The Catholic Lawyer

Volume 12 | Number 1 Article 4

November 2016

Ecclesiastical Annulments and Dissolutions of Marriage

Msgr. Stephen J. Kelleher

ECCLESIASTICAL ANNULMENTS AND DISSOLUTIONS OF MARRIAGE

MSGR. STEPHEN J. KELLEHER*

A PERSON WHO PRESENTS A MARRIAGE CASE for adjudication in an ecclesiastical tribunal is seeking either an annulment or a dissolution. In Church law, an annulment is a declaration that the marriage bond never did exist—that the marriage never took place. A dissolution consists in the breaking of a valid marriage bond in order that one or both parties may contract another marriage. A dissolution is a canonical or ecclesiastical "divorce." Many marriage cases are submitted by non-Catholics who desire to be free in the eyes of the Catholic Church to contract marriage with Catholics.

We will first consider cases for dissolution, and in so doing we will speak initially of those dissolutions which, under present law, can be granted only in Rome. A dissolution can be granted if it is proven that the marriage has not been consummated and if it is adjudged that the dissolution will be of great spiritual advantage to one or both parties. Before such a case can be tried under present law, permission must be had from Rome in each instance. The priest who processes these cases is specifically designated by the Bishop. This priest, though called a judge, does not render a decision; he merely compiles the medical and testimonial evidence. In the practical order, it is usually impossible for a person to obtain a dissolution unless there is indisputable physical proof that the marriage was not consummated. Moreover, a logical reason for the non-consummation should be established. After the Defender of the Marriage Bond has submitted observations, the Bishop writes an opinion—not a decision—as to why he thinks a dissolution should or should not be granted. The decision is given in Rome by the Sacred Congregation on the Discipline of the Sacraments, the Supreme Sacred Congregation of the Holy Office, or the Sacred Congregation for the Oriental Churches.

---

* Officialis, Archdiocese of New York.

If both parties to the marriage are Latin Catholics, the decision is given by the Sacred Congregation of the Sacraments. If one or both parties are not Catholics, the decision is given by the Sacred Congregation of the Holy Office. If both parties are Oriental Catholics, the decision is given by the Congregation for the Oriental Churches. Each of these Congregations is a branch of the Roman Curia. The Curia is made up of a number of congregations, tribunals and offices which are directly subject to the Holy Father. The Holy Father presides over the Holy Office and the Congregation for the Oriental Churches. One of the Cardinals is the executive secretary. A Cardinal presides over the Congregation of the Sacraments.

A second type of dissolution which can be granted in Rome pertains to a marriage in which it is proven that either or both parties have not been baptized up to the time the dissolution actually is granted. Except in the case of the Pauline Privilege, which will be discussed in a moment, Rome reserves to itself the right to grant dissolutions in marriages in which either or both parties are not baptized. These cases are sometimes called Petrine Privilege cases because they are decided by the Holy Father, the successor to St. Peter. If it is proven that one or both parties were not baptized, a dissolution can be granted for the spiritual benefit of the party who seeks relief, the party he wishes to marry, and/or the children of an invalid marriage. As in non-consummation actions, the evidence adduced, together with the remarks of the Defender of the Bond and the opinion of the Bishop, are sent to Rome. Decisions in these cases are given by the Sacred Congregation of the Holy Office.

The Pauline Privilege is a dissolution which is effected by one of the parties to a marriage. The privilege is called Pauline because in his First Letter to the Corinthians, speaking of a marriage in which one party had become a convert, St. Paul wrote: "But if the unbeliever depart, let him depart. For a brother or sister is not under servitude in such cases. But God has called us in peace." The Pauline Privilege presupposes that neither party was baptized prior to the marriage or during the common life. If one of the parties to such a marriage embraces the Christian faith, and the unbaptized party refuses to cohabit peacefully, the convert can effect a dissolution and avail himself of the Pauline Privilege by marrying a Christian. The dissolution takes place when the second marriage is contracted. In practice, permission to utilize the privilege is obtained from the Bishop if it is proven that all of the necessary requirements are present.

We turn now from dissolutions to annulments. Again, an annulment is a declaration that the marriage bond never existed, *i.e.*, that the marriage never took place.

Before we consider the bases or reasons for annulment, we mention and stress these points in Church law: (1) Without exception or qualification, a civil divorce or civil annulment does not affect the validity of any marriage; (2) The obtaining of a civil divorce or civil annulment is necessary only to assure that the person may be free to marry before the civil law; (3) Without exception or qualification, every marriage is presumed valid.

We say that every marriage is presumed to be valid without exception or qualification. This rule of law comes into play when we consider the most simple type of action for annulment, that is, an annulment granted because the canonical form of the marriage contract is lacking. The law of the Church, concerning the form of marriage, is that a Catholic, in order that he may contract marriage validly, must marry in the presence of an authorized priest and two witnesses. If a person claims to be a Catholic and also alleges that he did not marry in the presence of an authorized priest and two witnesses, he will not be considered free to marry again unless both of his claims can be substantiated. If this can be done to the satisfaction of the delegate of the Bishop, his marriage will be declared null. The Defender of the Marriage Bond does not participate in these cases. Actions of this type are called defect of form cases, or lack of form cases, because the canonical form of the contract is lacking.

It is only in marriages in which one or both parties are Catholic that the official capacity of the person assisting at the marriage affects the validity of the contract. It is well to remember that in Church law the following marriages, by way of example, are valid: the marriage of two Jewish persons in the presence of a rabbi or a civil official; the marriage of a Jewish person and a Protestant in the presence of a minister or a civil official; the marriage of a Protestant and a person of no religion in the presence of a minister or a civil official. In other words, in any marriage between two persons who are not Catholics, the nature of the official capacity of the person who assists at the marriage does not affect its validity. Common-law marriages between two non-Catholics are recognized by the Church if they are recognized by the civil authority.

In all of the cases thus far considered, once an affirmative decision has been given it may be acted upon. In the event of a negative decision, a request for reconsideration may be made if additional evidence becomes available. Under certain circumstances, the case may be submitted in formal process. For example, an unresolved lack of form case may merit consideration in formal process.

We now consider the bases for annulment which are processed in a summary judicial procedure. The most common cases in this category are bigamy, consanguinity, and disparity of worship. The case of a person who has married before a priest may be tried in summary judicial procedure. It is well to point out that in these cases the Defender of the Marriage Bond has a right which is not accorded to him in the divorce cases which are sent to Rome, namely, the right to appeal from an affirmative sentence. In the event of a negative decision, the plaintiff has a right to appeal or to ask that his case be tried in formal process.

We now come to a consideration of cases which are tried in formal process. It is only when we refer to these cases that we are speaking, in the strict sense of the word, of the Church court.

The major bases for declarations of nullity in cases tried in formal process are as follows: age; impotence due to physical or psychic causes; psychic inability to form marital consent; force and fear; partial or total simulation of con-

sent. For a valid Christian marriage, a man must be sixteen years of age, a woman fourteen. Impotence must have existed at the time of the marriage and must be considered incurable from the day of the marriage. Psychic inability to give consent must have existed at the time of the marriage. The majority of cases are introduced on this basis because psychiatric records prior to or immediately following the marriage constitute prime sources of evidence. The force of which we speak must be a grave external force unjustly brought to bear on either or both parties. Simulation of consent may be total (the exclusion of marriage completely) or partial (the exclusion of fidelity, permanency, or the right to have children). There must be a positive intention of exclusion. With regard to the exclusion of children, there must be a positive intention to exclude all rights to the marital act. There are other bases for nullity in cases tried in formal process. These bases very rarely exist, and even more rarely are they alleged to be causes of nullity. These bases are abduction, adultery with a promise of marriage, public dishonesty, ignorance and error, and lack of delegation on the part of the priest who assists at a marriage.

For each case tried in formal process there are three judges. The presiding judge is known as the official. Where the number of cases warrant, there may be one or more vice-officials. The official and vice-official are appointed by the Bishop and can be removed at his discretion.

The other persons who participate in the formal process are the Defender of the Marriage Bond, the Promoter of Justice, the Advocate, the Procurator, the Guardian, the Notary, and the experts. The work of the Defender of the Bond is similar to that of the district attorney in a civil court. The Defender argues for the validity of the marriage. The most common role of the Promoter of Justice is to impugn the validity of a marriage for the common good; for example, to attack the validity of a marriage in behalf of a person who is not legally capable. The work of the Advocate is similar to that of the attorney for the plaintiff in the civil court. The respondent may have an Advocate if he so desires. Procurators stand in the place of the principals when legal acts are being performed and the principals themselves cannot be present. The Guardians stand in the stead of a person or persons who are legally incapable of acting in the Church court; for example, a person who is mentally incompetent. The Notary performs substantially the same functions as the court stenographer in the civil court. The experts, by and large, are psychiatrists, gynecologists, and urologists who, depending on the basis alleged, examine the incapacitated individual, submit reports based upon their findings as well as the evidence adduced in the trial, and then appear before the court to testify concerning their conclusions.

It is the responsibility of the presiding judge to direct the implementation of the procedural law: the obtaining of documentary evidence; the citing and hearing of witnesses; the publication of the case; and the rendering of decision.

The affirmative sentences or decisions of cases processed in formal trial do not become definitive, *i.e.,* cannot be acted

upon, unless they are sustained by a court of appeals. The Defender of the Bond must file an appeal against every initial affirmative sentence. The plaintiff has the right to file an appeal against an initial negative sentence. The court which initially hears the case is called the court, or tribunal, of first instance. The first court of appeals is called the court of second instance. Ordinarily, an archdiocesan court is the court of appeals for cases originating in dioceses within the province. Province is a term used to describe the area over which an archbishop has certain jurisdiction. For example, New York is the ordinary or usual court of appeals for Brooklyn, Rockville Centre, Albany, Ogdensburg, Syracuse, Rochester, and Buffalo. The court of appeals for an archdiocese is the court of another archdiocese or diocese. For example, the metropolitan court of New York is the court of appeals for Newark and Boston; Philadelphia is the court of appeals for New York; Springfield, in Illinois, is the court of appeals for Chicago.

If the decision in the court of first instance is negative and the decision in the court of second instance is affirmative, or vice versa, the plaintiff may appeal to the Sacred Roman Rota. Aside from the fact that the Sacred Roman Rota is primarily a court of appeals with a dozen judges rotating on tribunals composed of three members each, the pattern of organization and procedure is the same as that of the diocesan or archdiocesan court. If the decision is negative in the courts of first and second instance, the plaintiff may appeal to the Rota only if he can indicate further sources of evidence pointing to the nullity of the marriage. Following a trial in first instance, if the sentence is negative, the Advocate, should he consider the case meritorious, may suggest an appeal to the Rota rather than to the ordinary court of appeals. The reason for this is that even if the court of appeals reverses a negative decision given in first instance, the case still must proceed to the Rota because one affirmative sentence does not become definitive unless and until a confirmatory decision has been rendered.

Some cases are processed before the Rota in first instance. These include the cases of heads of states and their immediate families. Any pilgrim in Rome may ask that his case be tried initially before the Rota. Many canon lawyers favor the deletion of this latter provision in the law, since it is available only to persons of substantial financial means.

A review of the number of cases considered by the Archdiocese of New York in an ordinary year will present a breakdown of the various procedures we have just described. These figures represent an annual average of cases on the calendar during each of the past several years.

In each year fifteen hundred marriage cases were considered with a view to possible annulment or dissolution. In seven hundred and fifty instances either no basis for annulment or dissolution was found, or there was insufficient indication that an alleged basis could be proven. These seven hundred and fifty cases progressed no further than a preliminary investigation.

Six hundred and thirty marriages were declared null by reason of a defect in the canonical form of marriage; that is, be-

cause one or both parties were Catholic and the marriage did not take place in the presence of an authorized priest and two witnesses.

Twenty-five cases were tried in summary judicial process, usually on the grounds of bigamy. Once a case is admitted to summary judicial process the decision ordinarily is affirmative.

Fifteen cases were tried in formal process in first instance. A period of two years may elapse between the initial interview of the plaintiff and his Advocate and the publication of the sentence. Twenty cases were tried in formal process in second instance on appeal. The ratio of affirmative to negative sentences in first and second instance usually shows more than two to one. The basis in twenty of the thirty-five cases tried in formal process was an alleged inability to give marital consent. The alleged bases for nullity in the other fifteen cases included psychic impotence, physical impotence, force and fear, total simulation of consent, and partial simulation of consent. Annulments in the strict sense are few and far between and there are more ecclesiastical dissolutions granted in New York than are there formal annulments. Thirty-five dissolutions were granted by Rome in New York cases on the basis of non-consummation and lack of baptism of one or both of the parties. Twenty-five dissolutions were effected through the Pauline Privilege.

The financial aspects involved in the processing of cases for annulment or dissolution can, again, be illustrated by a study of the practice in the Archdiocese of New York. Court expenses in the year 1964 were ninety thousand dollars. Full-time employees included a staff of eight priests, nine lay stenographers, and a receptionist. Twenty priests worked part-time and without compensation as judges, Defenders of the Bond, and Advocates. Other expenses included the purchase and maintenance of office equipment; fees for medical experts in cases involving mental inability to form consent, physical and psychic impotence and non-consummation; the photostating of medical records; the maintenance of a library; and mailing. In addition to the mailing expense entailed in New York cases, the court handled approximately four hundred requests for testimony from courts in other parts of the world.

In 1964, the court received a subsidy of seventy thousand dollars from the Archdiocese. In addition, it received twenty thousand dollars—less than one-fourth of the total expense—from persons seeking annulments or dissolutions. Inability to pay the court's assessment is not a deterrent in the processing of a case. The court readily, perhaps too readily, gives gratuitous service. In the investigation of the seven hundred and fifty marriages in which it was found that no case for annulment or dissolution could be introduced, the court did not ask for payment of expenses. The petitioner in a lack of form case is asked to pay ten dollars. The petitioner in a Pauline Privilege case, as also in a case to be tried in summary judicial trial, is asked to pay sixty dollars. The petitioner in a case to be tried in formal judicial process is asked to pay one hundred and fifty dollars. In these latter cases, if the services of one or more medical experts is required, there is an additional fee of

(*Continued on page* 91)

ANNULMENTS

(Continued)

seventy-five dollars. The small sum given the dedicated medical experts is more an honorarium than a compensation for services rendered. Petitioners in cases which are tried on appeal in New York and Philadelphia are asked to pay sixty dollars. The court does not accept fees in excess of expenses. The expenses for a case which goes before the Rota may amount to between one thousand and one thousand five hundred dollars. In the few cases which go from New York to the Rota the court sometimes asks for a reduction or cancellation of expenses. When a case goes to the Rota it is translated into Latin or Italian, retyped in translation, and then printed. This work is a major item of expense. Part of the Rotal fee is for the payment of the Advocate and the maintenance of the Rota. The expenses for cases which go to the Sacred Congregation of the Sacraments or the Sacred Congregation of the Holy Office vary with the nature of the case and the volume of the acts. The total expenses for the work done in New York and Rome in one of these cases may be as low as two hundred dollars and as high as four hundred dollars.

While only God is completely objective, I think this paper approximates an objective presentation in summary fashion of the grounds for annulment and dissolution of marriages in the Church courts, the procedure in the processing of cases, and the practical results of these procedures in the Archdiocese of New York.

Should we look for, should we strive for changes in the law so that more persons can obtain annulments and dissolutions more expeditiously so that they may return to the sacraments or embrace the Catholic faith? Some Church lawyers think substantial changes in the law are in order. In fact, it has been suggested recently that a committee of judges and lawyers of the civil court should review the procedures of the Church court and offer suggestions as to possible changes in the law. It is quite probable that such a committee, drawing upon its rich background and experience in civil law, could make a substantial evaluation of present Church law procedure and might offer tangible suggestions towards its improvement.