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Family Law Newsletters

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— Franks & Zalev - This Week in Family Law

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Three Annulments — The Sequel to Four Weddings and a Funeral

As the religious underpinnings behind marriage become weaker over time, annulment cases are becoming more-and-more rare. Annulments are of less fundamental legal importance today than they were in days of yore; but, at the same time, they remain more than a mere legal footnote or anachronism, a legal remedy from a bygone era. An annulment can still be psychologically, religiously and culturally important — and in some jurisdictions, an annulment can also have legal importance. As a reminder, a divorce ends a valid marriage; an annulment, on the other hand, is a declaration that a marriage "never was." Therefore, in jurisdictions without a "good faith marriage" provision akin to the definition of "spouse" in s. (1) of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Family Law Act*") an annulment can have significant consequences. In Ontario, the definition of "spouse" for property division purposes includes "either of two persons who . . . have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right." That definition protects a good faith party from what might otherwise be devastating consequences after an annulment.

Therefore, because annulment still *does* matter, we like to report annulment cases when we come across them. And this week we have three.

***Fahim v. Bhatti* (2025), 24 R.F.L. (9th) 241 (Ont. S.C.J.) — Mathen J.**

In this application for an annulment, Justice Mathen goes through the analytical framework a court uses when considering granting an annulment. As the parties discovered in this matter, courts will not grant annulments simply on the basis of the parties' consent.

The parties sought to annul their marriage which took place on March 14, 2018, in Toronto.

There were some strange facts that ultimately proved fatal to the annulment application.

First, the parties claimed that they had obtained a marriage license in 2015 and had pre-paid for a ceremony, but then chose not to go through with it.

The parties then married three years later on March 14, 2018, in a private ceremony after a friend's wedding celebration that the parties had attended together on the same day. The parties claimed that they had participated in "drinking games and celebratory toasts." At some point while everyone was drunk, friends encouraged the pair to get married. The parties claimed that their friends' encouragement, their intoxication and the "emotional atmosphere" led them to get married "impulsively." They claimed that the decision to marry was made while they were "impaired and heavily influenced by the celebratory environment and encouragement of others." This is pretty much the word-for-word slogan for Las Vegas.

The "husband" set out that the parties had not cohabited since the ceremony. In fact, the husband claimed that the parties only realized they were married when the wife's parents discovered the marriage certificate while cleaning their house eight years after the marriage ceremony. They claimed that prior to the marriage license being found, they had not been aware of the ceremony taking place.

Parties may apply for an annulment in Ontario under the *Annulment of Marriages Act (Ontario)*, R.S.C. 1970, c A-14 (the "*Annulment Act*"). The *Annulment Act* is not particularly long. Here it is in all its glory:

1. This Act may be cited as the *Annulment of Marriages Act (Ontario)*.
2. The law of England as to the annulment of marriage, as that law existed on the 15th day of July 1870, in so far as it can be made to apply in the Province of Ontario, and in so far as it has not been repealed, as to the Province, by any Act of the Parliament of the United Kingdom or by any Act of the Parliament of Canada or by this Act, and as altered, varied, modified or affected, as to the Province, by any such Act, is in force in the Province of Ontario.
3. The Supreme Court of Ontario has jurisdiction for all purposes of this Act.

That's it.

The *Annulment Act* neither sets out the circumstances for which an annulment can be granted nor the difference between a divorce and an annulment. These things have been developed through the common law, first in the United Kingdom and subsequently in Canada.

The key difference between a divorce and an annulment is that an annulment is a "decree of nullity." A divorce is caused by events happening subsequent to a valid marriage taking place. A nullity is caused by a defect or deficiency existing *at the time of the marriage* that impacts the formal or essential validity of a marriage.

A declaration of nullity falls into two categories:

1. Cases where the marriage is void *ab initio*, meaning it was invalid from the outset (meaning there was never a valid marriage); and
2. Cases where the marriage is *voidable*; meaning the marriage is treated as valid until one of the parties seeks to have it annulled.

Reasons that a marriage might be void *ab initio* include:

- At least one of the parties is party to a prior subsisting marriage;
- At least one of the parties did not consent to the marriage or lacked the mental capacity to consent;
- The parties are related to each other in prohibited degrees — see the *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46; [Can you marry your first cousin? Yes! You can! But ick . . .]
- At least one of the parties is under the age of majority at the time of marriage (or at least age 16 marrying with parental consent); and/or
- The marriage ceremony was incomplete.

See the helpful list in *Gill v. Kaur* (2019), 26 R.F.L. (8th) 376 (Man. Q.B.) at para. 41.

Comparatively, a marriage is merely *voidable* (as opposed to void *ab initio*) where, among other situations, the marriage was entered into for fraudulent purposes (assuming it is not the fraudster seeking the annulment) or the marriage could not be consummated. [See [Gill v. Kaur](#) at para. 42]

In the case before Justice Mathen, the parties argued that the marriage was void *ab initio* on the basis that they were too intoxicated to consent to the marriage.

While an annulment remains a valid and necessary remedy in Canadian family law, they are not to be granted lightly. Justice Mathen set out that, given the liberalization of divorce laws, courts must ensure that annulments are reserved for appropriate cases.

After considering the curious facts of the case, Justice Mathen was not convinced that an annulment was appropriate or made out:

- a. In 2015, the parties obtained a marriage license and pre-paid for a ceremony.
- b. No one had explained why, at a friend's wedding three years later, the parties would have had that marriage license on their person.
- c. While the parties suggested they were married "later that day," there was no explanation as to how they got an officiant to marry them.
- d. There was no evidence of their extreme intoxication or how it affected them. There was no evidence from third parties. There was insufficient information to support the conclusion that the parties were so intoxicated as to be incapable of consenting to the ceremony. To reach such a level, intoxication must be very high indeed. Being drunk is not enough; just ask Britney Spears.
- e. Although the argument was that the parties' decision to marry was "impulsive" and heavily influenced by the "celebratory" and "emotional" atmosphere — a person can act impulsively, while retaining capacity. A person can act emotionally, while retaining capacity.

Her Honour thought it more likely that the parties got married "on a lark", but not as a result of any incapacity.

No soup for you! And no annulment either.

S.M. v. R.F. (2025), 18 R.F.L. (9th) 108 (Ont. S.C.J.) — Presser J.

In *S.M. v. R.F.*, Justice Presser of the Ontario Superior Court of Justice offers a detailed review of the law of annulments, revisiting and reconsidering the *historic* definition of "consummation" and then applying it to the breakdown of a *modern* arranged marriage. The case required her Honour to assess what actually happened between the parties on their honeymoons and whether their failure to consummate the marriage was a matter of choice, refusal, or incapacity.

The parties were married in India on December 21, 2021. The wedding itself was lavish: more than 500 guests attended, and photos in evidence depicted a joyous occasion with all the traditional trappings. Both parties testified that they were virgins at the time of marriage. The marriage had been arranged through their families, a process that began with discussions between their older siblings and culminated in an agreement presented to their respective fathers. The applicant/husband described feeling "slightly pressured" into agreeing, although he ultimately confirmed his consent. The respondent/wife described the arrangement as a culturally normal and consensual process.

After the wedding, the couple spent several days in India with family before departing for their *first* honeymoon in Dubai. It was there, on December 28, 2021, that they had their first and only encounter that could be characterized as consummation. Their accounts diverged sharply. The wife testified that penetration had, in fact, occurred and lasted between one and five minutes before she involuntarily pushed him away. The husband testified that only the tip of his penis entered briefly before

she panicked and pulled away. He emphasized that she trembled and shook throughout, and he was not able to achieve what he considered complete penetration. Later text messages between them in May 2023 reflected the dispute, with the wife insisting he had inserted "halfway" and the husband retorting that it was "about 10% barely."

Both parties agreed this was the only incident that might be described as intercourse. Subsequent efforts — in India, after their return from Dubai, and again during a *second* honeymoon in Kashmir in late 2022 — were unsuccessful. The husband testified that whenever he tried, the wife became tense, she shook and she expressed fear. The wife insisted she was ready, willing and able — eager even — but accused the husband of shaming her and of failing to "take initiative."

The parties lived apart for much of the early marriage while immigration matters were being addressed. They reunited in Toronto in July 2023, after the wife obtained permanent residence. The relationship then quickly unraveled. The husband said they separated in October 2023; the wife said it was in November. Each blamed the other for the failed intimacy. She alleged impotence; he alleged an undisclosed incapacity.

The dispute was not merely about whether an annulment should be granted, but about what the remedy would mean. The wife opposed annulment because it would brand her in her community as a woman who was neither a virgin nor truly married. Divorce, at least, would situate her sexual history within a valid marriage. The husband insisted on annulment because he believed it would preserve the reputations of both as virgins, which he testified was essential for future marriage prospects. Unlike most Ontario family cases, where divorce is a practical mechanism to dissolve a union, here the symbolic weight of annulment versus divorce dominated the litigation.

An annulment on the basis of non-consummation turns on two central questions: (i) whether the marriage was consummated; and, if not, (ii) whether one or both of the parties were *incapable* of consummation, as opposed to merely *wilfully refusing* to consummate: *Gajamugan v. Gajamugan* (1979), 10 R.F.L. (2d) 280 (Ont. H.C.) at pp. 282-3; *S.S.C. v. G.K.C.*, 1999 CarswellAlta 1015 (Q.B.) at paras. 15-20.

The case law has been fairly consistent on the definition of consummation. The definition of consummation as requiring "ordinary and complete intercourse" was originally set out in *D. v. A.* (1845), 163 E.R. 1039 (Unknown Court) at 298 at pp. 389-390 as follows:

Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is not intercourse at all.

Full penetration is required, but fleeting or partial penetration is insufficient. Sexual satisfaction or resulting procreation is not required: *S.S.C. v. G.K.C.*, 1999 CarswellAlta 1015 (Q.B.).

In *Heil v. Heil*, 1942 CarswellOnt 108 (S.C.C.), the Supreme Court of Canada confirmed that annulment cannot be granted where parties simply refrain from consummating by choice; there must be an incapacity to consummate. In *G. v. G.*, [1924] A.C. 349 (U.K. H.L.), the House of Lords recognized that incapacity can be physical, physiological or psychological — arising from an "invincible repugnance" to intercourse. See also *PA v. VP* (2021), 60 R.F.L. (8th) 52 (Alta. Q.B.); *Fyith v. Sleiman*, 2016 CarswellAlta 1519 (Q.B.).

In *Foisy v. Foisy (Loyer)*, 1954 CarswellOnt 243 (H.C.), the Quebec Court of Appeal confirmed that incapacity can be relative to a particular partner rather than absolute. Incapacity can also be inferred by conduct over time, absent medical evidence: *Jones v. Jones*, 1947 CarswellOnt 91 (C.A.) and *Razavian v. Tajik*, 2019 CarswellOnt 15357 (S.C.J.).

Justice Presser carefully canvassed this body of law, stressing the distinction between refusal and incapacity. Refusal, even persistent refusal, will not support an annulment; incapacity — whether physical or psychological, will.

Justice Presser held that the "Dubai encounter" did not constitute consummation. Even if penetration occurred, it was "so transient" that it could not, without distortion of language, be described as ordinary and complete intercourse. The legal threshold was not met.

She then addressed whether the parties were *incapable* of consummation. In her view, this was not a case of refusal. Both spouses wanted to consummate and tried repeatedly over a span of almost *two years*. What emerged instead was a cycle of incapacity. The wife experienced fear, trembling, and pain whenever intercourse was attempted. The husband, unwilling to force the issue in the face of her distress, developed an aversion of his own. This dynamic prevented consummation on each occasion, despite their mutual desire.

Justice Presser concluded that the evidence established incapacity. The problem was not temporary or momentary obstinance, but an enduring psychological barrier. On that basis, her Honour annulled the marriage.

Her Honour also observed that the definition of consummation — heterosexual penetration — is now "out of step with current legal and societal norms," especially given the legal recognition of same-sex marriage and diverse sexual identities. Nevertheless, bound by precedent, she applied the law as it exists:

[106] Before proceeding to explain my findings, I want to note that the requirement of consummation by an act of "ordinary and complete" penetrative heterosexual sexual intercourse between a cisgender man and a cisgender woman seems out of step with current legal and societal norms and values. In our world, where same sex marriages are legally recognized and there is growing awareness and legal recognition of queer and trans rights, it seems anachronistic to maintain that a marriage is voidable if there has been no completed penetration of one spouse's vagina by the other's penis. The common law definition of consummation may also be vulnerable to a critique that it is too focused on a stereotypically male perspective of what constitutes "ordinary" and "complete" sexual activity.

[107] The ongoing social and legal relevance of consummation and its definition is not a question that is before me for determination in this case. Any potential reason for concern does not arise on the facts here: this was a heterosexual marriage between a man and a woman, both of whom expected and intended to consummate their marriage through penetrative sexual intercourse. Neither party challenged nor even questioned the common law definition of consummation at this trial. And even if they had, my ability to effect a change to the common law requirement of consummation and/or its definition would have been limited by the meaningful constraints on judges' ability to develop the common law: *Watkins v. Olafson*, 1989 CanLII 36 (SCC), [1989] 2 S.C.R. 750, at pp. 760-761; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, at p. 670. I am bound to apply the common law definition of consummation as it stands.

This decision situates itself alongside two other annulment cases we have covered in this Newsletter. In *S.S. v. H.K.*, [2023 CarswellSask 450](#) (K.B.), a Saskatchewan couple sought annulment based on alleged irregularities in their marriage registration. The court dismissed the claim, warning against treating procedural defects as a "get out of marriage card." In *Fouad v. Ji*, [2024 CarswellOnt 12492](#) (S.C.J.), annulment was granted in Ontario on the basis of sincerely held religious conviction: the parties believed they could not consummate until a further church ceremony that never occurred. Justice Myers accepted that belief as a form of psychological incapacity. So, the law of annulment continues to evolve, but slowly.

Justice Presser's candid acknowledgment that the definition of consummation is out of step with modern norms echoes Justice Myers's comments in *Fouad*. Both have flagged the need for reform. Yet, as we noted in "Annulment Reform — Not Coming Your Way from Any Government Anytime Soon" in the September 23, 2024 (2024-36) edition of *TWFL*, Ottawa has shown no appetite for family law reform, even in areas of pressing importance like the *Child Support Guidelines*. It is difficult to imagine the *Annulment of Marriages Act* climbing higher on the legislative agenda. Any changes are going to have to be incremental changes to the common law.

Kowgier-Prior v. Bissonnette, (December 12, 2025), Toronto FC-24-00000140-0000 (ONSC) — Johnston J.

Disclosure: Epstein Cole LLP represented Mr. Prior on this motion.

Bissonnette is an interesting case about an annulment proceeding and the request by Mr. Prior for leave to be added as a third party pursuant to Rule 7(5) of the *Family Law Rules*, O. Reg. 114/99 and Rule 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Mr. Prior and Ms. Kowgier were married in the Turkish Republic of Northern Cyprus on September 6, 2013. Mr. Prior was, at all material times, a resident of England. At the time of the wedding, Ms. Kowgier was a resident of Poland. After their wedding, Mr. Prior and Ms. Kowgier ate fish'n'chips in England for 16 years as residents there.

On October 20, 2022, Mr. Prior and Ms. Kowgier issued a Joint Application for Divorce. After the Joint Application was issued, Mr. Prior discovered that Ms. Kowgier had married Mr. Bissonnette in Ontario on August 18, 2002 — and that she had not been divorced from Mr. Bissonnette at the time of her marriage to Mr. Prior. This, as they say, is a problem.

In the English court, Mr. Prior issued an application to nullify his marriage to Ms. Kowgier on the basis that she was legally married to Mr. Bissonnette at the time of their wedding.

On September 12, 2024, Ms. Kowgier responded to the annulment application in England. She stated that she had issued an annulment application in the Superior Court of Justice in Ontario on August 29, 2024, 70 days *after* Mr. Prior had commenced his annulment application in England.

Ms. Kowgier and Mr. Bissonnette were married on August 18, 2002, at Carleton Place, Ontario. A valid marriage license had been obtained by both parties prior to the day of the ceremony. The officiant was legally entitled to perform marriage ceremonies.

In her Ontario Application for an annulment of her Ontario marriage to Mr. Bissonnette, Ms. Kowgier claimed that:

- While she and Mr. Bissonnette participated in a marriage ceremony on August 18, 2002, in Carleton Place, Ontario, they believed this to be only a "social event" with Mr. Bissonnette and his family.
- She did not possess a good understanding of the English language and believed the marriage was not legitimate.
- She would not have participated in the ceremony had she been aware of the legal implications. She never cohabited with Mr. Bissonnette and the marriage was never consummated.
- Ms. Kowgier claimed that representations were made to her by Mr. Bissonnette and his father that were false. She plead that she had been told that the ceremony had no legal significance — but rather it had been a party welcoming her to Canada.

Mr. Prior asked to be added as a party to the annulment Application in Ontario because, he argued, the narrative put forward by Ms. Kowgier conflicted with evidence she provided in the proceedings in England. Mr. Prior argued that he had relevant and important evidence to provide the Court, which he claimed proved that Ms. Kowgier and Mr. Bissonnette entered into a marriage for immigration purposes. She was a Polish resident and sought to gain legal status in Canada.

Mr. Prior said he had evidence that Ms. Kowgier had represented to Canadian immigration officials that she was married. He submitted that Ms. Kowgier had understood that she was entering into a marriage and had done so to further her goal of obtaining legal status in Canada.

To further complicate matters, after Ms. Kowgier commenced her Application, she and Mr. Bissonnette entered into Minutes of Settlement wherein Mr. Bissonnette paid a modest sum to Ms. Kowgier and the parties agreed to the annulment of the marriage on November 14, 2024.

Mr. Bissonnette sought for the Minutes of Settlement to be enforced at her motion, that the annulment granted and that Mr. Prior's motion to be added as a responding party be rejected.

Ms. Kowgier participated in the motion by zoom from the United Kingdom. She did not have counsel. She took no formal position on the request to add the third party, though she did state that he ought not to be added.

The court set out that if Mr. Prior was not added to the litigation, it was likely that the Superior Court would grant the annulment to Ms. Kowgier and Mr. Bissonnette based on the Minutes of Settlement. However, the evidence brought forward by Mr. Prior raised serious questions about the "*bona fides*" of those Minutes. The court stated that if Mr. Prior's evidence was found to be true, it would result in a finding that both Mr. Bissonnette and Ms. Kowgier entered into a marriage, knowing the legal consequences of that marriage in 2002, but were now claiming in 2025 that Ms. Kowgier lacked capacity. This could result in a fraud on the court and in the basis for the claimed annulment not to be genuine.

The interests of an informed and just decision required that Mr. Prior be added as a party. He had important evidence regarding the requested annulment. Mr. Bissonnette and Ms. Kowgier both wanted the annulment for their own reasons, and without Mr. Prior's involvement, this relevant information would not be presented to the trier of fact. The court stated that it was "contrary to the public interest and the principle of the Rule of Law to allow court orders to be obtained on false grounds or evidence."

Mr. Bissonnette argued that he would be prejudiced if the annulment is not granted — he claimed that the Minutes of Settlement should be enforced as they resolved all the issues between him and Ms. Kowgier. If they were set aside and the annulment not granted, he faced potential criminal sanctions due to his subsequent marriage. The court rejected this argument; first, the motion before the court was for Mr. Prior to be added as a third party — not for the annulment. Further, the court stated that if Mr. Bissonnette faces criminal or civil consequences for entering into a second form of marriage while still being married to Ms. Kowgier, it was of "his own doing." In the words of Justice Johnston, "Facing consequences from one's own action is not what is meant by prejudicial." *There's* a handy quote for later . . .

While the court determined that it was in the public interest to allow Mr. Prior to be added as a third party, it was aware of his lack of connection to Ontario. The court also candidly acknowledged that Mr. Prior was seeking legal status to further his own self-interest. However, it was only by allowing his participation that the full facts will be before the court. Given his lack of connection, Mr. Prior was ordered to pay into court \$7,500 as security for costs.

Two's company. But three makes for a really interesting annulment proceeding.