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Annulment Proceedings for Non-age (New York State)

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Annulment Proceedings for Non-age (New York State). — In England, the ecclesiastical courts assumed jurisdiction to decree the annulment of the marriages of infants who were below the age of consent. In this country, such courts did not exist. Hence, at an early date, courts of equity assumed jurisdiction; at the present writing, such jurisdiction is controlled locally by statutory enactment.[1]

The state of New York modified its Domestic Relation law in 1922:

> "A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto is under the age of legal consent, which is eighteen years, provided that such non-age shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding the marriage."[2]

This statute is best explained in detail by Justice Dowling in *Retan v. Mathewson*[3] where he states, in part:

> "Annulment of a marriage for non-age is no longer a matter of right, but rests now in the sound discretion of the court. Persons under the age of 18 may now contract a valid marriage, and such marriages will not be annulled at the mere desires of the parties."

In this decision the court rightly followed the land-mark case of *Todaro v. Todaro*[4] in which Justice Martin stated:

> "It is obviously the intention of the legislature to abolish the license afforded by the prior state of the law to permit persons under 18 years of age to make trial marriages, which they could repudiate without penalty. It recognizes that a marriage may be validly contracted by a person under that age that public policy dictates should be the standard age."

The law is further explained in *Lazarczyk v. Lazarczyk*:[5]

> "No hard and fast rule has been laid down by which it can be determined just when the discretion of the court should be exercised in favor of an annulment and when it should not. The results must be governed by the facts surrounding each case. The discretion of the court should be moved by whether an advantage has been taken of the plaintiff to entrap her into a relation that she would not have assumed if endowed with more mature judgment."

A bulk of New York case law extends the discretion of the court in these actions.[6] Hence, from the authority cited we realize the *substantive* law rights of infants married before one or both have attained the statutory requirement of 18 years: the court may void or affirm the marriage at

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1 *Cunningham v. Cunningham*, 206 N.Y. 341.

2 Dom. Rel. Law of New York, Sec. 7.

3 226 N.Y.S. 85.

4 200 N.Y.S. 567.

5 201 * 816.

6 *Smith v. Smith*, 221 N.Y.S. 672, (1927), *Retan v. Mathewson*, 226 N.Y.S. 80, (1927), *Simmons v. Simmons*, 203 N.Y.S. 215, (1924).

its sound discretion. Another question arises from these rights — a problem in *adjective* law, . . . May the parent of the infant successfully sue for annulment, and is the consent of the infant to the proceedings necessary?

At common law the right to annul the marriage on the ground of non-age extended to the parties only. The United States has generally adopted the English view — with the exception of two states: New York and Oklahoma.[7] Early New York cases accepted the English view. An early decision[8] emphatically demonstrates this:

> "The marriage contracts of infants are not dependent upon the consent of their parents, and parents may not have them annulled. It is only the infant who may maintain an action to annul his or her marriage. The parents right to maintain such an action is clearly in behalf of the infant. . . . The marriage contracts of infants are not void but only voidable at the election of the parties to the marriage. A parent or guardian is not such a party."

In 1915 New York's legislature accepted the *Code of Civil Procedure* — forerunner to the present Civil Practice Act. Section 1744 of the original code provided:

> "An action to annul a marriage on the ground that one or both of the parties had not attained the age of legal consent may be maintained by the infant, or the guardian of the infants person, or the court may allow the action to be maintained by any person as next friend of the infant. But the action shall not be maintained at the suit of a party who was of the age of legal consent when it was ocntracted, or by a party who for any time after he or she attained the age freely cohabited with the other party as husband or wife."

From a mere reading of the statute we can understand that the right of the parent to bring suit under the circumstances is absolute, and not conditioned upon the consent of the infant. As Justice Tuthill stated in *Kuykendall v. Kuykendall*:[9]

> "A case can be conceived, however, where children of immature years, under the age of consent and without judgment, might marry and be unwilling to ask that a sentence of nullity be granted as to their unwise act, yet under such circumstances a parent would not only be justified but it would clearly be a moral and parental duty to have the marriage annulled, and I believe that the law has been formulated to meet such and similar exigencies."

In the Kuykendall case, youngsters 15 and 17 years of age "eloped." The parents of the 15 year old brought an action for annulment and received judgment under the provision of section 1744 of the Code — which is now section 1133 of the New York Civil practice act. The section remains identically the same as it is set out on page ♂ of this

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7 New York: *Kuykendall v. Kuykendall*, 182 N.Y.S. Oklahoma: *Ross v. Bryant*, 90 Okl. 300.

8 88 N.Y.S. 854, (1904).

9 112 Misc. Rep. 12, 182 N.Y.S. 308.

paper. When the section was originally adopted by the legislature, Throop — New York's famous jurist, had this to say:

> "The annulling of the marriage may be a matter of such paramount importance to the infant and his parent that no technical obstacles should stand in the way of the court to grant relief. Sound social policy demands this change."[10]

From the case and statutory law cited we may unequivocally state the general proposition that in New York state a parent, guardian or best-friend may maintain suit to annul the marriage of the infant to whom it is related. Whether or not the case will be successful depends absolutely upon the discretion of the court which will weigh the circumstances carefully. Consent of the infant to the proceeding is neither necessary nor material, although the action must specifically be brought in his or her name, and the parties to the marriage must be enjoined in the action.[11]

On the several points discussed, New York law is crystal clear, but sadly in the weak minority with Oklahoma.

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10 *Thoops' Commentaries on Procedure*, p. 354.
11 *Fero v. Fero*, 62 App. Div. 470.

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