccessfully.

Notwithstanding the California divorce decision, the Kesslers pursued the Nevada contest and cited authority

from outside Nevada that allows collateral attacks on a void marriage after the death of one of the spouses. They also cited Nevada Revised Statutes ("NRS") 125.290(2), which provides that a marriage is void if a party has a former spouse who is living without legal proceedings terminating the former marriage:

> All marriages which are prohibited by law because of: 1. Consanguinity between the parties; or 2. Either of the parties having a former spouse then living, if solemnized within this State, are void without any decree of divorce or annulment or other legal proceedings. A marriage void under this section shall not bar prosecution for the crime of bigamy pursuant to NRS 201.160.

The Kesslers argued they had standing in the trust proceedings to assert that the marriage was void, and to seek to invalidate Gerry's trust on the grounds that it was based on Gerry's allegedly mistaken belief that he was legally married to Meadow. The Kesslers claimed that since Gerry created a marital trust for Meadow to take advantage of the marital deduction from estate tax, the marriage was a material purpose of the trust.

In ruling on Meadow's motion to dismiss, the court noted that a complaint can be dismissed "'only if it appears beyond a doubt' that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim."[62] The court is required to assume all factual allegations in the complaint are true, and draw all inferences in favor of the plaintiff.[63]

The court first analyzed whether the Kesslers had standing to seek a declaration voiding the marriage between Gerry and Meadow. The court explained that marriage is a civil contract.[64] In order to challenge the contract, the Kesslers would have to be able to demonstrate that they had legal rights under the contract, as provided under Nevada's declaratory relief statute: "Any person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected ..., may have determined any question of construction or validity...."[65]

The court explained that the Nevada Supreme Court had addressed the issue of heirs' standing to challenge contracts entered into by decedents, and had rejected the argument that heirs have standing to challenge those contracts because their inheritance would be affected. It wrote:

> The heirs cited to NRS 30.040 and NRS 30.130 to support their claim of standing because 'their inheritance would be "affected" by the court determination in a practical, as distinguished from a legal sense.' The Nevada Supreme Court disagreed, and found 'the complaining heirs have no rights, duties or obligations under the 1960 agreement and thus do not have standing as interested persons to challenge the contract in a declaratory judgment action.[66]

The court likewise concluded that the Kesslers did not have standing to challenge the marriage contract between Gerry and Meadow because the Kesslers had no rights, duties, or obligations under the contract; that their inheritance might be affected was an insufficient basis under Nevada law to confer standing on them.[67]

Furthermore, the court explained,

> Nevada law is clear that even in the face of a void marriage, 'an annulment proceeding [is] necessary to legally sever [the] relationship.' *Williams v. Williams*, 120 Nev. 559, 564, 97 P.3d 1124, 1127 (2004) (again stating and concluding that an annulment proceeding 'is the proper method for documenting the existence of a void marriage and resolving the rights of the parties arising out of the void relationship.').[68]

The court stated that there is no authority binding on a Nevada court that would allow a marriage to be annulled posthumously.[69] Thus, the first claim for relief seeking to declare the marriage void had to be dismissed.[70]

The court then turned to Meadow's motion to dismiss the claim for relief seeking to invalidate Gerry's trust on the grounds of mistake because allegedly a material purpose of the trust was Gerry's alleged belief in the validity of his marriage to Meadow. Accepting all allegations of the complaint as true, the court noted that the trust, attached to the complaint, provided for establishment of the "Meadow Williams Trust" as a subtrust to be created after Gerry's death, and, quoting from the trust, "'a material purpose in establishing the Meadow Williams Trust will be to obtain a marital deduction allowable pursuant to the Internal Revenue Code.'"[71] As we explained in our motion, the trust made gifts to Meadow separate and apart from the Meadow Williams Trust, the fact that "a" material purpose of the Meadow Williams Trust was to qualify for the marital deduction did not mean it was "the" material purpose, it was clear from the trust overall that "the" material purpose was to provide for Meadow, and the trust provided for the formation of other subtrusts for other beneficiaries not qualifying for the marital deduction. The court agreed that reading the trust as a whole, it was not reasonable to conclude that "the" material purpose of the trust was the validity of the marriage to Meadow.[72]

It is interesting to consider how the South Carolina Supreme Court would have dealt with the California court's decision

on the status of Gerry's marriage to Meadow. In the James Brown case, Ms. Hynie obtained a decree annulling her marriage to Mr. Ahmed as of a point in time during Ms. Hynie's marriage to Mr. Brown. Ms. Hynie argued that the decree merely papered what was legally true: the marriage was void regardless of the court decree declaring it so, and Mr. Brown apparently accepted that result.

So how would the South Carolina Supreme Court have handled the California court's order correcting its records to reflect, nunc pro tunc, that the divorce had occurred in 1993, long before Meadow's marriage to Gerry? Unlike Ms. Hynie who had an annulment decree as of a date while Mr. Brown was alive, Meadow had a divorce decree entered in 2016 that she was in fact divorced as of 1993, an order that she received after Gerry's death. Furthermore, could the Kesslers have argued they were not bound by that decision? They objected to Meadow's petition and they appeared at the hearing to object. However, the court held that the Kesslers had no standing and thus, the court would not consider the Kesslers' objection. I suspect, therefore, that the South Carolina Supreme Court would have concluded, based on the logic of the opinion in the James Brown case, that although Meadow was divorced in 1993, prior to her marriage to Gerry, as far as the court records are concerned, the Kesslers would not be bound by that decision in the estate case, i.e., they could contend that they should be free, in the context of an estate proceeding, to claim that the marriage was bigamous at the time of Meadow's marriage to Gerry.

Though that precise argument was not made by the Kesslers in Nevada, it does not appear, given the opinion of the court, that it would have mattered. In other words, the court would have accepted the California court's decision that the divorce occurred, as a legal matter, before Meadow's marriage to Gerry. Further, perhaps as an aside, given how famously quick and easy it is to marry in Nevada, it is not altogether persuasive that Nevada could claim an interest similar to South Carolina in ensuring the accuracy of its marriage records.

The other major difference between the Kessler decision in Nevada, and the decision in South Carolina in James Brown's estate, was the question of standing. The law in Nevada clearly provides that heirs do not have standing to challenge a contract entered into by the decedent, simply because the contract "affects" the heirs' inheritance. It is more interesting to frame the question the way the argument was framed by the successful petitioners to the South Carolina Supreme Court in the James Brown case: whether, instead of challenging the validity of the marriage contract, the heirs had standing to challenge the trust on the theory that it was based on a fraud, or even mistake of fact, that the marriage was valid at the time Gerry established the trust. That might have been a more difficult call.

IV. A PRYOR OFFENSE: NO COLLATERAL ATTACKS IN CALIFORNIA

Under California Family Code section 2201, "a subsequent marriage is void and illegal if a spouse is already married and the prior marriage was not terminated before the subsequent marriage."[73] Had the marriage between Gerry and Meadow been solemnized in California, it would have been void and illegal at the time, but to the contrary, one would have to conclude it were valid and legal after the fact, indeed, after Gerry's death, i.e., the nunc pro tunc decision corrected the court records to confirm that Meadow was actually divorced in 1993 before her marriage to Gerry. It may not be what the Legislature intended, but it is hard to argue that the result would be to validate (revive?) the marriage between Gerry and Meadow, since the court accepted that it was its own records that were inaccurate. The court ruled that Meadow's marriage to Mark Spadafino was indeed dissolved all the way back in 1993.

It is interesting to consider whether the South Carolina Supreme Court (or another court) would agree. The South Carolina Supreme Court attempted to create a bright line test, static in time, by concluding that one looks only at the time of the subsequent marriage, not at a subsequent decree that the prior marriage was never valid. Would it have made a difference to the South Carolina Supreme Court that, instead of a post-facto decree of nullity, the court had decided to correct the record to reflect that the prior marriage had actually been dissolved prior to the subsequent marriage? The decision concerning the status of the prior marriage between Meadow and Mr. Spadafino occurred after the subsequent marriage, but the decision was to correct the record of the prior marriage to reflect that the dissolution occurred prior to the subsequent marriage.

Though it is beginning to appear more common than might be imagined, bigamy is no doubt less common a complaint than a marriage that may be infirm on other grounds such as incapacity. However, if one spouse dies, it is impossible to nullify the marriage.[74] Family Code section 310 provides that marriage is dissolved by one of three means: (1) the death of one of the parties, (2) a judgment of dissolution or (3) a judgment of nullity of the marriage. Under Family Code section 2337, the family court "may sever and grant an early and separate trial on the issue of the dissolution of the status of the marriage apart from other issues." When a spouse dies during the pendency of a marital dissolution action and before the status of the marriage is terminated, it is the death of the spouse that terminates the marriage

under Family Code section 310. In that circumstance, the Family Court's jurisdiction abates.[75]

Under California Family Code section 2210, a marriage is voidable on various grounds, including, for example, that a party was of unsound mind, was defrauded into the marriage or the marriage was obtained by force.[76] A person of "unsound mind" has no capacity to contract.[77] A rebuttable presumption arises that a person is of unsound mind if he or she is substantially unable to manage his or her financial affairs or resist undue influence.[78] This is the standard under the California Probate Code for the establishment of a conservatorship of a person's estate.[79] The establishment of a conservatorship of the estate is a judicial determination that the person lacks capacity to contract.[80] Pursuant to Family Code section 2211, subdivision (c), the conservator or a relative can seek an order nullifying a marriage based upon unsound mind before the death of either of the married parties.[81]

Under section 2211, subdivisions (d) and (e), only the person whose consent was obtained by fraud or force may bring an action to nullify it.[82] In *Pryor v. Pryor*, the Court of Appeal explained that the Legislature expressly stipulated who has standing to seek orders nullifying marriages based on the individual, specific grounds set forth in Family Code section 2210:

> In contrast, in circumstances where the spouse seeking an annulment is capable of protecting his or her interests, only that spouse has standing to initiate annulment under section 2211. Where bigamy is the ground for annulment, the former husband or wife is given standing to seek annulment of his or her spouse's second, bigamous marriage as is either spouse of the bigamous marriage. Where statutes involving similar issues contain language demonstrating the Legislature knows how to express its intent, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes. The language of section 2211 establishes that the Legislature treated the various grounds for annulment differently with respect to standing. By choosing to extend standing to third parties acting for one of the spouses only where a spouse is a minor or is of unsound mind, the Legislature expressed its intent that the injured spouse has exclusive standing to commence an action for annulment based on fraud, force, or physical incapacity.[83]

The *Pryor* court also explained that the Legislature provided within section 2211 of the Family Code the applicable statutes of limitation for an action to nullify a marriage.[84] The court rejected appellant's argument that actions to nullify a marriage based on fraud survive the death of a spouse.[85] Appellant argued that survival of the cause of action for fraud can be inferred from the Legislature's failure to limit the claim to the lifetime of the spouses.[86] Appellant noted, by contrast, that the Legislature expressly provided that actions to nullify a marriage based on bigamy must be brought before the death of a spouse.[87] The court disagreed, explaining that there was no need for the Legislature to add this limitation to a claim based on fraud:

> In light of the clause in section 2211, subdivision (d) providing that an action for nullity based on fraud must be commenced by the defrauded spouse, we conclude that it was unnecessary for the Legislature to state that annulment had to be sought in the lifetime of one or both spouses. Such a clause would have been redundant.[88]

The court further explained that its decision finds support in the court's decision in *Greene v. Williams*.[89] In that case, a parent sued to annul a marriage between the parent's minor child and a third person.[90] The court held that a cause of action to annul a marriage based upon the age of consent did not survive the death of the child, because the child's death terminated the marriage.[91]

Prior to the enactment of the California Family Code, the California Civil Code contained provisions which were materially the same on the question of void and voidable marriage.[92] In *Estate of Gregorson*, the California Supreme Court held that the public administrator of a decedent could not assert, in the decedent's probate case, that her marriage was invalid due to her alleged "unsound mind."[93] In determining whether the fact of validity can be disputed collaterally, the court drew a distinction between void marriages and those that are merely voidable.[94] The court explained that, while the Legislature provides a mechanism for obtaining a declaration that a marriage is void, a marriage is void from the start in certain specified circumstances, and the fact that it was void may be established in a collateral proceeding.[95] The court held that marriages that are merely voidable, such as ones based upon "unsound mind," cannot be challenged in any collateral proceeding, a decision supported by the conclusion that, in the case of fraud or force, "no one would contend that in the absence of complaint by the injured party the validity of the marriage could be disputed collaterally."[96]

Unlike the South Carolina Supreme Court, the California Supreme Court held long ago that there is a clear distinction between void and voidable marriages, and that a void marriage is void from the beginning and that fact can be established collaterally.[97] By contrast, voidable marriages

cannot be attacked collaterally; if the person with the right to annul the marriage chooses not to do so, no one else may.[98]

V. WHERE THERE'S A WILL, NEW YORK FINDS A WAY

After allegations surfaced of abuse of 104-year old New York socialite Brooke Astor, which ultimately led to convictions of her son and a lawyer for swindling millions of dollars, there was heightened attention paid to elder abuse, particularly because of the round-the-clock New York tabloid coverage of the case. In particular, it was noted, these problems are worrisome because they often happen out of public view and the abuse is often committed by family members.[99]

In *Campbell v. Thomas*, the Appellate Division of the New York Supreme Court lamented that New York statutes do not adequately address whether a spouse who procured a marriage by undue influence should be permitted to profit from that status, and so it considered whether equitable principles would afford the courts a means of denying benefits of inheritance to the spouse:

> New York, however, does not yet have a statute specifically addressing a situation in which a person takes unfair advantage of an individual who clearly lacks the capacity to enter into a marriage by secretly marrying him or her for the purpose of obtaining a portion of his or her estate at the expense of his or her intended heirs. When a marriage to which one of the parties is incapable of consenting due to mental incapacity is not annulled until after the death of the nonconsenting party, a strict reading of the existing statutes requires that the other party be treated as a surviving spouse and afforded a right of election against the decedent's estate, without regard to whether the marital relationship itself came about through an exercise of overreaching or undue influence by the surviving party. On this appeal, we have occasion to consider whether the surviving party may nonetheless be denied the right of election, based on the equitable principle that a court will not permit a party to profit from his or her own wrongdoing.[100]

In *Campbell*, Howard Thomas, age 72, had been diagnosed with prostate cancer and dementia in 2000.[101] In February 2001, Howard's daughter and primary caregiver, Nancy Thomas, left for a one-week vacation, leaving Howard in the care of his friend Nidia.[102] During Nancy's one-week vacation, Nidia married Howard and he transferred various assets into her name.[103] Howard died in August 2001.[104] Howard's children filed an action seeking to invalidate the marriage on grounds of fraud, undue influence, and unsound mind.[105] Howard's son Christopher petitioned the Surrogate's Court to admit his father's will from 1976 which provided that his estate would pass to his children.[106] Nidia sought a spousal election since the will was executed years before the marriage and failed to provide for her.[107] The Surrogate's Court stayed the action pending the outcome of the proceedings concerning Nidia's status.[108]

The children sought summary judgment on their claims to invalidate the marriage.[109] Nidia submitted an affidavit in opposition in which she explained that she had a 25-year relationship with Howard that began in 1975 shortly after his first wife's death.[110] Howard was a school principal and Nidia was a school safety officer.[111] According to Nidia, Howard proposed marriage four times, in 1979, 1980, 1981, and 2001.[112] Nidia finally accepted even though she knew it would upset Howard's children.[113] Nidia also testified that the children's claim that she had something to do with changing the beneficiary on Howard's retirement plan to Nidia made no sense because she was not even aware of the change until three months after Howard's death.[114] As for his mental status, Nidia testified that Howard was sometimes forgetful but otherwise fine and made his own decisions.[115] Nidia also submitted affidavits from the pastor who married the couple in church as well as the two witnesses who attested to the fact that Howard knew he was marrying Nidia and seemed happy.[116]

The children had a different point of view. Nancy submitted an affidavit in which she declared that Howard's dementia over the course of the last three years of his life caused him to become "paranoid, extremely forgetful, and prone to temper outbursts."[117] She indicated that Howard became extremely confused about the identities of various people and called almost all females "Nancy."[118] Nancy explained that Howard required constant supervision, particularly when they would leave the house because Howard would wander off or stand frozen and staring into space.[119] Nancy recounted two hospital stays in which Howard could not feed himself, was combative and aggressive.[120] He had to be restrained and sedated because he would pull out his catheter and IV.[121] Nancy also said that she made Nidia aware of all of this information so that there could be no misunderstanding on her part about Howard's condition.[122] Nancy indicated when she found out about the marriage in March 2001, she confronted her father, who responded: "What are you talking about? . . . I'm not married . . . Are you crazy?"[123] Nancy also explained that her father kept his will in a safe in his home, which Nancy knew because her father had shown it to her in the fall of 2000.[124] But when Howard died, Nidia said the will was not in the safe and could not be found.[125] However, Nidia's lawyer later produced the will in the litigation.[126]

Peter, Howard's grandson, testified that Howard had threatened to kill Peter during Howard's hospitalization in 1999.[127] Starting in 2000, Howard required constant supervision, would soil himself and be entirely unaware.[128] On several occasions, Howard left Nancy's house or "ran away" and got lost.[129] Christopher submitted an affidavit in which he explained that a month before Howard's death, Nidia sold a parcel of Howard's real property, deposited the $90,000 proceeds in what had become a joint account, and at the time of filing the affidavit, $.54 remained.[130] The children also attached excerpts from Nidia's deposition in which she admitted that the handwriting on the change-of-beneficiary form for the retirement plan was Nidia's, contradicting her testimony that she was unaware of the change until after Howard's death.[131]

The children also submitted affidavits from Howard's physician of 13 years and a neurologist, both of whom examined Howard in the fall of 2000 and diagnosed him with severe dementia.[132] They also indicated that Howard's condition made it inadvisable for him to be left unsupervised "even for a minute."[133] One of the physicians indicated Howard "was confused and had lost the mental capacity to provide for himself or understand his legal and financial affairs."[134]

The court denied the summary judgment motion on the grounds that there were triable issues of material fact about Howard's capacity to marry.[135] The Appellate Division reversed and directed entry of an order declaring the marriage null and void.[136] The court then entered the order and made various other orders including that Nidia had no entitlement or legal right in Howard's estate.[137] Nidia appealed, arguing that under New York statutes, she is still considered the surviving spouse entitled to an elective share, even if her marriage were annulled or voided.[138] The Appellate Division explained that a marriage null and void on the ground of incapacity, while merely voidable, does not mean it was valid until voided; it merely means it is not void unless and until the party chooses to obtain an order that it was void.[139]

The law in New York is thus obviously very different than in South Carolina. In South Carolina, even a marriage void ab initio due to bigamy, according to the South Carolina Supreme Court's decision in the *Estate of Brown*, really has the effect of being void only if and when a court declares it void. In New York, even a voidable marriage relates back to the beginning and is considered effaced as though it never happened. Further, a void marriage may be considered void even without a judicial declaration. Another distinctive feature of the New York law is that a marriage may be challenged and annulled after death and persons other than husband and wife, i.e. relatives, have standing to seek annulment of a marriage after death.

The *Campbell* court quoted the New York Domestic Relations Law, providing as follows:

> [a]n action to annul a marriage on the ground that one of the parties thereto was a mentally ill person may be maintained at any time during the continuance of the mental illness, or, after the death of the mentally ill person in that condition, and during the life of the other party to the marriage, by any relative of the mentally ill person who has an interest to avoid the marriage.[140]

By contrast, the court noted, New York's Estates, Powers and Trusts Law provides that even if a marriage is voided after death pursuant to an action by relatives under the Domestic Relations Law, section 140, the defendant is nonetheless considered the surviving spouse with a right to election,

> unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that: (1) A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage . . . was in effect when the deceased spouse died [or that] (2) The marriage was void as incestuous under section five of the domestic relations law, bigamous under section six thereof, or a prohibited remarriage under section eight thereof [or that certain other circumstances, not relevant in this case, existed].[141]

The court lamented that Estates, Powers and Trusts Law, section 5-1.2, means that the right of relatives to invalidate a fraudulent marriage under Domestic Relations Law, section 140, is "largely illusory" because the interest of relatives in the status of the marriage is its effect on relatives' rights of inheritance.[142] While the court acknowledged that this conclusion rendered it "technically" impossible for the family to deny Nidia her right to an elective share, the court also held that the statute did not end the inquiry in this case.[143] The court said that it is a court of equity, not just a court of law, and did not need to apply statutes literally, rigidly or mechanically.[144]

The court had little trouble concluding that equitable principles compelled the conclusion that Nidia should not be able to profit from her wrongdoing, and held that she forfeited any right in Howard's estate.[145] It reasoned that this result was necessary not simply to protect incapacitated and vulnerable victims of abuse, but the courts themselves: "It is 'an old, old principle' that a court, 'even in the absence of express statutory warrant,' must not 'allow itself to be made the instrument of wrong, no less on account of its detestation of every thing conducive to wrong than on account of that regard which it should

entertain for its own character and dignity[.]'"[146] The court explained that it was not supplanting legislation, but complementing it.[147] It added that when the statute was enacted in 1966 (implying old laws that frustrate us are suspect because they are old), the Legislature intended to prevent people from disinheriting a spouse, but the court was confident the Legislature did not intend to allow unscrupulous people to take refuge in the law to profit wrongfully by inducing vulnerable people into marriage.[148]

VI. NO LACK OF LIGHT ON THE SUBJECT IN THE SUNSHINE STATE

If one feels uneasy about the New York court contorting to reach a result, even if a satisfying one in the context of seemingly deplorable facts, no need to twist and turn in Florida. Florida enacted a statute that addresses explicitly the issues with which we have seen other courts in other states struggling.[149] It is clear that the Florida Legislature is serious about protecting vulnerable persons from the possibility of being coerced into a marriage, as well as the families of the victims. The Florida statute prohibits a spouse from benefiting from that status if the marriage was procured by fraud, duress or undue influence, and allows an action to be brought for up to four years after the death of the spouse allegedly subject to coercion.[150]

VII. TEXAS TWO-STEP

Under Texas Estates Code, section 123.101, if a petition seeking to void a marriage based upon lack of mental capacity by one of the parties to a marriage, including a guardian for a party, is pending at the time of death of one of the spouses, the court may determine the matter and declare the marriage void even after the decedent's death.[151] If there is no such petition pending at the time of death, an interested person may file an application with the court requesting that the court void the marriage if the couple was married within three years before the date of the decedent's death.[152] The application must be filed before the first anniversary of the decedent's death.[153] An "interested person" means "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered."[154] The marriage can be declared void after death if one of the parties did not have sufficient mental capacity to consent or understand the nature of the marriage ceremony, if one occurred, except if the person regained capacity during the marriage and recognized it.[155] "If the court declares a decedent's marriage void in a proceeding described by Section 123.101(a) or brought under Section 123.102, the other party to the marriage is not considered the decedent's surviving spouse for purposes of any law of this state."[156]

Texas law provides that, except for the grounds set forth in Texas Estates Code, sections 123.101 et seq., relating to incapacity, "a marriage subject to annulment may not be challenged in a proceeding instituted after the death of either party to the marriage."[157] Thus, for example, a marriage by fraud, duress or undue influence may not be challenged in a proceeding after death. A bigamous marriage in Texas is void, but becomes valid if and when the prior marriage is dissolved, and only if the parties lived together as "husband and wife" and represented themselves to others as being married after the dissolution of the prior marriage.[158] Obviously, a marriage that was bigamous at the time of the death of one of the parties to it cannot be revived.

VIII. A CLEAR FIELD OF VISION IN THE PRAIRIE STATE

Illinois also has a comprehensive statutory scheme. A marriage will be declared invalid if;

> a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs or other incapacitating substances, or a party was induced to enter into a marriage by force or duress or by fraud involving the essentials of marriage.[159]

Only the party or a legal representative of the party can petition to invalidate the marriage and it must be done within 90 days of learning of the condition that rendered the marriage invalid.[160] "In no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage under subsections (1), (2) and (3) of Section 301 [which include the aforementioned grounds]."[161] A declaration of invalidity for the reason set forth in paragraph (4) of Section 301 may be sought by either party, the legal spouse in case of a bigamous marriage, the State's Attorney or a child of either party, at any time not to exceed 3 years following the death of the first party to die.[162]

IX. CONCLUSION

While it is clear that laws and rules are quite different state-to-state, it does not seem necessary to harmonize these laws dealing with highly-personal relationships, just as it is not necessary that other nations should adopt our laws and abandon their own culture and traditions. We are a republic and different states and regions have different values, cultures, and traditions, as well as laws and policies consistent with those differences. There is a reason that the subjects of marriage and inheritance are left to the

states, and there is no compelling reason why we should not respect our diversity.

While the variations in law and result discussed in this article can be surprising and frustrating, it cannot be fairly said that there is a "right" or "wrong" view on the central questions: (1) should strangers to the marriage be able to contest or invalidate it; (2) should they be able to do so after the death of one of the spouses; and (3) even if there is standing and a means to invalidate a marriage post-death, should it thus preclude the spouse from rights of inheritance? One thing that we can count on is that – no matter what laws are enacted – stories like those recounted in this article will continue to flourish, particularly in light of aging populations and prolonged lives.

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01 *Brown v. Sojourner (In re Estate of Brown)* (2020) 430 S.C. 474, 478-79.

02 *In re Estate of Brown, supra*, 430 S.C. at pp. 478-79.

03 *Id.* at p. 480.

04 *Wilson v. Dallas* (2013) 403 S.C. 411, 416.

05 *Ibid.*

06 *Ibid.*

07 *Ibid.*

08 *Ibid.*

09 *Ibid.*

10 *Ibid.*

11 *Id.* at p. 418.

12 *Id.* at p. 419.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 *Id.* at p. 421.

17 *Id.* at p. 422.

18 *Id.* at pp. 424-25.

19 *Ibid.*

20 *Ibid.*

21 *Id.* at p. 450.

22 *Id.* at pp. 437-41.

23 *In re Estate of Brown, supra*, 430 S.C. at p. 481.

24 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 *Id.* at pp. 481-82.

33 *Estate of Brown* (Ct. App. 2018) 424 S.C. 589.

34 *Ibid.*

35 *In re Estate of Brown, supra*, 430 S.C. al p. 498.

36 *Id.* at p. 487.

37 *Ibid.*; *Presbrey v. Presbrey* (1960) 179 N.Y.S.2d 788, 792.

38 *In re Estate of Brown, supra*, at p. 497 (citing *Tilt v. Kelsey* (1907) 207 U.S. 43, 52-3; *Gratiot Cty. State Bank v. Johnson* (1919) 249 U.S. 246, 248-49).

39 *Ibid.* (citing *In re Holmes' Estate* (N.Y. 1943) 52 N.E.2d 424, 429 quoting Restatement of the Law of Judgments section 74).

40 *Id.* at p. 487.

41 *Ibid.*

42 *Id.* at p. 493.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 *Id.* at p. 491.

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Id.* at p. 491.

52 *Id.* at p. 492.

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 *Id.* at p. 493.

57 *Ibid.*

58 *Ibid.*

59 *Id.* at p. 494.

60 *Id.* at pp. 494-95.

61 *Ibid.* (footnote and citation omitted).

62 Order Granting Motion to Dismiss the Amended Complaint's Claims for Relief 1 and 2 *In re Gerald R. Kessler Living Trust* (Nv. 2d Jud. Dist. 2016, No. PR15-00512), at p. 3 (citing and quoting *Buzz Stew, LLC v. City of North Las Vegas* (2008) 124 Nev. 224, 228, 181 P.3d 670, 672.

66 *Id.* at p. 5 (citing *Wells v. Bank of Nev.* (1974) 90 Nev. 192, 197-98).

67 *Ibid.*

68 *Id.* at p. 6.

69 *Ibid.*

70 *Ibid.*

71 *Id.* at p. 7.

72 *Id.* at pp. 7-8.

73 Fam. Code, section 2201.

74 Fam. Code, sections 2210, 2211.

75 *In re Marriage of Allen* (1992) 8 Cal.App.4th 1225, 1229.

76 Fam. Code, section 2210.

77 Civ. Code, section 38.

78 Civ. Code, section 39.

79 Prob. Code, section 1801, subd. (b).

80 Civ. Code, section 40.

81 Fam. Code, section 2211.

82 Fam. Code, section 2211.

83 *Pryor v. Pryor* (2009) 177 Cal.App.4th 1448, 1455-56 (internal citations and quotations omitted).

84 *Id.* at p. 1456.

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Id.* at p. 1460.

90 *Greene, supra*, 9 Cal.App.3d at p. 561.

91 *Id.* at p. 562.

92 See *Estate of Gergorson* (1911) 160 Cal. 21, 25, 266; Fam. Code, sections 2210-11.

93 *Estate of Gergorson, supra* 160 Cal. at pp. 22, 23.

94 *Id.* at pp. 25, 26.

95 *Id.* at pp. 25, 27.

96 *Id.* at pp. 26, 27 (referring to former Civ. Code, sections 59-61, 80, 82).

97 *Estate of Gergorson, supra*, 160 Cal. at pp. 26, 27.

98 *Ibid.*

99 *Campbell v. Thomas* (N.Y. 2010) 73 A.D.3d 103, 104, 105.

100 *Id.* at p. 105.

101 *Ibid.*

102 *Ibid.*

103 *Id.* at p. 106.

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

107 *Ibid.*

108 *Ibid.*

109 *Id.* at p. 108.

110 *Ibid.*

111 *Ibid.*

112 *Id.* at p. 109.

113 *Ibid.*

114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

117 *Id.* at p. 107.

118 *Ibid.*

119 *Ibid.*

120 *Ibid.*

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*

126 *Ibid.*

127 *Id.* at p. 108.

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

131 *Ibid.*

132 *Ibid.*

133 *Ibid.*

134 *Ibid.*

135 *Id.* at p. 109.

136 *Ibid.*

137 *Id.* at p. 110.

138 *Id.* at p. 111.

139 *Ibid.*

140 *Id.* at p. 114; N.Y. Domestic Relations Law section 140 [c].

141 *Campbell, supra* at pp. 114-15; EPTL 5-1.2 [a].

142 *Campbell, supra*, at pp. 114-15.

143 *Id.* at p. 115.

144 *Id.* at pp. 115-16.

145 *Campbell v. Thomas, supra*, 73 A.D.3d at p. 118.

146 *Id.* at p. 119 (citations omitted).

147 *Ibid.*

148 *Id.* at pp. 120-21.

149 Fla. Stat., section 732.805.

150 *Ibid.*

151 Tex. Est. Code Ann., section 123.101.

152 Tex. Est. Code Ann., section 123.102, subd. (a).

153 Tex. Est. Code Ann., section 123.102, subd. (c).

154 Tex. Est. Code Ann., section 22.018.

155 Tex. Est. Code Ann., section 123.103.

156 Tex. Est. Code Ann., section 123.104.

157 Tex. Fam. Code, section 6.111.

158 Tex. Fam. Code, section 6.202.

159 750 ILCS 5/301, subd. (1).

160 *Ibid.*

161 750 ILCS 5/302, subd. (3)(b).

162 750 ILCS 5/302, subd. (3)(c).