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DISSOLUTION AND VOIDABLE MARRIAGE UNDER
THE CALIFORNIA FAMILY LAW ACT

In 1969 a revolutionary concept in divorce proceedings was introduced into California law. The Family Law Act\(^1\) was the product of extensive inquiry into the public policy considerations and practical consequences of prior divorce law, which had been predicated primarily upon concepts of fault. As reported in the Assembly:

The bulk of our divorce law was established in 1872. The Plaintiff or cross-complainant was required to submit evidence to establish that at least one of a number of grounds for divorce existed. The grounds were adultery, extreme cruelty, willful desertion, willful neglect, habitual intemperance and conviction of a felony. Incurable insanity was later added.

Since it was necessary for one party to prove that such grounds existed, divorce proceedings quickly became adversary in nature and that in turn added to the already extant divisiveness. Allegations of extreme mental or physical cruelty became commonplace, and questionable methods of gathering effective but lurid and ludicrous evidence were occasionally employed. As a result, bitterness was often increased to the point that the division of property, child custody awards and other matters incident to dissolution were not subject to resolution without severe traumatic effects upon the children, as well as upon the parties.

Since the whole statutory scheme was unrealistic, a procedure evolved which promoted hate, scorn, bitterness and acrimony. One party—usually the plaintiff-wife—would appear at an often collusive default hearing. In response to a few well-rehearsed questions of counsel that party would testify that “he made me nervous,” or “he would stay out late without explanations,” etc.

A corroborating witness, made necessary by statute, would then take the stand and “verify” the party’s statements. The court would then grant a divorce.

It is not at all surprising that such sham procedures developed. It was a natural reaction to the fact that proof of fault in a divorce proceeding is undesirable and unrealistic . . .

First in priority, then, in any divorce reform was the elimination of the artificial fault standard. That is the premise of the Family Law Act. The intent has been to devise practicable procedures and a basis for dissolution which is descriptive of the actual reasons underlying marital breakdown.\(^2\)

The Act in its final form represented in large measure the work and recommendations of the Governor’s Commission on the Family.\(^3\) Among other charges, the Commission was to study the substantive laws of California relating to the family and suggest revision. However, the Act departed significantly from the Commission’s recommendation in one respect. In its report the Commission observed that

\(^3\) Id. at 8054.
the essential question presented in the annulment of a voidable marriage does not differ from that presented in any dissolution of marriage cases . . . [the Commission recommends] the elimination of the specific fault grounds, and the coalescence of all dissolution proceedings (save for declarations of nullity in case of void marriages) into a single form of action governed by a single standard.4

The legislature refused to follow this recommendation of the Commission with respect to eliminating voidable marriage.

The new law retains the action for a judgment of nullity based upon voidable marriage (annulment) for the following reasons: (1) it is not certain that those factors which would constitute grounds for annulment under the old law—fraud in the inducement, for example—would be determined by the courts to constitute either irreconcilable differences or a breakdown of the marriage at the time a petition for dissolution is filed; (2) for some persons the stigma of an annulment is less offensive than that of a dissolved marriage; and (3) the annulment voids the marital relationship ab initio.5

The Commission’s proposed act6 was also criticized respecting its disposition of contemporaneous voidable marriages:

[I]f the Family Court Act is adopted, abolishing the action for annulment, no presently voidable marriage could be annulled (although, of course, such a marriage could be dissolved, and a void marriage could still be declared a nullity). All presently voidable marriages would thus be forever valid. Upon their dissolution they would be treated the same as non-voidable marriages—that is, as formerly existing, valid marriages. Parties to what are now voidable marriages would, therefore, be entitled to alimony, and the property acquired by their joint efforts will be community or quasi-community property.7

The validity of these and other objections will be discussed when appropriate to the ensuing examination of the present Family Law Act.

DISSOLUTION

The propriety of retaining an express statutory provision for voidable marriage cannot be meaningfully resolved without a preliminary examination of the action for dissolution as presently constituted. The Act repealed the prior statute which had stipulated fault grounds for divorce.8 The superseding statute is section 4506 of the California Civil Code, which provides:9

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

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7 Hammer, Divorce Reform in California: The Governor’s Commission on the Family and Beyond, 9 SANTA CLARA LAW. 32, 70-71 (1968).
8 The prior statute was CAL. CIV. CODE § 92, (repealed by ch. 1608, § 3 [1969] Cal. Stat.)
9 CAL. CIV. CODE § 4506 (West 1970).
(1) Irreconcilable differences, which have caused the irremediable break-down of the marriage.
(2) Incurable insanity.

In commenting upon this section, the Assembly stated:
Irreconcilable differences will be the basis of nearly all actions for dissolution. It was chosen simply because it is in fact descriptive of the frame of mind of the spouses in a marriage which is no longer viable.

Addition of the modifying phrase “which have caused the irremediable break-down of the marriage” was not intended as the imposition of a second standard to that of irreconcilable differences. It was only meant to describe the relevant kinds of differences.

Furthermore, the legislature was careful to define its use of the term “ir-reconcilable differences” in section 4507 as those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dis-solved.

Clearly, then, marriage was not to be terminable at will but at the discre-tion of the court, thereby accomplishing the protection of society’s interest in the institution of marriage. Indeed, in determining the propriety of dissolution, the court could revert to fault considerations, subject to the above limit-ation that they were “substantial reasons for not continuing the marriage.” The legislative pronouncement of policy in this regard, however, is found in section 4509.

In any pleadings or proceedings for legal separation or dissolution of marriage under this part . . . evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue . . . or at the hearing where it is determined by the court to be necessary to establish the existence of irrecon-cilable differences.

The import of section 4507 as applied in combination with section 4509 is currently in doubt. If prior acts of misconduct were introduced in order to establish irreconcilable differences, the philosophy of the Act might be frus-trated. Insofar as such evidence may still be introduced, it must comply with a higher standard of admissibility than under former law; not only must the evidence relate to establishing only one criterion for dissolution (irrecon-cilable differences), but such evidence is admissible only to the extent that it is “necessary”. It is submitted that the “necessary” standard is more rigorous than the standard of relevancy which would otherwise apply. One might even suggest that the existence of a single alternative means of proving irre-reconcilable differences would render evidence of misconduct unnecessary within the meaning of the Act and the court would commit error in receiv-ing it.

11 CAL. CIV. CODE § 4507 (West 1970).
12 Id. § 4509.
13 CAL. EVID. CODE §§ 350 (West 1968).
14 CAL. CIV. CODE § 4509 (West 1970).
Under the Act, the submission of evidence of misconduct in dissolution proceedings (formerly divorce proceedings) has lost much of its appeal. Prior to the Act, the courts of California had directly held that an equal division of community property would be an abuse of discretion where one party was guilty of heinous misconduct and the other party innocent. Accordingly, it was in the pecuniary interest of the plaintiff in an action for divorce to allege a grievous fault ground. This system of property division became particularly unconscionable as the fault character of divorce became more fictional. Thus, the fiction of off-setting cross-complaints evolved in order that equal division of community property might be accomplished. With certain innocuous exceptions, the Act removes the court's discretion concerning property division. It provides in pertinent part:

-the court shall . . . divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally.

18 CAL. CIV. CODE § 4800(a) (West Supp. 1970-71). Exceptions to equal division of community property are provided as follows:

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property.

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

(3) If the net value of the community property and quasi-community property is less than five thousand dollars ($5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all such property to the other party on such conditions as it deems proper in its final judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties. Id. § 4800(b).

The Act further provides that the court may order either party to pay all or a portion of an obligation of a party directly to a creditor. Id. § 4358 (West Supp. 1970-71).

Subsection (b)(1) of section 4800 is clearly compatible with the no-fault equal division premise of the Act. The subsection is designed to give the court discretion to accomplish an equitable division of property where necessity dictates an unequal distribution, for example where the primary community asset is a homestead and child custody was awarded to the dependent spouse. See 1 CAL. ASSEM. JOUR. 785-88 (1970). Fault would not be a consideration. Moreover, the subsection would be available only where "economic circumstances warrant". Accordingly, it appears to be innocuous as an introduction of fault into property division. Subsection (b)(2) superficially appears to be punitive in character, operating where a party deliberately misappropriates property in order to frustrate equal division. Despite the culpability implicit in such conduct, it is suggested that the thrust of this provision is deterrence in order to facilitate equal division. Subsection (b)(3) is designed to afford some solution to the practical problem which arises where the sum of community property is small and one of the parties is absent and cannot be located. See 4 CAL. ASSEM. JOUR. 8457-58 (1970). With respect to section 4358, the legislative intent is a matter for speculation. Presumably,
Furthermore, spousal support (alimony),\textsuperscript{19} costs,\textsuperscript{20} and payments to creditors\textsuperscript{21} are now functions of necessity rather than culpability. Additional peculiarities of the dissolution proceeding, as established by the Act, will be considered as necessary to the discussion of voidable marriage.

**Declaration of Nullity**

An examination of section 4425 of the Civil Code reveals that a marriage is voidable and may be adjudged a nullity where certain conditions existed at the time of contracting the marriage: (a) lack of capacity as defined by section 4101, unless the party freely cohabited after majority,\textsuperscript{22} (b) the innocent bigamy situation commonly denominated “Enoch Arden”,\textsuperscript{23} (c) where either party was of unsound mind, unless such party freely cohabited after regaining reason, (d) consent obtained by fraud, unless such party cohabited with the other after the fraud was known, (e) consent obtained

\textsuperscript{19} CAL. CIV. CODE \S 4801 (West Supp. 1970-71).
\textsuperscript{20} \textit{Id.} \S 4370.
\textsuperscript{21} \textit{Id.} \S 4358.
\textsuperscript{22} See \textit{Id.} \S 4101. This section provides:

(a) Any unmarried male of the age of 21 years or upwards, or any unmarried female of the age of 18 years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage.

(b) Any male under the age of 21 years and over the age of 18 years is capable of consenting to and consummating marriage if such underage person obtains the consent in writing of his parents, or of one of such parents, or of his guardian, or an order of the superior court as provided for in Section 4102, and if such consent or order is filed with the clerk issuing the marriage license as provided for in Section 4201.

(c) Any person under the age of 18 years is capable of consenting to and consummating marriage if each of the following documents is filed with the clerk issuing the marriage license as provided in Section 4201:

(1) The consent in writing of the parents of each person who is underage, or of one such parents, or of his or her guardian.

(2) After such showing as the superior court may require, an order of such court granting permission to such underage person to marry.

(d) As part of the order under subdivision (c), the court shall require the parties to such prospective marriage of a person under the age of 18 years to participate in premarital counseling concerning social, economic, and personal responsibilities incident to marriage, if it deems such counseling necessary. Such parties shall not be required, without their consent, to confer with counselors provided by religious organizations of any denomination. In determining whether to order the parties to participate in such premarital counseling, the court shall consider, among other factors, the ability of the parties to pay for such counseling.

\textsuperscript{23} California’s Enoch Arden statute is typical, providing that a marriage is voidable, not void, notwithstanding that the first spouse was living at the time of contracting the second marriage, where the former husband or wife is absent and not known to such person to be living for the space of five successive years immediately preceding the subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. . . . \textit{CAL. CIV. CODE} \S 4401(2) (West 1970).
by force, unless such party afterwards freely cohabited with the other, or
(f) apparently incurable physical incapacity to enter into the marital state.24

As previously observed, the legislature retained these grounds for several
reasons, including its view that less opprobrium was associated with null
marriages than broken marriages. One might observe, however, that the Act
manifests a significant change in public attitude concerning divorce. It is
ture that dissolution is not available at will and is still subject to judicial re-
view and discretion. However, a fair inference might be that, in removing
the onus of fault from dissolution, the legislature has recognized a pre-
vailing state of mind in our society: marriage may prove impracticable
without culpability. This is not to say that an impression of personal failure
has been eliminated. Since evidence of prior misconduct would normally be
improper, neither party has been able to vindicate himself by showing that
irreconcilable differences occurred notwithstanding his ability to enter into
and sustain a viable human relationship. An aftertaste of failure may linger,
deterring and obstructing future relationships. The grounds of section 4425,
coupled with the ab initio aspect of declaration of nullity would remove this
shadow and leave no aftertaste of failure as to the putative spouse. The
world would be on notice that, through no fault of the putative spouse,
the purported status never existed.25 Furthermore, a pronouncement that
no marriage existed might accord more favorably with the religious views
of some parties, facilitating subsequent entry into a valid marriage.

Should an action for declaration of nullity under 4425 be brought by a
non-putative spouse, little property advantage could be obtained. While a
putative spouse would enjoy what appears to be a right in "quasi-marital
property"26 substantially the same as in community and quasi-community
property, the section 4425 action would not be desirable for a non-puta-
tive spouse. Although a culpable spouse could participate in division of
community property upon dissolution,27 a non-putative spouse might be pre-

24 Id. §§ 4425.
25 The Act defines a putative spouse as one who "believed in good faith that the
marriage was valid." CAL. CIV. CODE § 4452 (West Supp. 1970-71). To this extent
the Act reaffirms the essential aspect of the remedy made available to a putative
spouse under prior law. See, e.g., Vallera v. Vallera, 21 Cal. 2d 681, 134 P.2d
761 (1943).

Where the Act does not depart significantly from former statutory language reference

26 Quasi-marital property is defined as "that property acquired during the union
which would have been community property or quasi-community property if the union
had not been void or voidable." CAL. CIV. CODE § 4452 (West Supp. 1970-71).

27 See discussion note 18 supra.
cluded from participation in quasi-marital property. For example, where the property acquired during the voidable marriage was the product of the efforts of the putative spouse, the non-putative spouse will probably be precluded from asserting a quasi-marital interest.\textsuperscript{28} Of course, if the petitioner were putative and respondent were non-putative, an advantage might accrue under the provisions for declaration of nullity. The putative spouse could enjoy a substantially larger participation in the property accumulated during coverture by virtue of the exclusion of the non-putative spouse.

Under appropriate facts, a putative spouse might thus benefit from the nullity remedies. Such a situation could arise where a non-putative spouse was attempting to secure dissolution and participation in community property. Where a mandatory interlocutory period or jurisdiction was not at issue, any other combination of parties would be inclined to bring the action for declaration of nullity exclusively for philosophical reasons.\textsuperscript{29}

In order to determine if the section 4425 grounds could properly be included within irreconcilable differences, it is appropriate to consider each separately. Subsection (a) provides for declaration of nullity where:

The party who commences the proceeding or on whose behalf the proceeding is commenced was without the capability of consenting thereto as provided in Section 4101, unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband and wife.\textsuperscript{30}

Section 4101, in turn, provides that males who are at least 21 and females who are at least 18 may consent to marriage.\textsuperscript{31} Parties who fail to qualify under this provision must comply with certain requirements, for example consent of a parent or guardian, before entering into a valid marriage.\textsuperscript{32} If a purported marriage is contracted without strict compliance with the terms of section 4101, the marriage is within the purview of subsection (a), and voidable. If, on the other hand, parties who lack section 4101 capacity go to another state and enter a marriage valid where contracted, the marriage will not be voidable in California.\textsuperscript{33} This would appear to be true even where the parties leave the state for the express purpose of avoid-

\textsuperscript{28} \textit{See} CAL. CIV. CODE \textsection 4452 (West Supp. 1970-71). \textit{See also} page 352 \textit{infra}.

\textsuperscript{29} One might argue that such parties would seek an action for declaration of nullity because such a judgment would operate ab initio, relating back to the time of contracting the purported marriage, whereas dissolution would not. However, since considerations of equity and fairness have determined the extent to which the doctrine of relation back will be indulged where strangers to the action are involved, the textual statement is thought to be fair.

\textsuperscript{30} CAL. CIV. CODE \textsection 4425(a) (West 1970). For the provisions of \textsection 4101, \textit{see} note 22 \textit{supra}.

\textsuperscript{31} CAL. CIV. CODE \textsection 4101(a) (West Supp. 1970-71).

\textsuperscript{32} \textit{Id.} \textsection 4101(b), (c). \textit{See} note 22 \textit{supra}.

This would indicate that subsection (a) does not articulate a fundamental state public policy against under-age marriages, notwithstanding the fact that they are voidable under the Act. A recent case decided in the First Appellate District would suggest otherwise. In Ruiz v. Ruiz the court stated that "it seems clear that the code declares an affirmative policy of the state to restrict marriages of minors . . . ." Accordingly, the court reasoned that it would frustrate this policy to allow a respondent to invoke the affirmative defense of unclean hands to petitioner's action to annul under subsection (a). "[T]o permit a minor to effect a valid marriage by his own knowing misrepresentation is to allow him to defeat the very purpose of the statute." One might observe, however, that to permit a minor to secure a valid marriage by merely leaving the jurisdiction of the state is also to frustrate the "very purpose of the statute" as viewed by the Ruiz court. Hence, the reasoning of the court in Ruiz does not compel a conclusion that subsection (a) is expressive of strong public policy in this state that marriages contracted by minors are onerous. Rather, it is submitted that subsection (a) is prophylactic, designed to protect minors from their own improvidence. As a practical matter elimination of subsection (a) as a basis for voidable marriage would either render such marriages initiated in California void (in the sense of no marriage), or valid for all purposes against the world. The former alternative would clearly be undesirable. The rights of minor parties to a good-faith "non-marriage" would be unclear. There would not appear to be a strong pub-

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34 McDonald v. McDonald, 6 Cal. 2d 457, 58 P.2d 163 (1936). See 4 J. Goddard, supra note 33, at § 531.
36 Id. at 60, 85 Cal. Rptr. at 675.
37 Id.
38 See McDonald v. McDonald, 6 Cal. 2d 457, 58 P.2d 163 (1936).
39 There is no provision in California law for "common law" marriages. See CAL. CIV. CODE § 4100 (West 1970).
40 "Non-marriage", as used herein, denotes a good faith relationship other than a valid, voidable, or void marriage, each of which are specifically defined under the Act. See CAL. CIV. CODE §§ 4100, 4400, 4401, 4425 (West 1970), § 4101 (West Supp. 1970-71). The Act limits the judicial recognition of quasi-marital property to void or voidable marriages involving at least one putative spouse. Id. § 4452. Suppose that minors, not complying with the competency or consent requirements of section 4101, attempt in good faith to marry. If section 4425(a) were repealed (and the marriage were therefore not considered voidable) it would either be valid for all purposes (an unlikely result since common law marriage is not recognized in California) or it would be a "non-marriage". An action for declaration of nullity would not be available to the parties because the marriage would not be "void" or "voidable". Hence, the recognition of quasi-marital property would appear to be inappropriate. Note that case law prior to the Act suggests that parties to non-marriages could be treated in equity as putative. See Sancha v. Arnold, 114 Cal. App. 2d 772, 251 P.2d 67 (1952); Santos v. Santos, 32 Cal. App. 2d 62, 89 P.2d 164 (1939). However the availability of this equitable remedy is in doubt because of the restricted statutory definition of "putative". CAL. CIV. CODE § 4452 (West Supp. 1970-71).
lic policy against the marriage per se, as disclosed previously. Conversely, if such marriages were considered valid for all purposes, minors would be denied the protection of their parents and guardians. The only remedy available under the Act would be dissolution.\textsuperscript{41} Apparently only parties to the marriage could bring the action,\textsuperscript{42} but such parties, by hypothesis, would lack the judgment to conceive their best interests. It would appear, therefore, that subsection (a) serves a valid and useful purpose in protecting the interests of minors and parents. The fact that it might be easily circumvented by contracting the marriage in another state does not compel a conclusion that it is disfunctional. When minors do not leave this state they should have recourse to declarations of nullity. Furthermore, where very young minors are involved, a marriage would be at least voidable in every state. California should afford minors similar protection and a forum in which to seek a remedy.

Declaration of nullity is available under subsection (b) of section 4425 when:

The husband or wife of either party was living and the marriage with such husband or wife was then in force, provided, however, that such husband or wife was absent and not known to the party commencing the proceeding to be living for a period of five successive years immediately preceding the subsequent marriage for which the judgment of nullity is sought, or was generally reputed or believed by such party to be dead at the time such subsequent marriage was contracted.\textsuperscript{43}

Note that the section provides a remedy only where the party seeking relief is putative. Furthermore, the relief is available under those circumstances where the first husband or wife was merely absent for the statutory period and not affirmatively known to the petitioner to be living, or where the petitioner believed him to be dead at the time of contracting the voidable marriage.\textsuperscript{44}

It would be specious to suggest that inclusion within the dissolution rem-

\textsuperscript{41} \textit{CAL. CIV. CODE} § 4350 (West Supp. 1970-71).

\textsuperscript{42} \textit{See} Cohen v. Cohen, 73 Cal. App. 2d 330, 166 P.2d 622 (1946) (guardian lacks standing to bring action for divorce on behalf of an incompetent ward because of personal nature of the suit).

\textsuperscript{43} \textit{CAL. CIV. CODE} § 4425(b) (West 1970).

\textsuperscript{44} The import of the phrase "or was generally reputed" is dubious. As a matter of statutory construction, if the phrase modifies "or believed", one might argue that the belief of the party seeking relief must be predicated upon a general reputation. If, however, the clause were to stand alone, one might suggest that general reputation might be sufficient, irrespective of the spouses' credulity. At least one California Supreme Court case decided prior to the Act indicated the former construction. \textit{Cf.} Estate of Harrington, 140 Cal. 244, 247, 73 P. 1000, 1001 (1903) (dictum) (the statutory rule construed as "generally reputed and believed"). No cases have been found where annulment was granted on the basis of general reputation without belief of the death of the prior spouse where relief was sought under this clause. Obviously, requiring subjective belief is consonant with the public policy against knowingly entering into bigamous marriage.
edy as it now exists would afford an adequate remedy under the facts contemplated by subsection (b). True, the belated appearance of a prior spouse might afford a substantial reason for not continuing the second marriage. However, from the point of view of the remarried spouse, dissolution would be an undesirable remedy. Entry of final judgment for dissolution presupposes the issuance of an interlocutory judgment and the expiration of at least six months. The declaration of nullity, however, operates instantaneously and relates back. Accordingly the obstacle of the second voidable marriage is removed without delay. The status of the prior marriage would otherwise be in doubt during this period. There would appear to exist a logical inconsistency between granting an interlocutory judgment of dissolution (which presupposes a prior valid marriage) and a simultaneous valid other marriage. It would be little encouragement to either party to the first marriage to suggest another marriage after the expiration of the interlocutory period and dissolution of the second marriage in order that their legal status might be crystallized. Furthermore, remarriage before the expiration of the interlocutory period would be void \textit{ab initio} unless the court fictionalized some status during this period.

The express legislative pronouncement that the facts of subsection (b) of section 4425 give rise to voidable marriage has another consequence. Note that subsection (b) is a conspicuous legislative exception to the general rule that an attempt at remarriage while one's spouse is alive is void (not voidable) as inimical to public policy. Thus deletion of subsection (b) would appear to render the good faith second marriage void.

Subsection (c) of section 4425 provides for declaration of nullity if:

Either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband and wife.

Here, it is appropriate to note that dissolution is available on two bases, irreconcilable differences and incurable insanity. The required showing for

\textsuperscript{45} Note that the prior spouse would lose standing to vitiate a subsequent viable relationship against the will of the remarried spouse. For a more complete examination of this consequence see the discussion at p. 347 \textit{infra}.

\textsuperscript{46} \textit{CAL. CIV. CODE} § 4514 (West 1970).


\textsuperscript{48} A judgment \textit{nunc pro tunc} would be unavailable prior to the expiration of the interlocutory period. Moreover, such a judgment could not validate a marriage contracted during the interlocutory period since it relates back only to the time that a final judgment \textit{could} have been entered. \textit{CAL. CIV. CODE} §§ 4513, 4514 (West 1970).

\textsuperscript{49} \textit{Id.} § 4401.

\textsuperscript{50} There is case authority for the proposition that where no voidable marriage exception is expressly provided by the legislature, all bigamous marriages are void. Townsend v. Morgan, 192 Md. 168, 63 A.2d 743 (1949).

\textsuperscript{51} \textit{CAL. CIV. CODE} § 4425(c) (West 1970).

\textsuperscript{52} \textit{Id.} § 4506.
dissolution of marriage on the ground of incurable insanity is set forth in considerable detail in section 4510. Even a cursory reading of the section is sufficient to compel a conclusion that 4425(c) is incompatible. Section 4510 provides that dissolution on the basis of incurable insanity will be granted only upon proof that the insane spouse is incurably insane at the time of the proceeding. No other time is specified. Section 4425, however, requires that the person be of unsound mind at the time of contracting the marriage. Section 4425 expressly provides that the mental condition need not be incurable, nor need it last until the proceeding for declaration of nullity. Moreover, under 4426(c), the action can only be initiated by the “party injured” or the relative or guardian of the party of unsound mind. Presumably, if the marriage was initiated with knowledge of the mental condition, the other spouse would have consented to the condition or waived his rights with respect thereto. He would therefore not be a party injured within the meaning of the statute. No similar restriction on the party who may bring the action is found in section 4510. Furthermore, no provision is included in section 4510, as it is in nullity proceedings, granting relatives or guardians standing to bring an action for dissolution. Prior case law suggests that without an express provision such standing will not be recognized. Accordingly, persons of unsound mind entering into marriages would be denied the protection of relatives and guardians if 4425(c) were deleted in favor of the dissolution remedy. An unscrupulous person could exploit the mental inadequacy of the innocent spouse so long as the mentally deficient spouse was content to continue in the relationship. By hypothesis, such an innocent spouse would be incompetent to formulate a reasoned judgment and protect his own best interests.

63 A marriage may be dissolved on the grounds of incurable insanity only upon proof, including competent medical or psychiatric testimony, that the insane spouse was at the time the petition was filed, and remains, incurably insane. No decree granted on this ground shall relieve a spouse from any obligation imposed by law as a result of the marriage for the support of the spouse who is incurably insane, and the court may make such order for support, or require a bond therefor, as the circumstances require. If the insane spouse has a general guardian or guardian of his person, other than the spouse bringing the action, the petition and summons shall be served upon the insane spouse and such guardian and he shall defend and protect the interests of the insane spouse. If the insane spouse has no general guardian or no guardian of his person, or if the spouse bringing the action is the general guardian or guardian of his person, the court shall appoint a guardian ad litem, who may be the district attorney or the county counsel, if any, to defend and protect the interests of the insane spouse. If a district attorney or county counsel is appointed guardian ad litem pursuant to this paragraph, his successor in the office of district attorney or county counsel, as the case may be, succeeds him as guardian ad litem, without further action by the court or parties. Id. § 4510.

64 A proceeding to obtain judgment of nullity of marriage, for causes set forth in Section 4425, must be commenced within the periods and by the parties, as follows:

(c) For causes mentioned in subdivision (c): by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party. Id. § 4426.

Subsection (d) of section 4425 states that a declaration of nullity may issue when:

The consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife.56

Recall that in justifying the retention of voidable marriage the legislature expressly observed that consent procured by fraud might not be considered within the meaning of irreconcilable differences.57 It is submitted that in practice the likelihood of such a judicial construction would be remote. At the outset, it is to be observed that under either the voidable marriage or dissolution approach a de facto marriage would exist until one of the parties decided to terminate it.58 Presumably, if the fraud were not considered a substantial reason for discontinuing the relationship neither action would be initiated by reason of it. It would be frivolous to suggest that the four-year limitation upon the action for declaration of nullity59 would sustain the marriage in spite of the fraud. If the party refused to continue to cohabit with his spouse because of a prior fraud, a substantial reason for discontinuing the marriage would exist and dissolution would be appropriate. The availability of dissolution is even more probable since prior case law suggests that the marriage will be annulled on the basis of fraud only where that fraud goes to "the essentials of the marriage relation."60

Practical considerations afford a more realistic reason for retaining the fraud grounds of voidable marriage distinct from dissolution. Whereas section 4426(d) purports to limit the action for nullity based on fraud to the party injured,61 the dissolution provisions make no reference to fault and therefore are not so limited.62 As previously observed, the perpetrator of the fraud could probably maintain an action in dissolution irrespective of

57 See discussion p. 332 supra.
62 Id. § 4506-4510.
the provisions of 4426(d). Accordingly, an unconscionable result might follow in that he could potentially profit from his own wrong. Furthermore, if 4425(d) were repealed, the innocent putative spouse would suffer the additional hardship of a compulsory interlocutory period. As long as the remedies pursuant to 4425(d) are available, the putative spouse upon discovery of the fraud could instantaneously sever the relationship and be available for subsequent marriage. Requiring an interlocutory period for the purpose of facilitating reconciliation in marriage would be a futile formality since the fraudulently procured marriage never existed as contemplated by the putative spouse. The limitations of 4426(d) would also preclude a non-putative spouse (one with knowledge of the fraud), or the spouse who had continued to cohabit for the statutory period after disclosure, from taking advantage of the instantaneous aspects of declaration of nullity. Where the defrauded party has failed to seek judicial redress more than four years after discovery of the fraud, it is reasonable to assume that the fraud alone did not afford a substantial reason for discontinuing the marriage. The likelihood of a sham nullity proceeding is thus reduced. This result is compatible with the legislative purpose which the Act reflects, which is that marriage will be terminated on a basis descriptive of the actual reasons underlying marital breakdown.

Similar objections could be raised to elimination of subsection (e) of section 4425 which applies where:

- The consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife. Similarly to marriage procured by fraud, no viable marriage would exist in fact so long as the debilitory effect of the force remained. As with fraud, the culpable party would not have the nullity remedy available to him. The declaration of nullity would provide an immediate remedy to the innocent spouse, freeing her for subsequent marriage. Moreover, she would not be vulnerable to the potential opprobrium associated by many with divorce.

Subsection (f) provides for declaration of nullity where:

- Either party was, at the time of marriage, physically incapable of entering into the marriage state, and such incapacity continues, and appears to be incurable.

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64 The non-putative spouse might well bring an action for dissolution in order to enjoy an equal participation in community property, thereby securing an interest in property which might have been accumulated solely through the efforts of the innocent putative spouse. If section 4425(d) was unavailable, the putative spouse could not cross-petition for declaration of nullity in order to protect his interest. Recall that under these circumstances, it is likely that quasi-marital property would not be recognized in the non-putative spouse. See p. 336 *supra*.


68 Id. § 4425(f).
One might assume that incurable physical incapacity, sufficient by definition to preclude entering into the marital status, would constitute a substantial reason for not continuing the marriage, and therefore justify a finding of irreconcilable differences. Of course, all such speculation is subject to the limits imposed by the proper exercise of the court’s discretion. It also presupposes inquiry by the court into the factual basis of the assertion of irreconcilable differences. Conceivably, both parties could be putative spouses in an action for declaration of nullity on the basis of incurable physical incapacity as contemplated by subsection (f). In such a situation, the fault implications of the fraud and force grounds for annulment would be absent. The property division would be identical to that pursuant to dissolution. The unfortunate parties would be free of the six-month delay required by the interlocutory judgment of dissolution and would be immediately free for another union. It is submitted, however, that if the interlocutory period serves a useful purpose as applied to dissolution, it could be profitably added to the present provisions for declaration of nullity on the basis of incurable physical incapacity. For both parties to be putative, neither could have been aware of the incurable physical incapacity which existed at the time of contracting the marriage. One might reasonably surmise, therefore, that the physical problem must have been of a subtle and latent character. The subsequent failure of the marriage resulted from events beyond the control of the parties, rendering the marriage apparently impracticable. Such facts are fully consistent with the no fault concepts exemplified by the new Act’s provisions for dissolution. An interlocutory period would afford the parties an opportunity for reflection upon the gravity of sacrificing an otherwise satisfactory marriage through nullity proceedings. The parties might retain profound affection for each other, seeking annulment improvidently as a purely emotional reaction to disclosure of the incurable physical condition. Typically, however, one or both parties would be aware of the condition from the beginning. Since the subsection (f) nullity remedy of section 4425 is available only to the “party injured”, arguably a person with knowl-

69 “A court may decree a dissolution of the marriage . . . .” Id. § 4506. It is doubtful whether the court could deny a petition where the facts properly admitted in evidence supported the truth of the allegation of irreconcilable differences or incurable insanity. See Lewis v. Lewis, 167 Cal. 732, 141 P. 367 (1914); Quagelli v. Quagelli, 99 Cal. App. 172, 277 P. 1089 (1929); Dee v. Dee, 87 Cal. App. 17, 261 P. 501 (1927). See also Annot., 74 A.L.R. 271 (1931). But cf. Lewis v. Lewis, supra at 733, 141 P. at 368 (the court is given broad discretion to ascertain the facts upon which the statutory ground for dissolution is asserted).


71 Id. § 4452. See 1 B. ARMSTRONG, supra note 60, at 83.

72 This is notwithstanding the observation of the courts that “[t]he physical incapacity here referred to, as is thoroughly established, is the physical incapacity to consummate the marriage by coition.” Millar v. Millar, 175 Cal. 797, 802, 167 P. 394, 396 (1917).

73 CAL. CIV. CODE § 4426(f) (West 1970).
edge of the impediment (and actual or constructive knowledge of its apparent incurability) would not qualify.\textsuperscript{74} Where both parties were aware of the situation, the action would not be available. They would then, no doubt, seek relief through dissolution. This is appropriate since they must not have considered the incapacity a substantial reason for not entering into the marriage. If the unsound party was aware of the condition prior to marriage, failing to disclose it to the other, a classic case supporting avoidance on the basis of fraud would exist and section 4425(d) would provide an adequate remedy.\textsuperscript{75}

Does it follow that subsection (f) should be eliminated in favor of the dissolution remedy? It is submitted that it should not. In typical cases under subsection (f), the action will be brought by reason of incurable sexual impotence.\textsuperscript{76} Declaration of nullity would operate to show that, by reason of apparently incurable sexual impotence prevailing from the time of contracting the purported marriage, no valid marriage ever existed in a physical sense. Such a showing might well enhance the desirability of the putative spouse to prospective future spouses. So long as society considers virginity to be of legal or social significance, the parties should have the benefit of the more specific ground for declaration of nullity which physical incapacity affords.

The preceding discussion indicates that the legislature properly determined that the respective grounds for declaration of nullity for voidable marriage could not be subsumed within dissolution. Additional considerations demonstrate that the present action for dissolution would be inappropriate as a remedy under the facts contemplated by section 4425.

\textsuperscript{74} See 1 B. ARMSTRONG, supra note 60, at 83.

\textsuperscript{75} Recall that mere fraud in the inducement is insufficient to support an action for annulment. The fraud must vitiate the essence of the marital relation. Fraudulent non-disclosure of sexual impotence is a classic example. Millar v. Millar 175 Cal. 797, 803, 167 P. 394, 396 (1917).

\textsuperscript{76} Indeed, it has been suggested that the action will be available only where physical incapacity to consummate the marriage by coition is involved. Id. at 802, 167 P. at 396.

There would appear to be no contemporary reason why sterility should not afford a basis for declaration of nullity under subsection (f). The courts and authorities do not support this contention, however. Id. Stepanek v. Stepanek, 193 Cal. App. 2d 760, 762, 14 Cal. Rptr. 793, 794 (1961); W. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS § 16 (3d ed. R. Cooley 1921); 1 C. VERNIER, AMERICAN FAMILY LAWS § 42 (1931).

It is submitted that it is now time for judicial reappraisal of the prevailing anachronistic dictum that incurable physical incapacity does not include infertility. Cases have already recognized that deprivation of progeny goes to the essence of the marital relation. See Baker v. Baker, 13 Cal. 87, 103 (1859); Vileta v. Vileta, 53 Cal. App. 2d 794, 796, 128 P. 2d 376, 377 (1942); Aufort v. Aufort, 9 Cal. App. 2d 310, 311, 49 P. 2d 620, 621 (1935).
Standing to Bring the Action

Title 3 providing for dissolution of marriage does not specifically recognize standing on the part of anyone foreign to the marriage. Prior case law uniformly suggests that such standing will inhere to the parties alone. The conspicuous absence of provisions to the contrary in the Act suggests an intention not to derogate from the decisional law in this respect.

In contrast, standing is accorded designated third parties under certain of the causes of action for declaration of nullity:

<table>
<thead>
<tr>
<th>4425 Annulment Ground</th>
<th>4426 Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) § 4101 incapacity</td>
<td>parent, guardian, person</td>
</tr>
<tr>
<td></td>
<td>having charge of minor</td>
</tr>
<tr>
<td></td>
<td>prior to majority</td>
</tr>
<tr>
<td>(b) Enoch Arden</td>
<td>former spouse</td>
</tr>
<tr>
<td>(c) Unsound mind</td>
<td>relative or guardian</td>
</tr>
<tr>
<td>(d) Fraud</td>
<td>none</td>
</tr>
<tr>
<td>(e) Force</td>
<td>none</td>
</tr>
<tr>
<td>(f) Physical incapacity</td>
<td>none</td>
</tr>
</tbody>
</table>

The incapacity and unsound mind provisions are clearly designed to protect the interests of persons who might be incapable of exercising sound judgment. Without recognizing standing on the part of concerned third parties, such immature or mentally defective persons would be vulnerable to the importunity of their spouses and their own improvidence. They would be incapable of perceiving the desirability of either dissolution or declaration of nullity. The legislature was careful to relegate the grave responsibility of bringing the action in their behalf only to those persons who, through blood or fiduciary duty, would seek declaration of nullity exclusively in the interest of the incompetent. But the dangers of exposing an otherwise viable relationship to the caprice or selfishness of third parties is patent. The absence of complete discretion to deny a petition for declaration of nullity compounds the danger. In delineating the scope of judicial discretion to deny an action for declaration of nullity brought by a minor through his mother, guardian ad litem, a California appellate court recently suggested that the use of the word “may” in Civil Code section 82 (now section 4425), providing that a “marriage may be annulled” for specific grounds, including non-age, does not render the annulment wholly discretionary with the trial court in view of the affirmative policy of the state to restrict marriages of minors.

The court cited with approval the view that the defense of unclean hands was inappropriate to domestic relations cases. Notwithstanding the

79 CAL. CIV. CODE §§ 4425, 4426 (West 1970).
81 Id. at 60, 85 Cal. Rptr. at 675.
misrepresentation of the son that he was of age to marry (he was in fact 17 at the time of contracting the purported marriage), the court observed: “we conclude that the clear public policy cannot be frustrated by the conduct of the minor, however reprehensible.”\textsuperscript{82} The court was correct in observing that the legislative purpose of subsection (a) respecting non-age marriage could be frustrated if the immature minor, in whose behalf the statute was enacted, could through his own fraud unilaterally accomplish a marriage free from attack by his guardian. But expansive wording in applying a public policy rationale has clouded the availability of traditional equitable defenses under any of the grounds for annulment. In the court's words: “[I]t seems clear that the code declares an affirmative policy of the state to restrict marriages of minors . . . .\textsuperscript{83} Denial of the equitable defenses of unclean hands, laches, or estoppel would seem particularly unconscionable where the Enoch Arden situation contemplated by subsection (b) exists. Furthermore, since the court was denied discretion, it could not avoid an unjust result. It is submitted that the propriety of recognizing standing in parties foreign to the purported marriage may turn on the availability of judicial discretion and equitable defenses.

The recognition of standing in a former spouse to vitiate an Enoch Arden marriage\textsuperscript{84} is vulnerable to further criticism. Significantly, the Governor's Commission in its proposed Family Court Act\textsuperscript{85} intentionally provided otherwise. As was noted concerning the Commission's proposal:

[T]he proposed . . . Act does not give such standing to former spouses, where the marriage is unknowingly bigamous . . . . Thus, the putative spouse and the bigamous spouse could remain married despite the will of the former spouse to the contrary.\textsuperscript{86}

Although it has been suggested that section 4425(b) recognizing the Enoch Arden ground for declaration of nullity should be maintained in its present form,\textsuperscript{87} it does not follow that recognition of standing in a prior spouse is sound. The evil of such provision is apparent when viewed in the context of the following hypothetical situation: H\textsubscript{1} and W were married three months, living as husband and wife. H\textsubscript{1} disappeared without explanation. In fact, H\textsubscript{1} was “born under a wandering star.” An exhaustive search, initiated by W through the appropriate governmental agencies, failed to disclose any information concerning his disappearance. After five years, W concluded that H\textsubscript{1} must have died. Subsequently, she fell in love with H\textsubscript{2} and they were married. Ten years later, after three children were born to W and H\textsubscript{2}, H\textsubscript{1} returned. Is it reasonable that H\textsubscript{1} should be allowed to vitiate the marriage

\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} CAL. CIV. CODE § 4426(b) (West 1970).
\textsuperscript{86} Hammer, supra note 7, at 67.
\textsuperscript{87} See discussion pages 339-40 supra.
of W and H₂ and expose their three children to the attendant emotional trauma? If he were successful W would have no recourse but to institute dissolution proceedings against H₁ and go through the formality of an interlocutory period before resumption of the second fulfilling marriage. If she did desire a dissolution of her first marriage, her interest and that of H₁ would be adequately served without recognizing standing in H₁. Society’s interest would be protected since H₁ could not for vindictive or selfish reasons intrude into the lives of the second family. The intermediate proceeding for annulment would not reduce to a fiction. The potential for injustice is increased in the light of the broad language of Ruiz. The courts might well rationalize a legislative pronouncement of policy against bigamous marriage, whether willful or innocent, with the result that such marriages should be voidable. Accordingly, the court would be without discretion to deny declaration of nullity pursuant to the petition of the first spouse. Furthermore, the availability of equitable defenses through which the court could avoid hardship would be questionable. It would seem, therefore, that the Commission was correct in recommending against recognition of standing in the former spouse to bring an action for declaration of nullity.

LIMITATIONS ON DECLARATION OF NULLITY

The statutes of limitation and substantive limitations applied to declaration of nullity differ from those applicable to dissolution. It appears that the only limitation upon bringing an action for dissolution would be the death of one of the parties to the marriage. Death of one of the parties after entry of the interlocutory, however, would not preclude the issuance of final judgment of dissolution. Laches would also appear inappropriate since the proceeding for dissolution is predicated upon continuing irreconcilable differences, the focus being upon conditions at the time of the action.

Where actions for declaration of nullity are brought pursuant to the Enoch Arden or unsound mind grounds the statute similarly provides that an action cannot be maintained after the death of either party to the purported voidable marriage. Actions for declaration of nullity on any other grounds are not expressly limited upon death of either party. As a matter of stat-

90 CAL. CIV. CODE § 4514 (West 1970).
91 Laches was formerly recognized as a defense to divorce pursuant to fault grounds. CAL. CIV. CODE § 124 (repealed by ch. 1608, § 3, [1969] Cal. Stat.).
92 CAL. CIV. CODE § 4426(b), (c) (West 1970).
93 See CAL. CIV. CODE § 4426 (West 1970).
utory construction, one might argue a legislative intention that the action survive except as otherwise provided.\textsuperscript{94} Two arguments to the contrary may be made. Though the Act limits an action for annulment on the grounds of Enoch Arden to the lives of either party to the voidable marriage, it does not purport to limit the action upon the life of the former absent spouse. However, where a wife attempted to secure an annulment of her second marriage in order to participate in the estate of her former spouse, a California appellate court observed in \textit{Estate of LeMont}:\textsuperscript{95} "[T]he claimant's status must be determined as of the date of death."\textsuperscript{96} The court extended the death limitation beyond the parties to the second marriage. In \textit{LeMont}, the wife had remarried six years after separation, believing her first husband dead. She discovered after his death that he had been alive at the time of her second marriage. However, strict compliance with the letter of the Act was deemed by the court to be insufficient to bring the action within the provisions for declaration of nullity.\textsuperscript{97} The implications of \textit{LeMont} were clear: death may operate as a limitation upon actions for declaration of nullity, even without an express statutory mandate. Case law construing analogous annulment grounds suggests similar limitations.\textsuperscript{98} It would appear, therefore, that no significant difference may exist between annulment and dissolution with respect to death as a limitation.

Differences, however, exist in other respects. Theoretically, at least, declaration of nullity is appropriate only where the grounds supporting it existed at the time of contracting the purported marriage.\textsuperscript{99} Dissolution, however, looks to conditions existing at the time of the action. Arguably, parties to voidable marriage might seek declaration of nullity because of the continuing debilitory effect of the initial impediment. If they could not sustain their burden of proof respecting the initial impediment, it is obvious that dissolution would be available as an alternative, so long as irreconcilable dif-

\textsuperscript{94} The conspicuous omission of an express limitation upon the death of a party would suggest a legislative intent that the action for declaration of nullity on those grounds should survive through application of the rule \textit{expressio unius est exclusio alterius}. See \textit{Jones v. Robertson}, 79 Cal. App. 2d 813, 180 P.2d 929 (1947) (the express mention of a thing implies the exclusion of another different thing).

\textsuperscript{95} 7 Cal. App. 3d 437, 86 Cal. Rptr. 810 (1970).

\textsuperscript{96} \textit{Id.} at 439, 86 Cal. Rptr. at 811, \textit{citing} \textit{Estate of Harrington}, 140 Cal. 244, 73 P. 1000 (1903).

\textsuperscript{97} "Only if Maurine [petitioner] had secured her annulment while decedent was still alive, could she contend that her marriage to him—suspended in legal effect during her later marriage—had become revived so as to give her a widow's status. . . . Since we do not countenance a woman having two husbands concurrently, it follows that she cannot, at the moment of death, be both widow and wife." \textit{Id.} at 440, 86 Cal. Rptr. at 811-12.

\textsuperscript{98} See 1 B. ARMSTRONG, supra note 60, at 83 (1953); Annot., Right to Attack Validity of Marriage After Death of Party Thereto, 47 A.L.R.2d 1393 (1956); Annot., 76 A.L.R. 769 (1932).

\textsuperscript{99} CAL. CIV. CODE § 4425 (West 1970).
ferences existed. As to third parties properly seeking relief under these nullity remedies, however, the requirement that an initial defect be proved seems more functional.\textsuperscript{100} Such parties should bring the action, not on the basis of de facto irreconcilable differences between the parties to the voidable marriage, from which they are removed, but rather on the basis of facts existing at the time of marriage. They could prevail only if the initial impediment was alleged and proved to the court's satisfaction. Accordingly, this distinction would operate as a limitation upon their capacity to interfere in the lives of other people. This is not to say that third parties would be indifferent to the continuing effect of the original impediment. They would be inclined to initiate the action because the voidable marriage in essence was not in the interests of their charge. One might suggest that the impropriety of allowing a former spouse to bring an action in the Enoch Arden situation is demonstrated by the lack of consideration such a person might give to prevailing circumstances.

The Act provides other limitations in declaration of nullity actions, typically time and free cohabitation as husband and wife.\textsuperscript{101} These limitations would certainly operate as a deterrent to improper use of nullity proceedings as a mere substitute for dissolution. By removing fault from most dissolution proceedings and providing for equal division of community property, the likelihood of such abuse is increased. The petitioner might choose declaration of nullity in order to plead a specific fault ground. Moreover, a putative spouse might bring the action for declaration of nullity rather than dissolution in order to derive enhanced participation in the property acquired during the period of the voidable marriage.\textsuperscript{102} Accordingly, the limitations serve to assist the legislative purpose of the Act, which is to terminate the marriage on a basis consistent with the realities of human behavior and subjective state of mind of the parties.

\textbf{PROPERTY CONSEQUENCES}

One of the hallmarks of the Act is that it has removed much of the prop--

\textsuperscript{100} As to permissible third parties, see discussion page 346 supra.

\textsuperscript{101} See CAL. Civ. CODE §§ 4425-26 (West 1970):

\begin{center}
\textbf{GROUNDS} \\
\textbf{LIMITATIONS}
\end{center}

\begin{itemize}
\item[a.] § 4101 incapacity \hspace{1cm} Free cohabitation as H and W after reaching the age of consent. Within four years of reaching age of consent as to H and W. At any time before reaching the age of consent as to parents.
\item[b.] unsound mind \hspace{1cm} Free cohabitation after coming to reason as to the party of unsound mind.
\item[c.] fraud \hspace{1cm} Free cohabitation after discovery of the facts constituting the fraud or within four years of discovery of such facts.
\item[d.] force \hspace{1cm} Free cohabitation as H and W. Within four years of marriage.
\item[e.] physical incapacity \hspace{1cm} Four years after marriage.
\end{itemize}

\textsuperscript{102} See page 352 infra.
property incentive to the introduction of fault in dissolution proceedings. The court, subject to certain exceptions, no longer has discretion to award more than one-half of the community property to either party to the marriage. Similarly, fault has been removed from the award of spousal support. Under the Act, the court may consider the relative circumstances of the parties, duration of the marriage, and the ability of either to secure gainful employment. Accordingly, need would appear to be the proper criterion. Unless the courts construe “relative circumstances” to include prior acts of misconduct, it would appear that this standard will be consistent with the no-fault premise of dissolution. The length of time for which spousal support will be payable will continue to be a matter for judicial discretion. The court is also expressly granted discretion to modify or revoke an order for support where the dependent spouse is living and holding himself out as the husband or wife of another. Furthermore, without a contrary agreement between the parties in writing, the obligation of spousal support would terminate upon death of either party or remarriage of the dependent party. Where the court has provided in its order for a specific term for which spousal support is payable, it is clear that the court could not extend its term unless the initial order had reserved jurisdiction to do so.

It is apparent that different property consequences could attend an action for declaration of nullity. Sections 4800 (providing for division of community property) and 4801(a) (relating to award of spousal support) expressly apply only to dissolution. No mention is made of declaration of nullity. Property division upon declaration of nullity is accomplished in accordance with section 4452, which provides in part:

Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and . . . shall divide in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property

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105 CAL. CIV. CODE §§ 4357, 4801 (West Supp. 1970-71). Costs and attorney's fees will also be awarded irrespective of fault; the guiding consideration being the reasonable and necessary cost of maintaining the action. Id. §§ 4370-71.
106 Id. § 4801(a).
107 Id. § 4801(a), (d), (e).
108 Id. § 4801(e).
109 Id. § 4801(b).
shall be termed "quasi-marital property"...112

Since the equal division provisions applicable to dissolution are incorporated into the nullity statute, a first reading would suggest that where a putative spouse is a party the property consequences are identical to those upon dissolution.

In reality a significant difference may exist. Under the dissolution provisions of section 4800, a culpable spouse could secure participation in the community property equal to that of the non-culpable spouse.113 This is, of course, consistent with the no-fault premise of the Act. However, under the nullity provisions the putative spouse might well enjoy twice the participation available under dissolution.

Suppose that most of the property accumulated during the period of the voidable marriage was the product of the putative spouse's effort. But for the purported marriage such property would clearly be the separate property of the party earning it. Notwithstanding the ambiguous wording of section 4452 noted above, it is submitted that it was the legislative intention to provide a statutory remedy to a putative party to a void or voidable marriage, not to create in a non-putative petitioner a property right unavailable but for his misconduct. This would be consistent with the remedy recognized at equity prior to the Act.114 Moreover, any other construction would make the state a party to the unjust enrichment of the culpable non-putative spouse and encourage importunity and fraud. Hence, where a putative spouse brought the action for declaration of nullity, it is clear that quasi-marital property would be recognized to protect his good faith effort at matrimony. However, where a non-putative spouse brought the action under the circumstances above, no quasi-marital property would be recognized as to him. Presumably, quasi-marital property would be available under these circumstances to the putative respondent. Where the putative spouse had contributed most of the property to the purported marriage it would not appear to be in his interest to pray for quasi-marital property. Quasi-marital property would not appear to be a vested property interest but rather a statutory remedy available to a putative spouse. This result is suggested by a recent amendment to the Act which provides that such property will be declared by the court only where the "division of property is in issue."115 Arguably, by not placing quasi-marital property at issue the putative spouse could retain what would be denominated separate property. Where the non-putative party placed division of property at issue, it is submitted that courts will so construe section 4452 as to preclude unjust enrichment.

112 Id. § 4452 (emphasis added).
113 But see note 18 supra.
Obviously, the putative spouse would realize a considerable benefit by bringing an action for declaration of nullity rather than dissolution. Is such a result desirable? It would appear so. This situation could arise only where one of the spouses was non-putative and the other putative. Under such circumstances, the non-putative spouse would be considered on notice of the defective character of the marriage and should not profit by reason of his own culpability to the prejudice of the innocent putative spouse. Otherwise, such odious conduct as fraud or force might become profitable ploys for the unscrupulous; the no-fault dissolution remedy could be perverted to facilitate importunity and fraud.

Differences between declaration of nullity and dissolution also exist relative to property settlement agreements. The Act impliedly recognizes the validity of such agreements, at least as to dissolution. It stipulates that so much of such agreement as provides for spousal support and child support shall be severable. The section also provides that so much of the agreement as applies to child support shall be modifiable or revocable by the court at any time, notwithstanding inconsistent provisions between the parties. Further, that portion relating to spousal support is modifiable or revocable by the court subject only to express provision between the parties to the contrary. Hence, the stringency of prior law, which had rendered “integrated property settlement agreements” non-modifiable, is relaxed.

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116 I.e., did not believe in good faith that the purported marriage was valid. Id.
118 CAL. CIV. CODE § 4811(a),(b) (West Supp. 1970-71).
119 Id. § 4811(a).
120 Id. § 4811(b).
121 "An agreement is integrated where the parties thereto adopt the writing or writings as the final and complete expression of the agreement..." RESTATEMENT OF CONTRACTS § 228 (1932). See also Wilson v. Viking Corp., 134 Pa. Super. 153, 3 A.2d 180 (1938); Dexter v. Dexter, 42 Cal. 2d 36, 265 P.2d 873 (1954) (it is settled that integrated settlement agreements are not modifiable). Case law prior to the Act suggested that, as a matter of law, such an agreement was non-modifiable and monthly monetary payments thereunder were not severable, subject to express provisions in the agreement otherwise. Messenger v. Messenger, 46 Cal. 2d 619, 628, 297 P.2d 988, 993 (1956):
When... the parties have clearly expressed their "purpose of fixing and adjusting their personal and property rights," have provided that the provision for alimony is "for and in consideration of the permanent... settlement of all their property rights of every kind..." and the wife has waived "all right to future... support... except as herein otherwise expressly provided," the conclusion is inescapable that they have made the provisions for support... an inseparable part of their... agreement. With such conclusive evidence of integration, the provisions for support... would be subject to modification only if the parties expressly so provided. Accord, Fox v. Fox, 42 Cal. 2d 49, 265 P.2d 881 (1954). See 1 B. ARMSTRONG, supra note 60, at 803.
Some doubt prevails concerning the application of these principles to nullity. The provisions relating to property settlement agreements are to be found under Title 6 of the Act, "Property Rights of the Parties." Certain of the sections included within Title 6 expressly apply only to actions for dissolution or legal separation, not nullity. Other sections apply to the provisions of "this part", which would include nullity as well as dissolution. Unfortunately, the aforementioned settlement agreement provisions are silent as to the proceedings to which they relate. Accordingly, the modifiability or revocability of an agreement providing for spousal support pursuant to an action for declaration of nullity is questionable.

It might be argued that the settlement agreement provisions of Title 6 apply to nullity proceedings as well as to dissolution. One might suggest that if the legislature had intended the provisions of Title 6 to apply only to dissolution and legal separation except as otherwise provided, they could have expressly so stated. Alternatively, they could have included the settlement agreement provisions under discussion within Title 3, entitled "Dissolution of Marriage", rather than separately. Separate treatment would suggest, as a general rule, that the provisions of Title 6 should apply to all proceedings under the Act, subject to express provision to the contrary. A different inference of legislative intention would inevitably lead to the conclusion that the express limitation of particular sections to dissolution and legal separation was superfluous, an inference incompatible with the sophistication of the draftsmen. Accordingly, the court would have power to modify an agreement for spousal support, even in nullity situations, subject only to the limitations imposed by the Act upon similar action in dissolution proceedings.

Disturbingly, however, spousal support pursuant to nullity proceedings receives express treatment elsewhere in the Act. Section 4455 provides:

The court may, during the pendency of a proceeding to have a marriage adjudged a nullity or upon judgment, order a party to pay for the support of the other party in the same manner as if the marriage had not been void or voidable, provided that the party for whose benefit the order is made is found to be a putative spouse.

This section is patently distinguishable from the Title 6 settlement agreement provisions: (a) there is no express provision respecting modifiability or revocability; and (b) it applies to court orders rather than agreements between the parties. Clearly where the right to spousal support was solely

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123 CAL. CIV. CODE §§ 4800-01 (West 1970).
124 Id. §§ 4803, 4805. "This part" refers to Part 5 of the California Civil Code, which includes the Family Law Act.
126 The rule expressio unius est exclusio alterius would suggest a similar result. See note 94 supra.
the product of court order, the court could expressly reserve jurisdiction to modify or revoke it. Additionally, section 4801, pertaining to orders for spousal support in dissolution, is the counterpart to section 4455. Where the recipient party is putative, the language quoted from section 4455 suggests that the other party will be ordered to pay spousal support “in the same manner as if the marriage had not been void or voidable.” This would be a clear reference to section 4801. Significantly, spousal support pursuant to that section is expressly modifiable or revocable by the court. It would appear, then, that where an award of spousal support was allowable upon declaration of nullity (where the party for whose benefit it was paid was putative), modification or revocation of the order could be accomplished. Furthermore, since section 4455 applies only to court orders rather than settlement agreements per se, a separate statutory treatment would not derogate from the applicability of Title 6 settlement agreement provisions to nullity proceedings. Where spousal support was the product of an agreement between the parties other than a property settlement agreement, the availability of the Title 6 provisions in nullity proceedings would facilitate modification by the court. In the statutory language: “The provisions of any agreement or order for the support of either party shall be subject to subsequent modification or revocation by court order. . . .”

**Effect of the Judgment**

One of the historic and fundamental distinctions between annulment and divorce has been the effect of the judgment upon parties foreign to the action. The Act purports to preserve this distinction: “A judgment of nullity is conclusive only as to the parties to the proceeding and those claiming under them.” No similar provision is included in the Act respecting dissolution. The logical inference would be that final judgment of dissolution, acting in rem or quasi-in-rem, would be res judicata or create an estoppel by judgment as to third parties, at least as to particular facts and issues litigated.

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130 "Any order for support . . . may be modified or revoked as the court may deem necessary . . . ." *Id.* § 4801.
131 *Id.* § 4811(b) (emphasis added). Where an agreement to provide support arises in a nullity proceeding outside the context of a property settlement agreement, the parties could certainly assure modifiability or revocability by so providing in the agreement. Alternatively, they could have the agreement merged in the judgment declaring nullity. The court could then reserve jurisdiction to modify its decree, and modification or revocation could be accomplished by the court pursuant to a proper order. Lubin v. Lubin, 144 Cal. App. 2d 781, 302 P.2d 49 (1956).
The development of case law in California, however, obfuscates this distinction.

In *Watkins v. Watkins*\(^\text{135}\) a California appellate court stated that after an action for divorce had been successfully maintained a second suit could not be brought to try again anything within the scope of the first action.\(^\text{186}\) Accordingly, a determination of title to real property accomplished in the prior divorce action was deemed res judicata as to a subsequent quiet title action respecting the same property. *Watkins*, however, involved the parties to the original action. The court would appear to have been over-zealous in stating the general rule. It is safe to say, however, that as between parties to the action for dissolution and their privies, the judgment is res judicata not only of their status with relation to each other, but also of all issues that were litigated or that could have been litigated therein.\(^\text{137}\) However, insofar as the proceeding related to the validity of the marriage, it would not be binding upon parties foreign to it.\(^\text{138}\) Indeed, the judgment would be res judicata as to strangers only as a conclusive determination that the parties were thereafter free to remarry so far as any relation to each other was concerned.\(^\text{139}\) Does this afford a basis of distinction between dissolution and

\(^{134}\) It is a well-established rule of law that a final judgment rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and of their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, or further action. It is also a well-established principle of law that a final judgment precludes the relitigation of particular facts or issues litigated in a previous action, where the later action is between the same parties or their privies although the causes of action are different. The rule first referred to is denominated as the doctrine of res judicata, and the rule last referred to is known as the doctrine of estoppel by judgment.

These doctrines as to the conclusiveness of judgments, either to preclude the institution of another action upon the same cause of action or to preclude the relitigation of issues and facts once litigated, operate only as between the parties to the litigation or their privies, where the judgment is one in personam. They do not operate to affect strangers to the judgment, that is, persons who are neither parties to the former litigation nor privies of those who were parties.

A judgment in rem, however, is res judicata and conclusive as to the whole world—parties and nonparties or strangers alike. But this principle applies to bind strangers to the judgment only as to the ultimate matter, condition, relation, or status particularly adjudicated in the previous action. Even facts upon which the judgment in rem is necessarily predicated and which must therefore be deemed as expressly or by implication adjudicated are not res judicata as to persons not actually participating or contesting the proceedings, though interested therein, when the same issues arise with respect to a different subject matter. Annot., 20 A.L.R.2d 1164-65 (1951) (citations omitted).


136 Id.

137 Id.


nullity? There would appear to be no logical reason why a subsequent spouse should not be able to rely upon the validity of a declaration of nullity to the same extent as dissolution insofar as the right of the parties to remarry is concerned. Indeed, such reliance would appear to be justifiable in light of the language of the Act: "The effect of a judgment of nullity is to restore the parties to the status of unmarried persons." This wording is conspicuously similar to that applicable to dissolution. The California Supreme Court has observed relative to divorce: "The weight of authority holds that a decree of divorce is a judgment in rem only to the extent that it adjudicates the future status of the parties in relation to each other." The court went on to state the rule that "... between strangers or strangers and parties ... the decree is res judicata only in that it conclusively determines that the parties are thereafter free to remarry so far as any relation to each other is concerned." In support of this rule the court cited Estate of James:

The decree of divorce ... established the status of the deceased as an unmarried man, leaving him free to again enter into the marriage relation with any other person consenting thereto. ... After that decree, and until reversed or vacated by some appropriate proceeding, his status as a single man could not be changed without his consent.

Hence, it would appear that the right of parties to dissolution to remarry is unassailable because of the operative effect of the judgment in restoring them to the status of unmarried persons. By analogy, the same reasoning should apply to nullity. The specter of blind adherence to the purported general rule that declaration of nullity is not conclusive as to strangers to the action looms large, however. Such a distinction between nullity and dissolution would appear to be highly artificial, insofar as the future status of the parties is concerned. If the world is entitled to rely upon a judgment of dissolution insofar as it determines the right of parties to remarry, similar reliance should be justified after declaration of nullity. If the trier of fact has adjudicated the right of the parties to a declaration of nullity on the basis of facts proved, it would appear consistent with public policy to afford them the right to remarry and create a stable environment for subsequent children. If extrinsic fraud has been perpetrated upon the court in the nullity proceeding, public interest and the interest of affected parties would be protected through an action to vacate the judgment for all purposes. Where third parties were prejudiced by operation of the declaration of nullity, but not through the right of the parties to remarry, their cause of action would be preserved under either declaration of nullity or dissolution.

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141 Id. § 4501.
143 Id.
144 99 Cal. 374, 33 P. 1122 (1893).
145 Id. at 380, 33 P. at 1124-25.
However, the legislative pronouncement that an action for declaration of nullity would be conclusive only as to the parties and those taking under them retains significance. This provision was designed to mitigate the hardship which might attend strict observation of the fiction of relation back upon declaration of nullity.\footnote{Sefton v. Sefton, 45 Cal. 2d 872, 876, 291 P.2d 439, 441 (1955). See Price v. Price, 24 Cal. App. 2d 462, 75 P.2d 655 (1938).} The action for annulment proceeds upon the theory that, for some cause existing at the time of the purported marriage, no valid marriage took place. Were this theory carried to its logical extreme, an unconscionable result might follow. Therefore, the courts will not invoke the doctrine where an unfavored result is accomplished and unfairness to third persons results.\footnote{Where third parties might be prejudiced were the doctrine of relation back applied, the courts have refused to do so. Sefton v. Sefton, 45 Cal. 2d 872, 291 P.2d 439 (1955) (voidable second marriage deemed a remarriage such as would terminate the former husband's obligation for support under a property settlement agreement, the court reasoning that the former husband had detrimentally relied upon the attempt at remarriage); Estate of Gosnell, 63 Cal. App. 2d 38, 146 P.2d 42 (1944) (voidable remarriage of a widow terminated her special rights in her former, now deceased, husband's estate). Certain statutory provisions are also inconsistent with the doctrine: CAL. CIV. CODE § 4452 (West Supp. 1970-71) (quasi-marital property accumulated during putative marriage); CAL. CIV. CODE § 4453 (West 1970) (children born of the void or voidable marriage legitimate); CAL. CIV. CODE §§ 4350, 4425 (West Supp. 1970-71) (voidable marriage legally effective until adjudged a nullity).} Apparently, where the doctrine would injure innocent third parties, it will not be invoked and no distinction on this basis will exist between nullity and dissolution.

This is not to say that the doctrine retains no practical and legal significance. Indeed, the "doctrine of 'relation back' . . . was fashioned by [the] courts to do substantial justice as between the parties to a voidable marriage."\footnote{Sefton v. Sefton, 45 Cal. 2d 872, 875, 291 P.2d 439, 441 (1955).} Consistent with this premise, the courts have indulged the doctrine to: restore to a policeman's widow pension rights which had abated upon entry into a voidable second marriage;\footnote{Clark v. Los Angeles, 187 Cal. App. 2d 792, 9 Cal. Rptr. 913 (1960); Cottam v. Los Angeles, 184 Cal. App. 2d 523, 7 Cal. Rptr. 734 (1960).} reinstate a widow's insurance benefits under the Social Security Act after annulment of her remarriage;\footnote{Shaw v. Board of Admin., 109 Cal. App. 2d 770, 241 P.2d 635 (1952).} declare a promissory note signed by a minor putative wife during a voidable marriage void as to her where guardianship proceedings had been instituted thirteen years prior to her purported marriage.\footnote{Cf. Shaw v. Board of Admin., 109 Cal. App. 2d 770, 241 P.2d 635 (1952).} Accordingly, the doctrine is not moribund but serves a legitimate purpose in avoiding hardship. It is clear that dissolution could not accomplish this result since it would operate only prospectively and not relate back to relieve injustice.\footnote{Niemann v. Deverich, 98 Cal. App. 2d 787, 221 P.2d 178 (1950).}
Therefore, the legislature was correct in retaining declaration of nullity because of the operative effect of the doctrine of relation back. Since the courts apply it in accordance with equitable principles, the likelihood of harm is reduced, it will be resorted to only to accomplish justice which would be unavailable under dissolution.

RESIDENCE AND JURISDICTION

The Act retains residence requirements, in the legal sense of domicile, as a prerequisite to entry of judgment decreeing dissolution. It provides:

A judgment decreeing the dissolution of a marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition.

The Act further provides that, for the purpose of establishing the requisite domicile or residence, "... neither the domicile nor residence of the husband shall be deemed to be the domicile or residence of the wife." Therefore, as to dissolution, the presence of domicile in the forum state may be deemed jurisdictional. Should a final judgment for dissolution issue pursuant to a sham domicile, the judgment might be subsequently vulnerable to collateral attack.

As to declaration of nullity, however, domicile is not necessary to support the court’s jurisdiction. Indeed, the California Supreme Court in the case of *Wheaton v. Wheaton* concluded that a voidable marriage could be adjudged a nullity where both parties were before the court even though the marriage ceremony was celebrated in another state, the defendant was domiciled elsewhere, the matrimonial domicile was maintained elsewhere, and the plaintiff had not alleged domicile in his pleadings. The court, however, vacated a default judgment previously entered where only the plaintiff was before the trial court. In so doing, however, an ex parte annulment was approved, even on the facts of the *Wheaton* case as noted, so long as the plaintiff was a domiciliary of the forum state. It would appear, then, that a significant distinction between declaration of nullity and dissolution with regard to jurisdiction prevails. It is submitted that this distinction is appropriate, for it affords innocent parties to a voidable marriage an immediate

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164 See note 6 supra.
166 CAL. CIV. CODE § 4530(a) (West 1970).
167 Id. § 4531.
169 4 J. GODDARD, supra note 33, at § 639.
170 67 Cal. 2d 656, 432 P.2d 979, 63 Cal. Rptr. 291 (1967).
171 Id.
172 Id.
and convenient forum for relief. Of course, it might also make California courts a party to forum shopping with the result that the public policy of sister states could be frustrated. The court in *Whealton* was careful to observe, however, that the fact that a court may exercise its jurisdiction does not require that it do so.  

**Term of residence prerequisite to judgment also distinguishes declaration of nullity from dissolution.** Recall that the Act requires domicile in the state for at least six months and the county in which the action is brought for three months preceding entry of judgment for dissolution.  

It is settled in California, however, that length of residence requirements established for dissolution do not appertain to annulment. The policy rationale generally propounded for this distinction is that public policy discourages hasty divorces, whereas the perpetuation of an ostensible marriage void *ab initio* is a matter of public indifference at best. One might also suggest that it would be unconscionable not to provide an immediate forum for relief to parties suffering under some of the odious impediments contemplated as grounds for declaration of nullity, for example, force and fraud. Therefore, it is obvious that inclusion of declaration of nullity in dissolution would aggravate hardship by subjecting innocent parties to an arbitrary residence requirement.

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164 67 Cal. at 664-65, 432 P.2d at 984-85, 63 Cal. Rptr. at 296-97.