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THE ANNULMENT CONTROVERSY: REVIVAL OF PRIOR ALIMONY PAYMENTS

INTRODUCTION

As the legal and social barriers have fallen away, divorce has become more prevalent and acceptable. The latest Census shows that one out of every three marriages in America will end in divorce.¹ Annulment, on the other hand, is a very ancient remedy for dissolution of the marital relationship and its incidence is declining today in light of liberalized divorce laws.² Nonetheless, a substantial number of annulments are decreed each year to legally rescind marriages.³

Provisions for alimony, child support, and property division typically accompany a decree of divorce. However, because the incidence of remarriage has also increased,⁴ many difficult issues arise as to the extent and duration of support obligations between ex-spouses. Despite the increases in the dissolution of marriages and in the frequency of remarriage, the law in Oklahoma remains in disarray with regard to certain aspects of divorce, alimony, and annulment. One such un-

3. Figures compiled by the Oklahoma State Department of Health (Provisional Statistics 1976). The number of annulments granted in previous years are as follows:
   1976 251
   1975 307
   1974 199
   1973 245
   1972 226

The number of marriages and divorces in Oklahoma during this same period are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Marriages</th>
<th>Divorces</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976</td>
<td>40,985</td>
<td>21,236</td>
</tr>
<tr>
<td>1975</td>
<td>40,110</td>
<td>20,334</td>
</tr>
<tr>
<td>1974</td>
<td>40,160</td>
<td>19,687</td>
</tr>
<tr>
<td>1973</td>
<td>41,367</td>
<td>19,687</td>
</tr>
<tr>
<td>1972</td>
<td>40,767</td>
<td>18,063</td>
</tr>
</tbody>
</table>

4. Latest figures indicate that 66% of all divorced women remarry. See, POPULATION REPORTS, supra note 1, at 9. There has been a 30% increase in the number of women remarrying between 1960 and 1974. See, U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1976, at 68 (97th ed.) (Statistical percentages for the number of men remarrying are not available).
settled issue in Oklahoma, as well as many other states, is whether the annulment of a later marriage revives the prior husband’s obligation for alimony.

Typically, a decree of divorce grants the wife alimony, which shall terminate upon death or remarriage.\(^5\) If she remarries, but subsequently has this marriage annulled, is she entitled to the resumption of alimony payments from her former husband? Does the annulment mean that the later marriage never existed, or rather that it validly existed and only became a nullity at the time of the court's decree? In either case, shall that answer determine whether a later marriage, subsequently annulled, is a “remarriage” within the meaning of the decree granting alimony?

Finding answers to these questions is difficult. The common law is hopelessly unclear as to this controversy; it has not been dealt with by statute in Oklahoma, nor has the Oklahoma Supreme Court ever ruled on the issue.\(^6\) While at least two district courts in Oklahoma have considered the question,\(^7\) the rising incidence of divorce, the alternative of annulment, and the increase in remarriages may force the state's supreme court or legislature to settle this area of the law.

This comment will discuss the implications of a remarriage, subsequently annulled, as it relates to the resumption of alimony and provide a current survey and analysis of the law. In this context, the law of annulment in Oklahoma, as well as other jurisdictions, and the implications of alternative policies will be reviewed. Finally, a compromise approach for the resolution of this issue will be proposed.

**The Operation and Effect of an Annulment**

**Background**

To examine and understand the issue of alimony revival, it is necessary to review the general concepts surrounding annulment, its definition, and legal effect. From the twelfth century to the middle of the nineteenth century, marital relations in England were within

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5. Although many references in this comment are to the wife seeking alimony resumption, courts have taken a similar approach when it is the husband who is seeking continuation of support from his earlier wife. See, e.g., Beckett v. Beckett, 272 Cal. App. 2d 70, 77 Cal. Rptr. 134 (1969).

6. See notes 44-48 infra and accompanying text.

REVIVAL OF ALIMONY

the exclusive jurisdiction of the ecclesiastical courts. The law reflected
the Christian belief that marriage was a sacrament giving rise to an indissoluble relationship. In the extraordinary circumstances where
the church would permit dissolution of the bond, an ecclesiastical fiat in
the form of an annulment was decreed. The effect of such a decree
was to declare that the church had never recognized the purported union. In legal theory, the marriage never existed.

The concept of annulment evolved through the common law and
today it is generally a remedy defined by statute which reflects society's attitude that, for one reason or another, the marriage should not be recognized. Unless there is a legal defect at its inception, a marriage cannot be annulled; instead, the proper remedy is divorce. At the outset, it is essential to the validity of the marriage that the parties freely consent; when mutual consent is lacking at the time the ceremony is performed, the marriage may be annulled. Most states, including Oklahoma, have additional grounds for annulment. These include consanguinity or incest, polygamy, nonage, mental inca-

9. This was a decree a vinculo matrimoni. The other form of relief available, a decree of divorce a mensa et thoro, was not a true divorce or annulment. Rather, this later decree merely accorded the parties a legal separation, leaving them still man and wife. 2 J. Bryce, Studies in History and Jurisprudence 826-27 (1901).
10. See id. at 811-30. See also Clark, supra note 2, at § 11:1; Comment, The Void and Voidable Marriage: A Study in Judicial Method, 7 Stan. L. Rev. 529, 538 (1955) [hereinafter cited as Stan. L. Rev.].
11. An action for annulment of a marriage differs from a divorce proceeding in that the latter is instituted to dissolve a marriage relation that is legally existent, whereas an annulment is for the purpose of declaring that no valid marriage ever existed. An annulment is also distinguishable from divorce in that the former exists for causes existing at the time of the marriage, while the latter is ordinarily available for causes arising after the marriage. 3 W. Nelson, Divorce and Annulment, § 31.04 (2d ed. 1945).
12. Okla. Stat. tit. 43, § 1 (1971); Okla. Stat. tit. 12, § 1283 (1971). See, e.g., Martin v. Martin, 157 Fla. 835, 26 So. 2d 901 (1946) (where the groom drugged his prospective spouse, who had never consented to the marriage and was not aware of the ceremony until several hours after it had been performed).
13. In cases of incest and polygamy, the marriages are considered void and an annulment action for a formal decree is not necessary, although often sought and granted. Whitney v. Whitney, 192 Okla. 174, 134 P.2d 357 (1942). All other grounds for annulment are cases where the marriage is considered voidable and a court decree is necessary to declare it a nullity. Note, Void and Voidable Marriages, 14 Okla L. Rev. 304, 307 (1961) [hereinafter cited as Okla. L. Rev.]. For a discussion of the confusing void-voidable dichotomy, see notes 25-37 infra and accompanying text.
16. Okla. Stat. tit. 43, § 3 (Supp. 1976). The age of 18 is generally the age when people gain the legal capacity to consent to marriage. Nonage refers to those under the prescribed age who seek to marry. In Oklahoma, the minimum age limitation may be avoided by parental consent, or judicial authorization in certain instances. Id.
pacity, and, until recently declared unconstitutional, miscegenation. In addition to these statutory grounds, marriages may be set aside in equity, on grounds of duress, jest, undisclosed impotency, fraud and pregnancy by another at the time of the marriage.

By far the most common ground for annulment today arises from the so-called "penalty marriage." Oklahoma law provides: "It shall be unlawful for either party to an action for divorce whose former husband or wife is living to marry . . . a person other than the divorced spouse within six months . . . ." Violation of this provision subjects the later marriage to annulment if either party to the later marriage institutes legal action. Statutes such as this constitute the basis for the greatest number of annulments awarded today.

As shall be pointed out, the grounds on which an annulment is granted may be relevant in regard to the propriety of reinstating the alimony obligation.

Operation and Effect: The Annulment Trichotomy

The evolution of the law of annulment has been neither logical nor consistent. Central to any discussion regarding the operation or legal consequences of an annulment is an examination of the development of a strange trichotomy; a distinction among marriages as being "void," "void ab initio" or "voidable." A marriage with a defect constituting grounds for annulment is susceptible to any of these three interpretations.

First, the marriage was absolutely void from its inception

17. OKLA. STAT. tit. 12, § 1283 (1971).
19. See In re Mo-se-che-he's Estate, 188 Okla. 228, 107 P.2d 999 (1940). Impotency and pregnancy by another are also grounds for divorce. OKLA. STAT. tit. 12, § 1271 (1971). It would appear that the party may elect either remedy.
20. OKLA. STAT. tit. 12, § 1280 (1971).
21. OKLA. STAT. tit. 12, § 1281(b) (1971).
22. Because of liberalized divorce laws, annulment is becoming less frequent but it is still widely used for penalty marriages. Until recently, California and New York accounted for almost 73% of all annulments in the United States and this was directly traceable to their restrictive prohibited remarriage period following a final divorce decree. Comment, The Aftereffects of Annulment: Alimony, Property Division, Provision for Children, 1968 WASH. U.L.Q. 148, n.4 [hereinafter cited as WASH. U.L.Q.].
23. See notes 33-44 infra and accompanying text.
and, in essence, never existed. Second, the purported marriage was merely voidable, but upon the decree it became void ab initio. Third, a valid marriage relationship existed between the parties up until the date that the court decreed it a nullity. Logically, a void marriage has never existed and thus is incapable of causing any marital consequences. A voidable marriage on the other hand, is valid until annulled. Based on the nature of the defect, marriages are classified as void or voidable by either case law or statute.

The classification of the marriage as either void or voidable would appear to be dispositive of the issue of the proper effect to be given an annulment. However, this is not the case due to a confusing legal fiction known as the "relation-back" doctrine which provides the basis for the void ab initio classification. Few legal fictions have engendered as much confusion as this one.

Under ecclesiastical law, a defective marriage was simply void and regarded as nonexistent. But as the concept of annulment evolved through common law, the courts recognized that a union which did in fact exist could not be ignored. To deal with this discrepancy, the courts adopted the idea that the defective marriage was merely voidable, and that, unlike a void marriage, a judicial decree terminating the marriage was necessary. Although such a decree was necessary, it was generally held that the decree of nullity "related back", so as to render the relations of the parties illegal from the beginning. Even where the marriage was classified as voidable, and thus valid until decreed a nullity, upon this decree the marriage became void ab initio.

25. A void marriage is considered to have never existed and a judicial decree so stating is not even necessary. See, Comment, Void and Voidable Marriages, 27 Mod. L. Rev. 385, 386 (1964). This reflects a strong social or moral policy against even recognizing the marriage in cases such as bigamy or incest. See Drummond v. Irish, 52 Iowa 41, 2 N.W. 622 (1879); Farnow v. Jones, 34 Okla. 694, 126 P. 1015 (1912).

26. Marriages declared void ab initio are usually those contracted by persons not of legal age or who are otherwise incompetent. See, e.g., Ross v. Ross, 175 Okla. 633, 54 P.2d 611 (1936); Hunt v. Hunt, 23 Okla. 490, 100 P. 541 (1909).

27. In cases of voidable marriages, they become a nullity only as of the time of the decree and until that time are valid. See, e.g., McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163 (1936); White v. McGee, 149 Okla. 65, 299 P. 222 (1931).

28. For example, where a man who already has a wife marries, the later marriage is considered absolutely void and not to exist. Okla. Const. art. I, § 2. On the other hand, where the marriage is between two minors, the union is considered merely voidable, and becomes a nullity only as of the decree. Okla. Stat. tit. 43, § 3 (Supp. 1976); McKee v. State, 452 P.2d 169 (Okla. Crim. 1969); White v. McGee 149 Okla. 65, 299 P. 222 (1931). See notes 25-27 supra.

29. The concept has been criticized in several cases. See notes 30-34 infra and accompanying text. See generally Annot., 45 A.L.R. 3d 1033 (1972).

30. See note 13 supra.
When the relation back doctrine is applied, there is the anomalous result that a decree of annulment has the same effect upon both void and voidable marriages; it relates back to the time of the marriage contract so that, de jure, the marriage never existed. This confusing fiction arose from the judicial need to recognize the existence of a relationship which would survive in the absence of judicial action, while at the same time allowing the court's decree to reflect early religious precepts that annulment was a punishment for "unscriptural marriages." This common law rule, however, has not been consistently followed by the courts. As the law of annulment further evolved, the courts began to recognize that if they consistently applied the relation back doctrine, so that "no marriage ever existed", enormous complications arose as to the legitimacy of children, the availability of property settlements, inheritance rights, and the marital communications evidentiary privilege. In general there has been little uniformity of approach in the cases involving the retroactive effects of an annulment. Some courts have refused to apply the relation back fiction to voidable marriages.

31. See STAN. L. REV., supra note 10, at 530.
32. See, MONT. L. REV. supra note 24, at 269. It would be absurd to pretend, after two people had lived together in a purported marital union, that no relationship existed. Nevertheless, this relation back doctrine was developed in early ecclesiastical canons and incorporated into the common law.
33. In addition to the alimony question, the interpretation given the annulment can define what other legal consequences attach to an annulled relationship. For instance, the interpretation has implications as to the children born of that marriage. If the court concludes that the marriage was void and never existed, children of that marriage would be illegitimate. This was the case at common law. In re Moncreif's Will, 235 N.Y. 390, 139 N.E. 550 (1923). Recognizing the harshness of this rule and its societal implications, most states have statutes declaring children of annulled marriages to be legitimate. See, e.g., OKLA. STAT. tit. 12, § 1283 (1971).

Rights of inheritance are also affected. If wife, W, who is a party to a marriage with a defect, dies, husband, H, will be heir at law if the marriage is merely voidable; but he will inherit nothing if the marriage is void. Plummer v. Davis, 169 Okla. 374, 36 P.2d 938 (1934). Another problem arises where W is a party to a marriage with a defect and H injures her. If this marriage is classified as void, W may be able to bring suit against H in an action for personal injuries. If however, the marriage is classified as merely voidable, and thus valid until annulled, W may be precluded from bringing the action where one spouse is prohibited from suing the other. State ex rel Angvall v. District Court, 151 Mont. 483, 444 P.2d 370 (1968).

An additional problem arises in the field of evidence. Does the marital communications privilege protect statements made between parties during a marriage that is subsequently annulled as void? California has ruled that the privilege does protect communications made during such "marriage" though later annulled. People v. Godines, 17 Cal. App. 2d 721, 62 P.2d 787 (1936) (where the marriage was voidable). Contra, People v. Mabry, 71 Cal. 2d 430, 455 P.2d 759, 78 Cal. Rptr. 655 (1969) (where the marriage was void).

34. STAN. L. REV. supra note 10, at 533.
marriages where the results would be socially undesirable or especially harsh.85

The trend over the years has been to abandon the doctrine of relation back.86 Cardozo criticized this legal fiction by observing that a decree of annulment "could not obliterate the past and make events unreal."87 Nevertheless, the retroactive annulment fiction continues to pervade some judicial thinking. Due to this division, the variety of interpretations and legal effects assigned an annulment decree is both confusing and contradictory. Further confusion is generated when, from this variety of approaches, one is selected for the specific purpose of determining whether a subsequently annulled marriage was a "remarriage" for the purpose of terminating the alimony obligation of a former spouse. The determination that the later marriage was valid until annulled, that it became void ab initio, or that it was always void, is in no way conclusive.

Some courts have held that the annulment revives the prior husband's alimony obligation in cases where the marriage was void.88 Other courts have ruled that the obligation does not continue even though the later marriage was void.89 Likewise, where the annulled marriage was merely voidable, some courts have ordered the alimony reinstated,40 while others have ruled that the obligation for alimony is not revived.41 Pursuant to another view, it has been held that the alimony obligation is never revived upon an annulment.42 Finally, at least one court has sought to avoid the theoretical quagmire by denying reinstatement of an earlier alimony obligation on the theory that the remarriage of the wife, even though it was later annulled, constituted

35. STAN. L. REV. supra note 10, at 532-36. Instead of declaring a voidable marriage void ab initio, many courts today recognize that such a marriage can "ripen into" a valid marriage when and if the defect is removed, as in cases where minors reach majority during the marriage. See White v. McGee, 149 Okla. 65, 299 P. 222 (1931); Mantz v. Gill, 147 Okla. 199, 296 P. 441 (1931).
37. American Surety Co. v. Conner, 251 N.Y. 1, 9, 166 N.E. 783, 786 (1929).
41. Evans v. Evans, 121 So. 2d 107 (Fla. 1968); Bridges v. Bridges, 217 So. 2d 281 (Miss. 1968); Chavez v. Chavez, 82 N.M. 624, 485 P.2d 735 (1971); McConkey v. McConkey 216 Va. 106, 215 S.E.2d 640 (1975).
an irrevocable waiver by her of any alimony rights which she may have possessed against her former spouse.48

THE LAW AS APPLIED

Implications of the Interpretation

An examination of the case law dealing with annulment illustrates how the confusing trichotomy of interpretations has developed in Oklahoma and how a particular interpretation would be chosen to achieve the desired result. It also becomes clear that in light of recent judicial trends and modern statutory provisions, the trichotomy should be abandoned.

Typical of the cases where the question of alimony revival upon annulment is at issue is Fleming v. Fleming.44 There, the plaintiff wife was granted a divorce by the District Court of Carter County, Oklahoma in 1970. The decree provided that her former husband was to pay alimony in monthly installments. Plaintiff later remarried and the defendant ex-husband terminated his alimony payments, contending that the plaintiff was now financially able to maintain herself and that termination of alimony upon remarriage was sanctioned in Oklahoma by a statutory provision.45 However, this marriage was annulled shortly thereafter on grounds of the mental incapacity of the second husband. Plaintiff then brought an action asking the court to reinstate her former husband's alimony obligation. Her position was that her later marriage had "never existed," and, consequently, there was no basis for the defendant's unilateral termination of alimony. The district court disagreed and found that the purported remarriage terminated the husband's obligation. However, on appeal, the Oklahoma Court of Appeals reversed the lower court and ruled that because an annulment was secured, "no marriage ever existed."46 The alimony was ordered reinstated. However, since a state statute provides that no court of appeals decision shall be binding or cited as precedent unless the supreme court, upon review, orders the opinion officially published,47 the law in Oklahoma remains unsettled.48

45. OKLA. STAT. tit. 12, § 1289 (Supp. 1976).
47. OKLA. STAT. tit. 20, § 30.5 (Supp. 1976).
48. The Oklahoma Supreme Court did not so order, and denied certiorari of Fleming. 46 Okla. B.A.J. 944 (1975).
The Law in Oklahoma

Like other jurisdictions, Oklahoma has classified marriages as void or voidable depending on the nature of the defect existing at the time of the ceremony. All three interpretations of annulments, void, void ab initio, or valid until annulled, have found their way into Oklahoma decisions, resulting in confusing inconsistencies.

The Oklahoma Supreme Court has found some marriages to be absolutely void and thus has regarded them as never having existed. In Fearnow v. Jones, the court found that an incestuous marriage was absolutely illegal and void, and that no rights or privileges whatsoever arose from the relationship. However, in Krauter v. Krauter, the court, while finding the incestuous marriage absolutely void, nevertheless ruled that the wife was entitled to a division of the property jointly acquired during the “nonexistent” marriage. Krauter suggests that some legal consequences attach to an annulled relationship and that even a void marriage may nevertheless be regarded as a marriage if a court of equity recognizes that a property settlement is consistent with fairness.

In Whitney v. Whitney, the plaintiff wife sought a property settlement at the end of a purported marriage. The Oklahoma Supreme Court applied the void ab initio concept to the polygamous marriage and stated that since the annulment related back to make the marriage void from its inception, no legal consequences could attach to the relationship. Therefore, the wife was entitled to no property. Likewise, in Clark v. Barney, the court expressly rejected the notion that the marriage could “ripen into” a valid relationship and reiterated that a polygamous marriage was void ab initio. The court, in Clark, endorsed the traditional concept of retroactive annulment, which was founded on moral precepts, stating: “And whilst it is the policy of the law to encourage legitimacy, yet, in order to do so, it will not encourage licentiousness.”

In later decisions, the Oklahoma courts recognized that the effect of declaring a marriage nonexistent was frequently a harsh one, especi-
ally where children and property were involved.56 The courts then began applying the voidable classification with varying results. In *Hunt v. Hunt*,60 two minors entered into a marriage which was subsequently annulled due to their incapacity or nonage. The court ruled that a marriage with this defect was voidable and not void. This being the case, the husband was estopped from denying the marriage and was ordered to pay child support to his former wife. In *Ross v. Ross*,67 it was declared that where the husband lacked capacity, specifically mental incompetency, the marriage to which he was a party was merely voidable. The court reasoned that since he continued to cohabit with the woman after the defect was removed, he had ratified the marriage and could not have the relationship declared void *ab initio* so as to avoid the legal consequences of that union. However, the *Ross* and *Hunt* decisions appear to be in conflict with the more recent court of appeals opinion in *Fleming*, which held that a marriage with the defect of incapacity was void and never existed.

As previously stated, the most common incidence of annulment arises from the penalty marriage.68 Inconsistencies are also present in the application of the void-voidable label to these marriages. In early decisions, such as *Atkeson v. Sovereign Camp*,69 a penalty marriage was classified as void. There the court applied the Oklahoma penalty marriage statute which provided: “Any person marrying contrary to the provision of this section [within the six month penalty period] shall be deemed guilty of bigamy and such marriage shall be absolutely void.”70 The Oklahoma legislature noted dissatisfaction with the result in *Atkeson*, and, on April 6, 1925, amended the law by eliminating the clause which read, “and such marriage shall be absolutely void.”71 A few years later, in *Plummer v. Davis*,72 the court held

55. “The American courts have softened this rule and the Oklahoma courts are no exception.” OKLA. L. REV. supra note 13, at 305. *See In re Mo-se-che-he’s Estate*, 188 Okla. 228, 233, 107 P.2d 999, 1004 (1940), where the Oklahoma Supreme Court noted, “In divorce matters modern civilization strongly condemns the harsh doctrine of *ab initio* sentences of nullity.” (quoting from *Jones v. Jones*, 119 Fla. 824, —, 161 So. 836, 839 (1935)).
56. 23 Okla. 490, 100 P. 541 (1909); *See also* *Stone v. Stone*, 193 Okla. 458, 145 P.2d 212 (1944).
57. 175 Okla. 633, 54 P.2d 611 (1936).
58. *See note 22 supra and accompanying text.*
59. 90 Okla. 154, 216 P. 467 (1923).
60. OKLA. COMP. STAT. § 510 (Bunn 1921) (repealed, 1925 Okla. Sess. Laws, ch. 119, p. 166, § 1).
61. 1925 Okla. Sess. Laws, ch. 119, p. 166, § 1 (The present law is codified at OKLA. STAT. tit. 12, § 1280 (Supp. 1976)).
that, in light of *Atkeson* and the amended law, it was the intention of the legislature that a penalty marriage should be *voidable* and not void.\(^{63}\) However, this decision appears not to have been followed in *Rutherford v. Rutherford*,\(^ {64}\) a 1975 Oklahoma district court case. In *Rutherford*, the plaintiff was awarded alimony to cease upon her death or remarriage. The wife remarried, but soon sought an annulment upon the ground that her new husband's prior divorce was not yet six months old and thus the marriage was in violation of the statute. The district court agreed, but in applying the statute, ruled that the penalty marriage was void. Alimony was reinstated.

The confusion regarding the classification of marriage in Oklahoma is further complicated by an examination of the line of cases emanating from *White v. McGee*.\(^ {65}\) There the court stated that a voidable marriage is not invalid from its inception, but the parties are considered husband and wife until the marriage has been annulled. The court abandoned the *ab initio* concept and recognized that a voidable marriage may "ripen into" a valid marriage.\(^ {66}\) Thus, a voidable marriage is nevertheless a "remarriage" to which some legal consequences may attach.

Since the precise question of alimony revival has not been settled in Oklahoma, it is necessary to look to these cases defining other consequences attaching to annulments. The cases cited in this section serve this purpose, but more specifically they serve to illustrate the confusion and inconsistency in this area of the law. It is apparent that the Oklahoma decisions are not only inconsistent, but also fail to conform to the modern trend of authority.\(^ {67}\)

**POLICY CONSIDERATIONS: A PROPOSAL**

As emphasized already, confusion and disagreement exist among the states concerning the effect of an annulment on the alimony obligation. Also clear is the need for resolution of these contradictions and conflicts which inhere in the present state of affairs. Before consider-

\(^{63}\) See also *Harvey v. State*, 13 Okla. Crim. 299, 238 P. 862 (1925).


\(^{65}\) 149 Okla. 65, 299 P. 222 (1931); See also, *In re Mo-se-che-he’s Estate*, 188 Okla. 228, 233, 107 P.2d 999, 1004 (1940).


\(^{67}\) See notes 89-100 *infra* and accompanying text.
ing any improvements however, the policies underlying the void-voidable concept and the arguments for and against resumption of alimony must be considered.

Abandoning the Trichotomy

It has been suggested that the type of defect in the remarriage, and thus its classification as either void or voidable, should be conclusive as to whether or not alimony will be revived.\(^{68}\) Under this approach, recognition that a voidable marriage usually involves a less serious defect,\(^{69}\) and that it can be ratified and validated,\(^{70}\) would permit it to be regarded as a “remarriage,” allowing alimony termination. On the other hand, a void marriage usually embodies a more serious defect, such as incest or bigamy. Courts may feel compelled to deter such “wrongful” marriages by simply denying their existence or refusing to accord them any legal effect. In these cases, incidents, such as alimony, would logically continue.

The better reasoned view however, recognizes that the use of the void-voidable classification to determine the revival of alimony is inherently defective. The defect lies in the lack of uniformity in application and result. The concept of retroactive annulment is an obsolete legal fiction.\(^{71}\) The courts have applied that concept and the void or voidable labels inconsistently to reach a particular, desired result. The confusion thus engendered, has led some courts to modify and vary the fiction of relation back. Others have refused to accept the fiction and have abandoned altogether the distinction between void and voidable marriages.\(^{72}\)

An examination of the cases confirms the fact that the courts have applied the annulment trichotomy inconsistently in order to avoid inequitable results. Such inequities include the possibility of making

\(^{68}\) STAN. L. REV., supra note 10, at 540-41.

\(^{69}\) See notes 13-21 supra and accompanying text.

\(^{70}\) In re Mo-se-che-he's Estate, 188 Okla. 228, 233; 107 P.2d 999, 1004 (1940); Ross v. Ross, 175 Okla. 633, 54 P.2d 611 (1936).

\(^{71}\) See STAN. L. REV., supra note 10, at 537-38.


Certainly, when a former wife remarries, the divorced husband does not concern himself with any legal distinctions between void and voidable. She has been married. He is free. In the interests of fairness, the last previous husband must be the source of the wife's future financial security. Restoration of alimony payments from a former husband must be denied. Id. at —, 353 A.2d at 144.
children illegitimate or denying a property division to the wife; both of which could be the result if the marriage is ruled never to have existed. On the other hand, courts have also avoided the harsh rule that no spousal rights can be acquired by a void marriage, and have effected the distribution of property upon the dissolution of void and voidable marriages by various theories, such as, quasi-contractual obligation, quasi-partnership, and grounds of equity and justice. These facts reflect a judicial recognition that the law needs reform.

Considerations for Resumption

Potential solutions to the current state of affairs include the positions which uniformly revive or deny alimony upon an annulment. Each view will be considered.

The leading case holding that an annulment revives the prior husband's obligation of alimony is Sleicher v. Sleicher. There, the New York Court of Appeals applied the traditional notion of retroactive annulment, reasoning that the annulment related back and effaced the marriage as if it had never been. Since the second marriage was regarded as nonexistent, the husband's obligation of alimony was not terminated.

The line of cases following Sleicher's reasoning consistently hold that an annulled marriage is no marriage, and that the parties remain in the same relation to each other. In holding that the alimony obligation survives the "attempted remarriage," these courts are greatly influenced by the social policy of ensuring the wife a source of financial support. This view may also reflect the courts' adherence to tradi-
tional thinking regarding the moral justifications for retroactive annulment.

Certainly, a strong argument can be made that it is the duty of the courts to provide for the financial security of a divorced spouse. The concept of alimony is generally based on a legislative determination that the husband's duty to support his wife is more contractual than relational and continues beyond the dissolution of the marriage.\footnote{See Wash. U.L.Q., supra note 22, at 152. Recently, a growing controversy has developed around the concept of alimony and its traditional automatic award. See the recent case of Stansberry v. Stansberry, 48 Okla. B.A.J. 2107 (Okla. Ct. App. 1977).} Alimony serves a valid function in adjusting economic relationships between the parties. This policy and function should not be defeated where the wife would have no other support. This line of reasoning leads to the conclusion that since an award of alimony in an annulment action is available in only a few states,\footnote{See, e.g., N.H. Rev. Stat. Ann. § 458:19 (1955); Va. Code § 20.107 (Supp. 1976); Or. Rev. Stat. § 107.105 (1973); Minn. Stat. Ann. § 518.59 (West Supp. 1977); D.C. Code § 16-910 (1966).} the wife should not be precluded from the reinstatement of support by her prior husband.

\textit{Consideration Against Resumption}

The better reasoned view is that the remarriage, even though later annulled, conclusively terminates the support obligations of the prior husband.\footnote{At the outset, one interpretation of the problem could be dispositive of the issue. Some courts have interpreted the provision, "unless and until she remarries", in decrees awarding alimony as contemplating the ceremony of marriage and not the acquisition of the status of a valid marriage. The divorced wife's ceremonial marriage to a second husband is regarded as a remarriage even though grounds for annulment existed at the time. "Those interpreting the words as referring to the ceremony reason: First, no one would contend that the separation agreement should be revived if the remarriage ended in death or divorce and likewise it should not be revived in case of an annulment." Vand. L. Rev. supra note 73, at 911-21. If the remarriage should end in divorce or if the second husband died penniless, the wife could not look again to her former husband for support; the consequences of annulment should be the same. This logical argument has found support in the courts. See, e.g., Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920); Brandt v. Brandt, 40 Ore. 477, 67 P. 508 (1902). See Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E. 290 (1954).} The justification for such a policy is based on several considerations. However, the most persuasive reason for denying resumption of alimony is the realization that innocent wives and children of remarried husbands should not suffer because former wives have made foolish errors in their remarriages.\footnote{See Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E. 290 (1954).}

As discussed previously, the retroactive concept of annulment, which voids the marriage \textit{ab initio}, has fallen into disrepute due to the
REVIVAL OF ALIMONY

harshness of its effect. New York and California have taken the lead in abandoning the relation back concept of annulment. The decisions in these states make no distinction between void and voidable marriages, and hold simply that an annulled marriage is nevertheless a remarriage for alimony purposes. These decisions are premised on the belief that the reasonable expectation of both the wife and the first husband is that the wife's remarriage will be valid. The first husband should be able to rely on this expectation without "waiting in the wings" for the possibility that the remarriage might be annulled.

In examining the implications of allowing the wife to reinstate alimony, other justifications can be found for rejecting such a policy. One obvious implication of reinstating the obligation is the potential for abuse by the wife. In a case where the remarriage would "ripen into" a valid marriage if not annulled, the wife would be able to assess the relative financial situations of her present and prior husband. If she determines that she would be better supported by her prior husband's alimony payments, she might wish to annul her later marriage and regain this support. This possibility becomes especially important in a state like Oklahoma where at least some of the grounds for annulment and divorce are the same. If alimony can be revived by annulling the second marriage, the wife can choose between two sources of support. A divorce would present the opportunity for alimony from the second husband, while an annulment would reinstate alimony from the first. Few would disagree that she should not be given this control. In essence, the wife would have the power to "shop around" for the most solvent husband from which to draw support payments.

Another consideration militating against the reinstatement of alimony is the fact that a woman who was a party to an annulled marriage need not go remediless or be denied financial support. There

89. Okla. Stat. tit. 12, § 1271 (1971) allows as grounds for divorce: Impotency, pregnancy by another, fraudulent contract, and insanity. If these defects are present at the time of the marriage celebration, the remedy of annulment is also available. See notes 14-21 supra and accompanying text.
is authority for the proposition that the wife, under appropriate circumstances, can maintain an action for damages against the purported husband of her annulled marriage in those cases where it was his fraud which caused her to relinquish the first husband's support.\(^{91}\) Fraud, in the form of undisclosed impotency or circumstances of jest or duress at the time of the marriage, all constitute grounds for annulment.\(^{92}\)

The leading case for the view that alimony should not be reinstated upon the annulment of a later marriage is *Gaines v. Jacobsen*.\(^{93}\) In *Gaines*, the New York Court of Appeals took a strong stand against reinstatement of alimony by repudiating the disparate treatment between void and voidable marriages and holding that the retroactive effect of rescission must be limited by considerations of justice. The court ruled that, upon his wife's remarriage, the husband should have the right to regard himself as being free from any further financial responsibility. It was suggested that it would be particularly harsh to limit the first husband in his capacity to assume new obligations: "He could then assume new obligations—he could himself remarry . . . without remaining forever subject to the possibility that his first wife's remarriage would be annulled and the burden of supporting her shifted back to him."\(^{94}\) The court also noted that the financial solvency of a new spouse is one of the risks that any wife takes upon marrying.\(^{95}\) Alimony is predicated on the husband's duty to support his ex-wife. The obligation ceases upon remarriage since the ex-wife has acquired another source of support; she has elected to share her second husband's economic fortunes rather than depend on alimony.\(^{96}\) This sound argument predicated on simple fairness is persuasive.

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91. *See Ah Leong v. Ah Leong*, 27 F.2d 582 (9th Cir.), cert. denied, 278 U.S. 636 (1928). Here the man and woman assumed a marital status for 35 years. The wife bore 13 children and assisted the husband in a business in which they accumulated several hundred thousand dollars worth of property. Relying upon a 1920 Hawaii Supreme Court decision, *Parke v. Parke*, 25 Haw. 397, which held that a license was a prerequisite to valid marriage, the husband ceased to recognize the woman as his wife and denied her interest in any property. The court in *Ah Leong* rejected the claim, as tantamount to fraud, and ordered a distribution of the property. *See also* *Roberts v. Roberts*, 64 Wyo. 433, 196 P.2d 361 (1948); *Cf.* *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943).

92. *See In re Mo-se-che-he's Estate*, 188 Okla. 228, 107 P.2d 999 (1940). Here the court discussed its broad equitable powers to annul a marriage for other than statutory grounds, including fraud.


94. *Id.* at 219, 124 N.E.2d at 293-94.

95. *Id.* at 220, 124 N.E.2d at 295.

As the doctrine of retroactive annulment falls prey to continuing criticism, the courts of Oklahoma and other jurisdictions should adopt a policy which denies reinstatement of alimony. Logic and justice dictate that the wife should be estopped from denying her remarriage and seeking to reimpose an obligation on a former husband. The first husband is entitled to rely upon her new marital status. He must be free to assume that his financial obligations to her have ceased if he wishes to re-order his own affairs in confidence. This freedom would permit him to change his mode of living or even to remarry and establish a new family. There is no sound reason for treating an annulment any differently from a divorce or death in this regard.\textsuperscript{97}

\textit{A Compromise Approach}

A third, intermediate, approach to the problem is to make the reinstatement of alimony contingent on the nature of the defect, the status of the party seeking the annulment, and the length of time that the putative marriage existed. This approach would be a compromise between the absolute rules that uniformly deny or allow the continuation of support. Under this policy, the distinction between the void-voidable classification would be irrelevant. The court would decide the reinstatement question on a case-by-case basis utilizing these three criteria.

The first, the nature of the defect or the grounds for the annulment, would be relevant to the expectation of the spouse. For example, if the party seeking the annulment suffered from lack of capacity, they should not fairly be denied their rights under the prior decree if an annulment is immediately sought. In these instances, a party should not be penalized when they were not mentally competent to appreciate the serious nature and consequences of their actions. On the other hand, where the party was in a marriage that was incestuous, bigamous, or a penalty marriage, they should not be rewarded by reinstatement of prior alimony upon voiding a union with such an obvious defect. The second important criteria for the court should be the status of the person seeking the annulment. If the party seeking the annulment had knowledge of the defect at the time of the ceremony, they should be estopped from denying the remarriage. On the other hand, where the party to the annulled marriage was a

victim of the other's fraud, jest, duress, or concealment of impotence, they should be able to immediately annul this fraudulent union and not be penalized by a rule denying the reinstatement of former alimony. A final factor would be the length of the putative marriage which is subsequently annulled. If, in the court's opinion, the marital union existed for a period of time sufficient for it to be ratified or “ripen into” a valid consensual relationship, the party should logically be denied former alimony. This compromise policy would obviate the need for resort to the traditional notions of retroactive annulment and, in conformance with modern thinking, adopt a policy that is flexible and equitable.8

Essential to the success of any formula for determining the reinstatement of alimony is legislation allowing consideration of the question on its own merits. This would require that the other inequities or harsh results which might accompany annulment be rectified or avoided by statute. Oklahoma,9 0 like most states,1 00 has adopted a statute that declares children of annulled marriages to be legitimate. Other states have statutorily empowered the courts to effect some equitable distribution of property upon annulment, just as in divorce proceedings.1 0 1 Finally, several states have by statute allowed the wife to receive alimony from the husband of the annulled marriage, thereby completely eliminating the controversy as to revival of the former husband's obligation.1 0 2 By codifying these principles, the law in this area would be greatly clarified, the results would be predictable and equitable, and the confusing annulment trichotomy could be abandoned.1 0 3

CONCLUSION

The question of whether annulment of a later marriage revives

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98. This proposed policy approach is largely a product of the author's own analysis. However, it appears that at least two courts would find merit in such a model policy. See, e.g., Gevis v. Gevis, 147 N.Y.S.2d 489 (Sup. Ct. 1955) (noting wife's knowledge of the defect at the time of the marriage); Beckett v. Beckett, 272 Cal. App. 2d 70, 77 Cal. Rptr. 134, '136 (1969) (discussing the parties' detrimental reliance on the validity of a new marriage).


100. See, e.g., CAL. CIVIL CODE § 4453 (West 1970); COLO. REV. STAT. § 14-2-110 (1973); N.Y. DOM. REL. LAW § 175 (McKinney 1964).


103. For an excellent discussion of statutory provisions for alimony, child support, and property division as to an annulled marriage, see WASH. U.L.Q., supra note 22.
a prior husband's alimony obligation is one that has been considered in numerous jurisdictions. Many, including Oklahoma, have yet to resolve the issue. The policy adopted regarding the alimony question has many implications since it can affect the entire spectrum of legal consequences that may attach to the annulled marital relationship.

Presently, a variety of devices are used to resolve the problem. Whether the courts should continue to adhere to the confusing doctrine of *ab initio* nullity and the inconsistent classifications of void and voidable, is questionable. The better alternative would be for the Oklahoma legislature to follow the lead of states that deny reinstatement, but statutorily protect the financial security of the wife by allowing a party to an annulment to receive alimony and a property division from that annulled marriage.

As an alternative to legislative reform, the courts could adopt one of two policies. The first would reinstate alimony contingent on an examination of the grounds for the annulment, the knowledge of the party as to the defects, and the length of time that the putative marriage existed. The second approach would make a policy decision that a later marriage, even though annulled, is a "remarriage" and conclusively terminates any obligations of a husband under a prior decree.

Adoption of either of the latter policies would strengthen and clarify Oklahoma's position in the area of domestic relations. Statutory reform, however, would be preferable as this legislation could define precisely on what grounds, and under what circumstances, reinstatement of alimony would be appropriate. The enactment of such a statute would indicate a legislative intent that the wife look to her most recent "husband" for continued financial security, regardless of the reasons for the dissolution of that marriage.

In any case, resolution of the issue must be based upon legally and socially relevant factors. This would permit the abandonment of the confusing notions of void and voidable marriages and instead allow the termination of alimony obligations upon any "remarriage," whether subsequently annulled or not. This policy recognizes the inequity of subjecting divorced spouses to the spectre of renewed liability many years after their marriage was dissolved.

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