

ITEM 6

**Probate and Trust Litigation Committee
Key West, Florida
Friday, January 11, 2008**

**SUBCOMMITTEE REPORT ON CHALLENGES TO THE VALIDITY
OF MARRIAGE AFTER THE DEATH OF A SPOUSE IN PROBATE
PROCEEDINGS**

I. Introduction

The mere status of surviving spouse affords a myriad of significant financial benefits under Florida law, including the right to homestead property (at least a life estate in the decedent's homestead residence), an elective share (30% of the decedent's augmented elective estate), to take as a pretermitted spouse (up to 100% of the estate under the laws of intestacy), family allowance, exempt property, and priority in preference in selecting a personal representative. In addition, Florida courts have held that a presumption of undue influence in a will contest "cannot arise in the case of a husband and wife" because the requirement of active procurement would almost always be present. Jacobs v. Vaillancourt, 634 So. 2d 667, 672 (Fla. 2d DCA 1994); Tarsagian v. Watt, 402 So. 2d 471, 472 (Fla. 3d DCA 1981).

Most of these benefits are well deserved. It has often been said that Florida has a strong public policy in favor of protecting a decedent's surviving spouse. See, e.g., Via v. Putnam, 656 So. 2d 460, 462 (Fla. 1995). However, what happens when a marriage is procured by undue influence, fraud or exploitation? Is Florida's public policy furthered in such an instance? This report will discuss the current state of Florida law on the ability to challenge the validity of a marriage after the death of one of the parties to the marriage. It will also examine how other states have addressed this issue.

II. Current State of the Law in Florida

Presently, there are no Florida Statutes that authorize a challenge to the validity of a marriage after the death of one of the spouses. However, a number of Florida cases have addressed this issue. Under existing Florida case law, an invalid marriage may be **void**, or it may be merely **voidable**, depending on the cause and nature of the invalidity. The definitions of void versus voidable become critical because the ability to challenge a marriage after death turns on the distinction between the two.

Florida case law has made it clear that an action can be maintained after the death of a spouse challenging a marriage that is **void**.

"Under ordinary circumstances the effect of a void marriage so far as concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place, and therefore being good for no legal purpose, its invalidity can be maintained in any proceedings in which the fact of marriage may be material, either direct or collateral in any civil court between any parties at any time." Kuehmsted v. Turnwall, 103 Fla. 1180, 138 So. 775 (1932).

However, a marriage that is merely **voidable** may not be attacked by a deceased spouse's heirs.

"Although the invalidity of a void marriage may be asserted in either a direct or collateral proceeding and at any time, either before or after the death of the husband, the wife, or both, a voidable marriage is good for every purpose and can only be attacked in a direct proceeding during the life of the parties." Arnelle, 647 So. 2d at 1048-49 (citing Kuehmsted).

Accordingly, the question of whether a suit to annul a marriage can be maintained after the death of one of the parties to the marriage depends on whether the marriage is void in the true sense, or merely voidable. See *also* 4 Am. Jur. 2d Annulment of Marriage § 59 (2006); 47 A.L.R. 2d 1393, Right to Attack Validity of Marriage After Death of Party Thereto (2007 update).

A. Void Marriage

A void marriage is an absolute nullity and its invalidity may be shown either during the lifetime of the parties to the marriage, or after their deaths. Kuehmsted, 138 So. at 778. Upon proof of facts rendering a marriage void, the marriage will be disregarded or treated as nonexistent by the court. Id.; Bennett v. Bennett, 26 So. 2d 650 (Fla. 1946).

The invalidity of a void marriage may be maintained in any proceeding in which the fact of marriage may be material, either directly or collaterally, between any parties at any time, whether before or after the death of the husband, wife, or both. Arnelle, 647 So. 2d 1047 at 1048 (citing Kuehmsted, 138 So. at 777); see *also* Woginiak v. Kleiman, 523 So. 2d 1209 (Fla. 3d DCA 1988)(decedent's son had standing to seek relief from order declaring alleged wife to be surviving spouse).

A marriage is void ab initio, and will be treated as if no marriage had taken place, when:

- (1) it is a bigamous marriage, § 826.01, et al. Fla. Stat.;
- (2) it is an incestuous marriage, § 741.21, Fla. Stat., § 826.04, Fla. Stat.;

- (3) it is a marriage between persons of the same sex, § 741.212, Fla. Stat.;
- (4) it is a common-law marriage entered into after January 1, 1968, § 741.211, Fla. Stat.;
- (5) there is a prior existing marriage that is undissolved at the time the parties enter the marriage, Smithers v. Smithers, 765 So. 2d 117 (Fla. 4th DCA 2000); or
- (6) one or both parties lack the requisite mental capacity at the time the marriage is actually contracted, Kuehmsted, 138 So. at 778.; Bennett, 26 So. 2d at 651.

Because an essential element for marriage is the possession of sufficient mental capacity to consent to the marriage, the marriage of a person who is insane or otherwise mentally incompetent to consent to the marriage is void ab initio. Kuehmsted, 138 So. at 778; Arnelle, 647 So. 2d at 1048; see also 82 A.L.R. 2d 1040, Mental Capacity to Marry (2007 update).

Thus, mental incapacity, one of the most frequent grounds for contesting a will, is available as a ground for contesting the validity of a marriage after the death of a spouse.

B. Voidable Marriage

A voidable marriage, on the other hand, may be attacked only in a direct proceeding during the life of the parties. Arnelle, 647 So. 2d at 1048 (citing Kuehmsted, 138 So. at 777). When dealing with a voidable marriage, upon the death of either party, the marriage is deemed valid from the outset. Id. Consequently, a voidable marriage cannot be attacked after the death of either party to the marriage. Id. at 1048-49; see also 91 A.L.R. 414, Marriage to Which Consent of One of Parties Was Obtained by Duress as Void or Only Voidable (2007 update).

The right to annul a voidable marriage has been held to be a personal right, and an action to annul such a marriage can only be maintained by a party to the marriage contract, or where the spouse seeking annulment is under legal disability, by someone acting on his or her behalf. See Kuehmsted at 777; 25A Fla. Jur. 2d Family Law § 497 (2006).

A marriage has been held to be voidable when:

- (1) consent to the marriage was obtained by undue influence, Arnelle, 647 So. 2d at 1048-49; Hoffman v. Kohns, 385 So. 2d 1064, 1069 (Fla. 2d DCA 1980);

- (2) consent to the marriage was obtained by duress, In re Ruff's Estate, 32 So. 2d 840, 842 (Fla. 1947)(where party alleged that he was forced to marry under threats of prosecution and violence, the marriage was voidable); Tyson v. State, 90 So. 622, 623 (Fla. 1922)(evidence showed that marriage was procured by fraud and effected as a result of coercion); or
- (3) consent to the marriage was obtained by fraud, Cooper v. Cooper, 163 So. 35 (Fla. 1935)(marriage voidable where the marriage ceremony was procured by fraud).

The above cases suggest that the three of the most common methods for exploiting an elderly and infirm (but competent) person, to wit: undue influence, fraud, and duress, would only render a marriage voidable, possibly leaving the remaining family members and heirs without a remedy.

C. **Savage v. Olsen**

However, in Savage v. Olsen, 9 So. 2d 363 (Fla. 1942), the Florida Supreme Court created some uncertainty by suggesting that fraud can serve as a ground for finding a marriage void. In Savage, the decedent's surviving blood relatives and heirs at law brought an action to annul a marriage between the decedent and her husband. Id. at 363. Some time before the marriage, the decedent, Hannah Ford, was in a car accident and suffered a serious concussion. According to the Court, Hannah was mentally defective and lacked her normal faculties. Id. at 364.

At some point after the accident, the Defendant, Charles Savage, showed an unusual interest in Hannah. He subsequently proposed marriage, which was performed, but never consummated. Id. Savage lived apart from Hannah after the ceremony, held himself out as a single person, and executed mortgages on property belonging to Hannah without her knowledge. Id. The Court also noted that Savage had a long criminal record. Id. Savage lived and cohabitated with another woman before and after his wedding to Hannah. Id.

Sixty days after they were married, Hannah died in a car accident when the automobile in which she was a passenger, driven by Savage, plunged into a canal. Id. at 365. Savage escaped unharmed and when talking to officers and the funeral director after the accident, he referred to Hannah as a "friend." Id. The funeral was held before Hannah's relatives were informed, and two days after her death, Savage became the administrator of Hannah's estate and immediately emptied her safe-deposit box. Id.

The Florida Supreme Court affirmed the lower court's ruling that the marriage was void, and stated that Hanna's mental condition, as well as Savage's "artful practices" justified the decision. Id. The Court stated:

"It is true that much of the testimony was in conflict, but it was abundantly shown that the mental condition of Hannah Ford, although she would not be said to be actually insane, made her easy prey to the machinations of Charles B. Savage. Examining together her plight and his artful practices, we think the chancellor was fully justified in the decision he rendered declaring the marriage void. The testimony which he elected to give credit fully substantiated the allegations of the bill of complaint anent fraud of one and incapacity of the other."

Id. (internal citations omitted).

The Savage decision appeared to say that fraud alone could serve as a basis to challenge a marriage after death. Other courts, under different circumstances, have held that undue influence is a species of fraud. See, e.g., In re Guardian of Rekasis, 545 So. 2d 471, 473 (Fla. 2d DCA 1989)(noting that undue influence is a species of fraud and is treated as fraud in general); O'Hey v. Van Dorn, 562 So. 2d 405, 405 (Fla. 4th DCA 1990)(agreeing that undue influence is a species of fraud in the inducement). Does that mean that the Florida Supreme court has blessed challenges to marriage on these additional grounds? That was precisely the argument made by the parties in Arnelle, 647 So. 2d at 1049, under the factual circumstances quoted earlier in these materials.

In Arnelle, the court discussed the Florida Supreme Court's decision in Savage and opined that it was the combination of fraud and diminished mental capacity that rendered the marriage void. 647 So. 2d at 1049. The Arnelle court noted that the holding in Savage "at least suggests that where the *combination* of fraud and mental incapacity are present, the marriage is void and can be annulled after the death of one of the parties." Id. The Arnelle court declined to find that fraud or undue influence alone could support a challenge to a marriage after death absent at least some showing of mental incapacity. Accordingly, despite finding that Ms. Fortson was "conniving and exhibited undue influence over Mr. Fisher", the court refused to permit the decedent's heirs to challenge the marriage. Id.

However, diminished mental capacity is frequently present in almost every case of undue influence. When is the threshold set forth in Arnelle of diminished mental capacity plus fraud (or undue influence) met? Must a person lack the requisite mental capacity to marry or merely be of some level of diminished mental capacity? These questions currently remain unanswered under Florida law.

III. Florida Case Law Summary

The following Florida cases have addressed challenges to a marriage on the grounds of lack of capacity, fraud, and undue influence:

A. Tyson v. State, 90 So. 622 (Fla. 1922)

- This case involved a criminal prosecution against Enoch Tyson for deserting his wife and withholding alimony and child support payments.

- Tyson argued that the marriage was void because that marriage was involuntary, and that he entered into it as the result of coercion upon him by his wife and her mother.

- The Court affirmed Tyson's conviction and noted that a marriage to which the consent of one of the parties is obtained by undue influence is merely voidable.

B. Kuehmsted v. Turnwall, 138 So. 775 (Fla. 1932)

- This was a suit in equity to annul a marriage on the basis of mental incapacity. The lower court took evidence and declared the marriage to be null and void.

- The evidence at trial showed that, at the time of the marriage, the decedent was of unsound mind, memory, insane, wholly incompetent, and unable to understand or realize the marriage contract, which was entered into willfully, fraudulently, and maliciously.

- The question before the Court was: "Can a marriage alleged to be void for want of mental capacity be annulled by a court of equity after the death of one of the spouses, and may the heirs at law of the dead spouse maintain a bill in equity for that purpose?"

- The answer to both questions stated above is yes. In answering these inquiries, the Florida Supreme Court affirmed the lower court's judgment.

- The Court held that (a) the deceased spouse's lack of mental capacity served as grounds to declare the marriage void, and (b) that the decedent's heirs had a right to maintain a cause of action for annulment of the marriage.

- The Court noted that the effect of a void marriage is as though no marriage had ever taken place.

C. Cooper v. Cooper, 163 So. 35 (Fla. 1935)

- "It is well settled that party who has been the victim of a marriage ceremony procured by fraud and deception of the other party, and where such marriage has not been consummated by cohabitation, may maintain suit and procure decree of annulment of such marriage; provided, of course, such action

is taken by such party before condemnation of the fraud and any affirmance of the marriage has occurred on the part of such victim.”

- A marriage procured by fraud or while one of the parties thereto is actually under legal duress is voidable only, and therefore valid and binding upon the parties until annulled by a court of competent jurisdiction.

- This case suggests that a case for annulment based on fraud may be had when a spouse, having no intention to consummate the marriage, marries for financial benefits.

D. Savage v. Olson, 9 So. 2d 363 (Fla. 1942)

- This case is discussed at length in Section II(C) above.
- The Court held that a deceased wife’s heirs had standing to seek annulment of the marriage after the wife’s death.
- The Court analyzed the effect of fraud, undue influence and mental incapacity on a marriage. The Court ultimately opined that the marriage between Hannah Ford and Charles Savage was void.

E. Bennett v. Bennett, 26 So. 2d 650 (Fla. 1946)

- This case involved a lawsuit to reform a deed and declare a marriage void based on incapacity. The Court found the evidence of incapacity to be insufficient.
- The Court’s opinion recognizes the maxim that upon proof of the facts rendering such marriage void, the marriage will be disregarded or treated as nonexistent by the courts.

F. In re Ruff’s Estate, 32 So. 2d 840 (Fla. 1947)

- A marriage in which the husband was forced to enter into by threats of prosecution and violence was voidable only, and not void.
- The Court held that children of a marriage, following annulment, are not illegitimate and are heirs of the decedent.

G. Rubenstein v. Rubenstein, 46 So. 2d 602 (Fla. 1950)

- In this case, the Court suggested that concealment of a party’s intentions not to have children may be grounds for an annulment, at least if the marriage has not been consummated.
- Under these circumstances, the judgment for fraud against the wife was reversed based on the evidence presented.

H. Eden v. Eden, 130 So. 2d 887 (Fla. 3d DCA 1961)

- This case involved a suit for an annulment of marriage brought by an alleged "next friend."
- The Third DCA held that suit for annulment of marriage (based on incapacity) of an adult may not be maintained by an alleged next friend.

I. Sack v. Sack, 184 So. 2d 434 (Fla. 1966)

- Where a marriage is voidable and subject to annulment because of fraud or misrepresentation of one party, the right to annul belongs to the innocent party.

J. Hoffman v. Kohns, 385 So. 2d 1064 (Fla. 2d DCA 1980)

- The Second DCA held that a marriage to which the consent of one of the parties is obtained by undue influence is merely voidable. The court took the position that undue influence is not a proper ground for the heir of a decedent to bring a case to annul a marriage after death of one of the parties.

- However, a marriage may be posthumously set aside as being void because of the mental incompetence of one of the marriage partners.

- Here the evidence was sufficient to support the conclusion that the decedent was competent to marry.

- Even though the will was procured by undue influence, the surviving spouse inherited as a pretermitted spouse under Florida Statutes § 732.301.

K. Woginiak v. Kleiman, 523 So. 2d 1209, 1210 (Fla. 3d DCA 1988)

- In this case, the decedent's son had standing to seek relief where an order declaring the alleged wife to be the decedent's surviving spouse was obtained without notice to the son in a fraudulent attempt to moot the issue of survivorship in a pending probate proceeding.

- "Relief from an order or judgment is appropriate where, as here, the movant is a victim of fraud or other misconduct by an adverse party."

L. Arnelle v. Fisher, 647 So. 2d 1047 (Fla. 5th DCA 1994)

- The Fifth DCA held that an allegedly voidable marriage could not be challenged after death by the decedent's heir (in this case, a cousin).

- "Although the invalidity of a void marriage may be asserted in either a direct or collateral proceeding at any time, either before or after the death of the

husband, wife, or both, a voidable marriage is good for every purpose and can only be attacked in a proceeding during the life of the parties.”

- Here, where the collateral attack is based on allegations of undue influence only, a deceased’s heir cannot attack the marriage after death of one of the parties.

- The court distinguished Savage v. Olson, 9 So. 2d 363 (Fla. 1942), suggesting that fraud alone is insufficient to declare a marriage void. The Fifth DCA stated that Savage “suggests that where the combination of fraud and mental incapacity are present the marriage is void and can be annulled after the death of one of the parties.”

V. Survey of Other Jurisdictions

At common law, a marriage which is merely voidable, including one procured by fraud or undue influence, must be challenged during the lifetimes of the parties to the marriage. See also 4 Am. Jur. 2d Annulment of Marriage § 59 (2006); 47 A.L.R. 2d 1393, Right to Attack Validity of Marriage After Death of Party Thereto (2007 update). Most jurisdictions (like Florida) continue to follow the common law rule either by statute or case law. However, a number of states have enacted statutes that specifically authorize a challenge to the validity of marriage after death.

A. States with Statutes that Permit Challenges after Death for Fraud or Duress

1. New York

An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by force or duress may be maintained at any time by the party whose consent was so obtained. An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by fraud may be maintained by the party whose consent was so obtained within the limitations of time for enforcing a civil remedy of the civil practice law and rules. Any such action may also be maintained during the life-time of the *other party* by the parent, or the guardian of the person of the party whose consent was so obtained, or by any relative of that party who has an interest to avoid the marriage, provided that in an action to annul a marriage on the ground of fraud the limitation prescribed in the civil practice law and rules has not run. But a marriage shall not be annulled on the ground of force or duress if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud. N.Y. Domestic Relations Law § 140 (McKinney 2005).

Bennett v. Thomas, 38 A.D.2d 682, 327 N.Y.S.2d 139 (4th Dept. 1971)

- Children of deceased wife brought action to annul marriage on grounds of fraud after death to prevent husband from taking elective share.
- The court noted that New York law permits challenges to marriage after death on the grounds of fraud. However, New York's elective share laws contain specific provisions requiring the annulment to be obtained prior to death.

2. Vermont

A marriage may be annulled during the lifetime of the parties, *or one of them*, on the basis that the consent of one of the parties was obtained by force or fraud. Such action for annulment may be instituted by the innocent party, the parent or guardian of such party, or some relative interested in contesting the validity of the marriage. Vt. Stat. Ann. tit.15, § 516 (2005).

3. Louisiana

A marriage is relatively null when the consent of one of the parties to the marriage is not freely given. Such marriage may be declared null upon application by the party whose consent was not freely given. La. Civ. Code. art. 95 (2006)

Succession of Ricks, 893 So. 2d 98 (La. App. 2004).

- Children of the decedent challenged the validity of the marriage between the decedent and his wife. They alleged that the decedent was incompetent at the time of the marriage and that his wife "took advantage of [his] infirmity to regain her status as a legatee when she remarried him hours before his death."
- The court held that the above statute permitted a court appointed administrator to bring an action to challenge a marriage.

4. New Jersey

A marriage may declared a nullity where either of the parties "lacked capacity to marry due to want of understanding because of mental condition, or the influence of intoxicants, drugs, or similar, agents, or where there was a lack of mutual assent to the marital relationship; duress; or fraud as to the essentials of marriage" and the injured party has not subsequently ratified the marriage. N.J. Stat. 2A:34-1 (2007).

In re Estate of Santolino, 895 A.2d 506 (N.J. 2005)

- The court held that the sister of the decedent could bring a claim after death on the grounds that the decedent's marriage was void due to fraud.
- The court reasoned that the sister of the decedent had standing to challenge the validity of the marriage because New Jersey Statute 2A:34-1(b) did not explicitly provide that marriages may not be challenged after the death of one of the parties.

B. States with Statutes, which Prohibit Challenges to Marriage After Death for Fraud or Duress

1. Alaska

A marriage may be declared void on the ground that the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting fraud, cohabitated with the other as husband and wife. A marriage may be declared void on the ground that the consent of either party was obtained by force, unless such party afterwards freely cohabitated with the other as husband and wife. If the consent of either party is obtained by fraud or force, the marriage is voidable, but only at the suit of the party upon whom the force or fraud is imposed. Alaska Stat. §§25.24.030, 25.05.031.

Riddell v. Edwards, 76 P. 3d 847 (Alaska 2003)

- Probate court could not declare a marriage void after the wife had died even though the estate sought to invalidate the marriage because the wife was incompetent and the husband had fraudulently induced her to enter into marriage.

2. Colorado

A marriage may be declared invalid where "one party entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act goes to the essence of the marriage" or when "one or both parties entered into the marriage under duress exercised by the other party or a third party". However, "*in no event under such circumstances may a declaration of invalidity be sought after the death of either party to the marriage,*" except in the cases of marriages which are prohibited by law such as bigamous and incestuous marriages Colo. Rev. Stat. §14-10-111 (2005)).

In re the Estate of Fuller, 862 P.2d 1037 (Co. App. 1993)

- Children of the decedent challenged the validity of the decedent's marriage on the grounds that decedent lacked capacity to consent to the marriage.
- Colorado Statute §14-10-111(2) provides, "In no event may a declaration of invalidity be sought after the death of either party to the marriage."
- Because the action for annulment was not brought until after the decedent's death and no exception applied, the court held that the children lacked standing to challenge the validity of decedent's marriage.
- The court noted the exceptions under which a marriage may be attacked posthumously. Fraud and duress are not among the exceptions.

3. Illinois

A marriage may be declared invalid where a party lacked the capacity to consent or where a party was "induced to enter into a marriage by force or duress or by fraud involving the essentials of the marriage". A declaration of invalidity may be sought by either party or by the legal representative of the party who lacked the capacity to consent, no later than 90 days after the petitioner obtained knowledge of the described condition. In no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage. 750 Ill. Comp. Stat. §§301-302 (2006).

In re Estate of Crockett, 728 N.E.2d 765 (Ill.App. 2000)

- Notwithstanding this statute, the Court permitted children to challenge to marriage after death where the wife obtained marriage license, husband was mute and barely conscious during ceremony and was unable to sign marriage certificate, and representative spoke for the husband during the exchange of vows.

4. Minnesota

An action to annul a marriage, where a party lacked capacity to consent to the marriage or where consent was obtained by force or fraud and there was no subsequent voluntary cohabitation of the parties, may be brought by either party to the marriage or by the legal representative of the innocent party. However, "in no event may an annulment be sought after the death of either party to the marriage." Minn. Stat. §§518.05, 518.02 (2006).

5. Montana

A marriage may be declared invalid for lack of capacity to consent or if a party was induced to enter into a marriage by force or duress or by fraud, but such relief must be sought no later than 2 years after the petitioner obtained knowledge of the described condition. A declaration of invalidity may not be sought after the death of either party to the marriage. Mt. Stat. §40-1-402.

6. Ohio

A marriage may be annulled on the basis that the consent of either party was obtained by fraud, unless such party thereafter, with full knowledge of the facts constituting fraud, cohabitated with the other as husband or wife. An action for annulment may be brought by the aggrieved party, but must be instituted within two years after the discovery of the facts constituting fraud. A marriage may be annulled on the basis that either party has been adjudicated to be mentally incompetent, unless such party after being restored to competency cohabitated with the other as husband or wife. An action for annulment may be brought by the party aggrieved or the relative or guardian of the party adjudicated to be mentally incompetent at any time prior to the death of either party. Ohio Stat. §§3105.31-3105.32.

Hall v. Nelson, 534 N.E.2d 929 (Ohio 1987)

- The son of the decedent sought to annul the marriage between the decedent and his surviving wife on the grounds that the decedent lacked mental capacity to marry, that the marriage was obtained by fraud and that the marriage was not consummated.
- Pursuant to Ohio Statute §3105.32, the court found that only an aggrieved party may sue to have a marriage annulled because of mental incapacity, fraud or failure to consummate. Furthermore Ohio Statute §3105.02(C) permitted a relative or guardian of an incompetent to sue for annulment only while the incompetent was alive. Because the son was not a party to the marriage and the action for annulment was not brought while the decedent was alive, the court held that the son lacked standing to challenge the marriage.

7. Pennsylvania

A marriage is voidable and subject to annulment where one party was induced to enter into the marriage by fraud, duress, coercion or force attributable to the other party, provided that there has been no subsequent voluntary cohabitation after knowledge of the fraud or release from the effects of fraud, duress, coercion or force. Either party may obtain an annulment to a voidable marriage. The validity of a voidable marriage, however, may not be attacked or

questioned by any person if either party to the marriage has died. 23 Pa. Cons. Stat. § 3305.

8. Texas

A court may annul a marriage if the other party used fraud, duress or force to induce the petitioner to enter into the marriage, and petitioner has not voluntarily cohabited with the other party after becoming apprised of the fraud or being released from the duress of force. A marriage subject to annulment may not be challenged in a proceeding instituted after the death of either party to the marriage. Tx. Fam. Code §§ 6.107, 6.111.

9. Wisconsin

A court may annul a marriage if a party was induced to enter into the marriage by force, duress or fraud involving the essentials of marriage. A suit for annulment may be brought by either party, or by the legal representative of the innocent party, no later than one year after the petitioner obtained knowledge of the described condition. However, a marriage may not be annulled after the death of a party to a marriage. Wis. Stat. § 767.313 (2007).

C. **States where Challenges on the Grounds of Fraud, Duress, or Undue Influence are Prohibited After Death by Case Law**

1. Alabama

Rickard v. Trousdale, 508 So.2d 260 (Ala. 1987)

- The court held that a marriage allegedly induced by fraud is merely voidable and cannot be attacked after the death of one of the parties to the marriage. Therefore, even if the putative husband fraudulently induced the decedent to consent to marriage, the daughter of the decedent could not attack the validity of the marriage.

2. Arizona

Davis v. Industrial Commission of Arizona, 353 P.2d 627 (Ariz. 1960)

- In this case, the employer of the decedent denied the surviving spouse death benefits on the basis that the decedent and surviving spouse fraudulently procured a marriage license.
- The court held that the denial of benefits amounted to a collateral attack upon the validity of the marriage, which was not permitted after the death of one of the spouses.

3. Arkansas

Where the consent of either party was obtained by force or fraud, the marriage shall be void from the time its nullity is declared by the court. Ark. Stat. 9-12-201.

Vance v. Hinch, 261 S.W.2d 412 (Ark. 1953).

- In construing the identical predecessor to Arkansas Statute 9-12-201, the court held that a marriage induced by fraud was voidable (despite the fact that the statute referred to such a marriage as "void"). Because voidable marriages are only vulnerable to attack during the lifetime of the spouses, the granddaughters of the decedent could not challenge the validity of the marriage.

4. California

A marriage may be annulled when the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting fraud, freely cohabitates with the other as husband or wife. An action for annulment based upon fraud may be brought by the injured party, but must be instituted within four years after the discovery of the facts constituting the fraud. Cal. Fam. Code §§2210-2211 (2005).

Greene v. Williams, 88 Cal. Rptr. 261 (Cal. App. 197)

- Action to annul marriage does not survive the death of a party to the marriage.

5. Mississippi

Ervin v. Bass, 160 So. 568 (Miss. 1935)

- The court noted that a marriage induced by fraud or coercion was voidable. As a result, the marriage remains valid until dissolved by court decree, which can only be rendered during the lifetime of the parties.

6. New Hampshire

Patey v. Peaslee, 111 A.2d 194 (N.H. 1955)

- The heirs-at-law of the decedent sought to annul the marriage between the decedent and the surviving spouse on the basis fraud. The court held that the heirs-at-law did not state a cause for annulment because the marriage was voidable and not brought during the lives of both parties to the marriage.

7. Nebraska

Where the consent of one of the parties is obtained by force or fraud, and the parties have not subsequently voluntarily cohabitated, the marriage shall be deemed voidable. Neb. Stat. §42-118.

Christensen v. Christensen, 14 N.W.2d 613 (Neb. 1944)

- The court held that the marriage was voidable, where spouses knew of the husband's physical condition prior to the marriage, but fraudulently concealed such condition in order to obtain a marriage license.
- A voidable marriage may only be inquired into during the lives of the parties to the marriage.

8. North Dakota

A marriage may be annulled when the consent of either party was obtained by fraud, unless such party, with full knowledge of the facts constituting fraud, subsequently freely cohabitates with the other as husband or wife. An action to annul a marriage on the grounds of fraud may be brought by the injured party within 4 years after discovery of the facts constituting fraud. N.D. Stat. § § 14-04-01, 14-04-02 (2005).

Gibbons v. Blair, 376 N.W.2d 22 (N.D. 1985)

- The court held that the father of the decedent did not have standing to bring an action to annul the marriage between the decedent and his widow on the grounds of fraud.
- The court explained that under North Dakota Statute §14-01-01, the marriage was voidable and thus could only be annulled on the basis of fraud by an action brought by the defrauded spouse while both parties to the marriage were living.

9. Oregon

A marriage is voidable where the consent of either party is obtained by force or fraud. Such marriage may be annulled, provided that the marriage was not later ratified. Or. Stat. §106.030, 107.015.

In re Estate of Hunter, 588 P.2d 617 (Or.App. 1978), reversed on other grounds, Hunter v. Craft, 600 P.2d 415 (Or. 1979).

- The court held that the decedent's marriage was not subject to collateral attack by decedent's son in a will contest proceeding.
- There was insufficient evidence to support son's claim that surviving spouse exerted undue influence over the decedent.
- Pursuant to Oregon Statute §107.015, either party may seek an annulment on the ground of fraud, not just the injured party. However, a suit for annulment does not survive death. Because the marriage at issue was not annulled prior to the decedent's death, such marriage was valid and not subject to collateral attack

10. Washington

A marriage where the consent of either party is obtained by force or fraud is voidable, but only at the suit of the innocent party. Wash. Stat. §26.04.130.

In re Hollingsworth's Estate, 261 P. 403 (Wash. 1927)

- The court dismissed a petition seeking to annul the marriage between the decedent and surviving spouse on the basis that the surviving spouse fraudulently procured the marriage license by falsely swearing she was not feeble-minded.
- "A voidable marriage is valid for all purpose until annulled, and can be attacked only in a direct proceeding during the lifetime of both spouses; hence on the death of either party the marriage cannot be impeached."

In re Romano's Estate, 246 P.2d 501 (Wash. 1952).

- In this case, the executrix and legatees alleged that the newly employed housekeeper coerced the decedent into marriage.
- Applying Washington Statute §26.04.130, the court held that the marriage at issue was voidable and thus could not be set aside in a collateral attack after the death of one of the parties.
- The court, however, citing Savage v. Olsen, 9 So.2d 363 (Fla. 1942), noted that "under exceptional circumstances indicating fraud of the grossest kind, without apparent opportunity to detect or correct the inequity during the lifetime of the deceased spouse, a collateral attack after death has been permitted."

D. North Carolina Allows Challenge If There Are No Children

North Carolina law provides that a marriage followed by cohabitation and the birth of issue may not be declared void after the death of either of the parties to the marriage.

A marriage where either party is incapable of contracting due to lack of will or understanding is void. Such marriage may be declared void upon application by either party to the marriage. No marriage followed by cohabitation and the birth of issue may be declared void after the death of either of the parties. N.C. Stat. 51-3, 50-4.

Ivery v. Ivery, 129 S.E.2d 457 (N.C. 1963)

- In this case, the brother of the decedent challenged the validity of the marriage between the decedent and surviving spouse on the grounds that the decedent was incompetent and the surviving spouse “persuaded and induced” the decedent to enter into marriage.
- The court recognized that at common law the marriage of a person incapable of contracting for want of understanding was voidable. Accordingly, such marriage could only be attacked during the lifetime of both parties to the marriage.
- The court noted, however, that under the above statute, marriages are immune from attack after the death of either party only when the marriage was followed by cohabitation and the birth of issue. Because the marriage was followed by cohabitation, but not the birth of issue, the court held that the marriage was subject to collateral attack by the decedent’s brother.

VI. Conclusion

In sum, Florida follows the common law and majority rule which only allows **void** marriages to be challenged after death. In most instances, Florida courts have held that marriages procured by fraud, duress, and undue influence are merely voidable, affording potential heirs no ability to challenge a marriage after death. Given the extensive rights available to a surviving spouse, a wrongdoer can profit significantly by simply inducing or influencing an elderly person to enter into a marriage. The Subcommittee recommends that the full committee consider and discuss legislation to address this issue.

VII. Proposed Statute

Over the last several meetings, the Probate and Trust Litigation Committee discussed and debated a legislative change to permit a challenge to a marriage procured by fraud, duress, or undue influence. At the August 2, 2007

meeting in Palm Beach, a straw vote revealed that a majority of the Committee was in favor of working on a proposed legislative fix.

Accordingly, the proposed statute set forth below would provide an avenue to attack a marriage on the basis of fraud, duress, or undue influence after the death of a party to the marriage. The proposed statute aims to narrowly focus on inheritance rights. The proposed statute also borrows from F.S. §732.802 (the slayer statute), F.S. §732.5165 (effect of fraud, duress, mistake, and undue influence), and F.S. §733.107 (burden of proof in contests; presumption of undue influence).

73X.XXXX. Challenge to marriage procured by fraud, duress, or undue influence

(1) An action to challenge a marriage may be maintained by any interested person after the death of the husband, wife, or both in any proceeding under chapters 731 through 736, 744, 747, and the Florida Probate Code, in which the fact of marriage may be material, either directly or indirectly.

(2) The scope of this section is limited to all inheritance rights or other benefits a surviving spouse or any other person may acquire as a result of the surviving spouse's marriage to the decedent, including any rights or benefits acquired under chapters 731 through 736, 744, 747, and the Florida Probate Code.

(3) A marriage is void for all purposes under subsection (2) if it is procured by fraud, duress, or undue influence.

(4) In all proceedings contesting a marriage under this section, the contestant shall have the burden of establishing, by clear and convincing evidence, the grounds on which the marriage was procured by fraud, duress, or undue influence.