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The Law of Marriage in a Changing Society

Since the very recent decision of the Ontario Court of Appeal in *Halpern et al. v. Attorney General of Canada et al.* of June 10, 2003¹, there has been a lively debate in Canada about the definition of marriage and what marriage means.

Halpern held that the common-law definition of marriage as “the voluntary union for life of one man and one woman to the exclusion of all others” violates section 15(1) of the *Canadian Charter of Rights and Freedoms*. Accordingly, the court held that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution [and definition] of marriage.

The Ontario Court of Appeal said at paragraph 117:

No one is disputing that marriage is a fundamental societal institution. Similarly, it is accepted that, with limited exceptions, marriage has been understood to be a monogamous opposite-sex union. What needs to be determined, however, is whether there is a valid objective to maintaining marriage as an exclusively heterosexual institution. Stating that marriage is heterosexual because it always has been heterosexual is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a *Charter* guarantee.²

The Legislative division of Powers regarding Marriage and Divorce and the Solemnization of Marriage

By virtue of *The Constitution Act, 1867*, there is a distribution of legislative powers between the Parliament of Canada and the provincial legislatures.

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Section 91 of *The Constitution Act, 1867*, provides for the powers assigned to the Parliament of Canada. One of the legislative powers given to the Parliament of Canada is “Marriage and Divorce.”

Section 92 of *The Constitution Act, 1867*, provides for exclusive powers of the provincial legislatures. Among the many powers given to the provinces are “The Solemnization of Marriage in the Province” and “Property and Civil Rights in the Province.”

As a result of the powers given to the Parliament of Canada, Parliament has passed the *Marriage (Prohibited Degrees) Act*.³ This statute prohibits marriage between related persons. The prohibition applies to persons if they are related:

- (a) lineally by consanguinity or adoption;
- (b) as brother and sister by

- consanguinity, whether by the whole blood or by the half-blood; or
- (c) as brother or sister by adoption.⁴

Section 3(1) provides that subject to subsection (2), a marriage between persons related by consanguinity, affinity, or adoption is not invalid by reason only of their relationship. Section 3(2), however, declares that any marriage between persons related in the manner set out in section 2(2)(a), (b), or (c) is void. This statute declares itself to be a complete code by containing all of the prohibitions in law in Canada against marriage by reason of the parties being related.⁵

The Components of Marriage

There are many components of marriage, including capacity to marry; presence, or absence of consent and non-consummation that may or may not result in annulment, declaring the marriage voidable, or void *ab initio*, or valid. A void (void *ab initio*) marriage is one that is null and void from its inception and regarded as if it never took place. A voidable marriage is considered valid and subsisting unless it is declared void and annulled by the court after application by one of the parties.

As stated earlier, the accepted common law definition of marriage has been “the voluntary union for life of one man and one woman to the exclusion of all others.”⁶ Since the word “voluntary” appears in the definition, marriage cannot be imposed on someone. Therefore the absence of consent should render a marriage null and void, regardless of the

factor that precluded consent. In spite of this, there are differing judicial decisions on whether such factors as insanity, duress, or mistake render a marriage void or only voidable at the option of the non-disabled or innocent party.⁷

Absence of consent may be found by unsoundness of mind or excessive consumption of alcohol or drugs. On application by the person who seeks to question the marriage and upon whom the burden of proof falls, the marriage could be voided due to lack of consent.

If there has been improper pressure such that it vitiates a person's consent to marry, the marriage is voidable at the option of the party coerced into the marriage.

Mistake as to the identity of the individual the party intends to marry can render a marriage void for lack of consent. If a person intends to marry X but in fact, the other party to the marriage was Y, that is sufficient to render the marriage voidable on application by the offended party.

Interestingly, while the intention of the parties to enter into a contract of marriage is important, the courts have found the motive for doing so is irrelevant. The weight of Canadian and English authorities is that a marriage is not invalidated by reason only that it was entered into as a device to deceive or evade immigration rules and regulations, unless one of the parties to the marriage can satisfy the court that he or she was deceived by the other party to enter into the marriage when the other party's intention was only to obtain marital status in order to establish permanent residence in Canada.

Non-Consummation of Marriage

A marriage is consummated on the first occasion when the spouses engage in postmarital sexual intercourse. Once consummated, always consummated.⁸

The law in Canada draws a distinction between the inability to consummate a marriage due to a physical abnormality and the willful refusal to do so. Impotence constitutes a ground for

annulling the marriage,⁹ and either party to a marriage that has not been consummated may apply to the court for annulment of the marriage.

The inability to conceive children is not to be confused with impotence, as impotence is taken to mean an incapacity in one or both spouses to engage in normal sexual intercourse with each other. As was stated in an old English Case:

The only question is whether the [spouse] is or is not capable of sexual intercourse or, if at present incapable, whether that incapacity can be removed... . if there be a reasonable probability that the lady can be made capable of a *vera copula*—of the natural sort of coitus, though without power of conception—I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than incipient, imperfect, and unnatural coitus, I would pronounce the marriage void.¹⁰

The law in Canada draws a distinction between the inability to consummate a marriage due to a physical abnormality and the willful refusal to do so.

These concepts were recently discussed by the British Columbia Court of Appeal on May 29, 2003, in a case called *K.H.L. v. G.Q.L.*¹¹ The husband (defendant) appealed a decision of a trial judge in which his marriage to the plaintiff/respondent was declared to be a nullity due to non-consummation. The parties had married within a few weeks of the husband's arrival in Canada. After the marriage, the husband would disappear for periods of time, reappearing only when he needed the wife's support to stay in Canada. The wife testified that the husband had told her on two occasions that he was homosexual. The trial judge found that

the parties had not consummated the marriage and had never cohabited. The trial judge also found that the husband, by his words and actions, had demonstrated an invincible aversion to the consummation of his marriage.

In coming to his conclusion that the marriage was a nullity, the trial judge cited the test as set out in the following passage in *Juretic v. Ruiz* (1999), 49 R.F.L. (4th) 299 (BCCA):

To warrant a declaration of nullity for non-consummation, the applicant must demonstrate an incapacity of some kind. In *Heil v. Heil*,¹² Tashereau J said this for the majority at pp. 162–3:

...[I]t is now settled that there must be an incapacity of some kind, which in certain cases is a structural defect, but which may also arise out of mental condition, with the resulting effect of creating in the mind of the woman an aversion to the physical act of consummation...

The latest pronouncement on the matter is a decision of the House of Lords in the case of *G. v. G.* 1924 A.C. 349, where it was held that the conclusion to be drawn from the evidence was that the wife's refusal was due, not to obstinacy or caprice, but to an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity, and that the husband was entitled to a decree on nullity. The words of Lord Phillimore are as follows:

The evidence here seems to me to prove “invincible repugnance,” “invincible” in the full sense of an unconquerable, uncontrollable nervous condition which is physical and which creates nullity.

The court in *K.H.L. v. G.Q.L.* found there was ample evidence from which the trial judge could draw the inference that the appellant's hostility to any physical contact with the wife was due to an incapacity amounting to an invincible

aversion. The court also found that the manipulation of the wife by the appellant for immigration purposes provided the motive for his entering into the marriage, despite his invincible aversion to any sexual intimacy with her. Accordingly, the appeal court upheld the finding of the trial judge and dismissed his appeal.

What Lies Ahead?

In *Halpern*, the Ontario Court of Appeal reformulated the common law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others.”¹³ The court also provided a detailed description of marriage as follows.

Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires, and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.¹⁴

The federal government has produced draft legislation relating to same-sex marriages, which it has asked the Supreme Court of Canada to review with a view to its appropriateness, given the recent court decisions in which it was determined that the former definition of marriage violates equality rights on the basis of sexual orientation under section 15(1) of the *Charter*.

Will that legislation change the constituent elements of marriage? Will marriages still have to be consummated to be valid? Will the legislation change the definition of consummation or

provide two definitions of consummation, depending on whether a union is opposite-sex or same-sex?

If some of the definitions of the component parts of marriage are changed by virtue of the proposed legislation, will some of the rules relating to divorce also have to be changed? Currently adultery is defined as sexual intercourse with a person not one's spouse, and only relates to opposite-sex relationships. Will there have to be a new definition of adultery which takes into account same-sex relationships?

Canadian society is changing faster than some would wish. Others think it is not fast enough. It may be an ancient curse, but we do live in interesting times. ▲

- 1 2003 O.J. No. 2268; 225 D.L.R.(4th) 529; 36 R.F.L.(5th) 127
- 2 *ibid*
- 3 S.C 1990, c. 46
- 4 section 2(2)
- 5 section 4
- 6 *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130
- 7 Payne, Julien D. & Marilyn A., *Canadian Family Law* (2001), H. Absence of Consent
- 8 Payne, Julien D. & Marilyn A., *ibid*
- 9 *Heil v. Heil*, [1942] S.C.R. 160
- 10 *D. v. A.* (1845), 1 Robb Ecc. 279 at 296 and 299. cited in Payne, Julien D. & Marilyn A., *ibid*
- 11 2003 BCCA 313; 2003 B.C.J. no. 1249
- 12 *infra*, footnote number 8
- 13 *infra*. Footnote number 1. paragraph 156
- 14 *infra*. Footnote number 1. paragraph 5

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