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Comments and Casenotes

A QUERY ABOUT THE NEW MARRIAGE AGE LAW

Chapter 728 of the Maryland Laws of 1939¹ purports to set the minimum ages for marriage at 16 for females and 18 for males. The statute does not make it clear, however, whether its effect is to make marriages below those ages void (or perhaps voidable) on the one hand, or, on the other hand, effectual and valid even though forbidden and criminal.

The salient portion² of the statute reads:

“7. It shall be unlawful within this State for any female below the age of sixteen years or any male below the age of eighteen years to marry, or for a parent to permit any such female or male to marry, except on the certificate of a licensed physician, which shall be presented with the application for the marriage license, to the effect that the girl³ is pregnant, or for any female between the ages of 16 and 18 years, or for any male under the age of twenty-one years, to marry unless the parent or guardian of such male or female, in person or by signed affidavit, assent thereto, and, in the case of a female, swear or affirm that she is over the age of sixteen years, and in the case of a male, swear or affirm that he is over the age of eighteen years.”

¹ Md. Laws 1939, Ch. 728, repealing Md. Code, Art. 27, Sec. 363, amending Md. Code, Art. 62, Sec. 7, and adding Md. Code, Art. 62, Secs. 7A and 7B.

² The other sections (Md. Code, Art. 62, Secs. 7A and 7B) provide that the license issuing clerk or the witnesses at a Quaker ceremony shall demand the assent and statement required by Section 7 and shall incorporate same into the record, except for the certificate of pregnancy; and also provide criminal penalties involving a fine of from \$25 to \$250, and punishment as for perjury for making false statements to procure a license or ceremony. The new statute also repeals Md. Code, Art. 27, Sec. 363, which had made punishable a minister's knowingly marrying a male under 21 or a female under 16 without consent of parent or guardian. This statute was already largely obsolete under the existing marriage license statute, Md. Code, Art. 62, Sec. 7 (now amended by the statute under discussion) which required consent of parents or guardian before a license should issue for the marriage of a male under 21 or a female under 18.

³ The word “girl” in Section 7 raises a further query. If it refers only to a female under 16, then the exception for pregnancy is one-sided and makes no provision for an adult woman who is pregnant by a male under 18. Were it intended to provide for the latter situation, it would have been better to have used “female.” It would seem just as desirable to provide for this situation, but to do so under the statute may require some word-juggling.

Prior to this statute the Maryland law as to age for marriage was essentially this: Under the common law,⁴ if either spouse was under the age of seven, the marriage was totally void. If the female was between seven and twelve, or if the male was between seven and fourteen, the marriage was voidable by either, and subject to ratification⁵ when the under-age spouse reached 12 or 14 as the case might be.

An earlier Maryland statute⁶ (incorporated with more stringent language into the act of 1939) provided that no marriage license should issue where the female was under 18 or the male under 21 without the consent of parents or guardian of the under-age party. Under that statute, as under the 1939 act now being discussed the problem arose whether a marriage in violation of it was void or voidable on the one hand, or, on the other hand, valid and effectual even though criminal and forbidden.

While no Maryland case ever had so ruled, yet the proper conclusion apparently was that the latter answer was the correct one, and it was so suggested in two earlier treatments of the problem in this REVIEW.⁷ It was argued that if a person under age for parental consent (though over 12 or 14) actually was married by a religious⁸ ceremony in Maryland (either because the minister criminally married them without a license, or because a license had wrongfully been procured by perjury as to age, forgery of consent, or connivance of issuing clerk) the marriage was valid and not capable of being annulled or collaterally attacked for that reason alone.⁹ Analogies from the rule

⁴ There is no Maryland case squarely ruling on marriage age. On the common law rule, see Long, *Domestic Relations* (3rd Ed.), Sec. 27. See conflicting dicta in the dissenting opinion in *Lurz v. Lurz*, 170 Md. 423, 436-9, 184 A. 906, 185 A. 676 (1936), noted (1937), 1 Md. L. Rev. 348, 353-4.

⁵ For a dictum on ratification of infant marriages, with no mention of the appropriate ages, see *Jones v. Jones*, 36 Md. 447, 456, 11 Am. Rep. 505 (1872).

⁶ Md. Code, Art. 62, Sec. 7 (now amended by the statute under discussion).

⁷ Note, *Annulment of Marriage for Duress where Pre-Marital Relations Have Occurred* (1937) 1 Md. L. Rev. 348, 353-354, noting *Lurz v. Lurz*, *supra* n. 4; and an article, Strahorn, *Void and Voidable Marriages in Maryland and their Annulment* (1938), 2 Md. L. Rev. 211, 233-235.

⁸ Under Maryland law, the only way in which a marriage may be performed is by religious ceremony. See the article cited, *supra* n. 7, 2 Md. L. Rev. 211, 220-224.

⁹ See the article cited, *supra* n. 7, 2 Md. L. Rev. 211, 234-235, to the effect that annulments have been granted (in uncontested cases) where the only impediment was lack of parental consent, and in appealed cases where, in addition to that factor, other clearly recognized grounds for annulment were spelled out.

in other states,¹⁰ the Maryland rule that the license requirement is only directory,¹¹ and the fact that the reported Maryland cases¹² involving such marriages had gone off on other impediments to marriage all served to indicate this.

All of which poses the question: Has the 1939 statute entirely superseded the common law, discarded the 12-14 ages, and raised the age for total voidness from 7 to 16-18; or, on the other hand, has it preserved the 7 and 12-14 limits, and merely added to the 18-21 limits for parental consent another *in terrorem* proviso at the 16-18 level which attempts to prevent persons below those ages from getting married, without affecting the validity of the marriage if it has happened?

One thing seems certain—the same answer must *now* be given for the effect both of the new 16-18 years limits and the 18-21 ages for parental consent (as amended by the new statute). For whereas the earlier 18-21 year statute for parental consent had merely said “no license shall issue”, the 1939 statute says “it shall be unlawful . . . to marry . . .” both for the new purported minimum ages of 16-18 and, with respect to lack of parental consent, for marriages between those ages and 18-21.

It is this latter fact which suggests that the proper interpretation of the new statute may be that a marriage in violation of it (whether one under 16-18 or one between those ages and 18-21 without parental consent) is not a valid one. “It shall be unlawful” is capable of being interpreted as indicating a legislative intent to make the forbidden marriages not only criminal but also null and void. This is certainly stronger language in that direction

¹⁰ Madden, *Domestic Relations*, 65; *Payne v. Payne*, 295 Fed. 970 (Ct. of App. of D. C. 1924). Consider also a Maryland analogy in *Jones v. Jones*, 45 Md. 144, 159 (1876), to the effect that the (now obsolete) crime of a minister's marrying slaves without the master's consent did not render the marriage void.

¹¹ *Feehley v. Feehley*, 129 Md. 565, 99 A. 663, L. R. A. 1917C, 1017 (1916) discussed in the article cited, *supra* n. 7, 2 Md. L. Rev. 211, 221-224.

¹² In *Montgomery v. U'Nertle*, 143 Md. 200, 122 A. 357 (1923), both the parties were under the age for parental consent, but no mention of the impediment of non-age was made, and the annulment was granted for “fraud and deceit” on the basis of intoxication. This case is discussed in the article cited, *supra* n. 7, 2 Md. L. Rev. 211, 234, 244. In *Corder v. Corder*, 141 Md. 114, 117 A. 119 (1922), both the parties were under the ages for parental consent, but the annulment was granted for fraud, and, so it happened, for a fraudulent representation by the husband as to their being old enough to obtain a license in Maryland. This case is discussed in the article cited, *supra* n. 7, 2 Md. L. Rev. 211, 234-235, 245-246. Obviously, if non-age alone were a sufficient ground for annulment, it would not have been necessary to have gone to such pains to spell out intoxication and fraud, respectively, on the conflicting facts of those cases.

than the earlier "no such license shall issue" in the original version of the 18-21 rule for parental consent.

On the other hand, there are plausible arguments that the effect of the new statute is the same as was earlier the rule under the original 18-21 law for parental consent (marriage valid if it happens, although parties guilty of crime). The specific provision for criminal penalties,¹³ without any specific answer to the problem now under discussion suggests that the legislature meant only criminal consequences. The fact that "it shall be unlawful" applies (in the same sentence) both to the parties' engaging in a ceremony and their parents' permitting it can be argued to show that the effect is only *in terrorem*. The parents have no problem of status. Furthermore, that the statute only applies to marriages happening "within this state" shows that it was intended to prevent ceremonies rather than affect validity.

A further query arises: If it be held that the new statute does go to the validity of the marriages in violation of it, *how* will it affect them? Will it make them totally void and subject to both direct and collateral attack, or will it make them only voidable by direct attack under appropriate procedure during the joint lives of the contracting parties?¹⁴ A consideration of Maryland legal history with reference to marriage impediments¹⁵ indicates that this is no mere pedantic query. For instance, the plain word "void" in the statute on inter-marriage of near relatives has been judicially interpreted to mean only voidable by action during the joint lives of the parties.¹⁶ It would be no greater stretch of the imagination to limit "it shall be unlawful" to merely imposing criminal penalties, rather than affecting the validity of the marriage.¹⁷

The tendency of the Maryland court to uphold marriages whenever possible¹⁸ or, by ruling for voidability

¹³ The criminal penalties of the new statute are set out herein, *supra* n. 2.

¹⁴ For a treatment of the problem of "void or voidable" with reference to the earlier Maryland law of marriage age, see the article cited, *supra* n. 7, 2 Md. L. Rev. 211, 233.

¹⁵ See the whole article, *Ibid*, for a survey of the problem in its entirety.

¹⁶ *Harrison v. State*, Use of *Harrison*, 22 Md. 468, 85 Am. Dec. 658 (1864), interpreting Md. Code, Art. 62, Secs. 1, 2.

¹⁷ Consider that, on another occasion when the legislature set up an impediment to marriage, it made it clear that it did intend the statute to go to the validity of marriages. Thus, in the miscegenation statute, Md. Code Supp., Art. 27, Sec. 365, marriages between persons of the differing and prohibited races are said to be "forever prohibited, and void."

¹⁸ On this, see the article cited, *supra* n. 7, 2 Md. L. Rev. 211, 214, 225-231.

rather than voidness,¹⁹ to minimize the effect of defect in marriage, would help to indicate that the answer to the major query of this comment should be that the statute does not make the forbidden marriages void, but rather makes them, at worst, only avoidable by proceeding and, perhaps, not even that, but completely valid, although the parties and their guilty accessories may be criminally punishable.

This last would seem to be the most decent and socially desirable answer for the typical case, i. e., where by perjury as to age the parties improperly secure a license, go through a religious ceremony, and live together as husband and wife. It would be monstrous to say that such a marriage could later be attacked, directly or collaterally, or the legitimacy of the issue impugned. Rather, the better answer seems to be that, as under the older 18-21 statute, the forbidden marriage is valid, although the parties are punishable.

It is regrettable that the statute was not more carefully drafted so as to give a clear answer as to the legislative intent on the point under discussion.²⁰ The known²¹ existence of the analogous problem under the older 18-21 years statute should have called attention to the need for explicit solution of it in the new one.

¹⁹ *Ibid*; and consider also the Harrison case, *supra* n. 16.

²⁰ Consider also the fault in the statute pointed out *supra* n. 3; and the further point that the statutory provision withholding from the record the certificate of pregnancy (in the exceptional situation under Section 7) is a futile one in view of the fact that it will be obvious that pregnancy exists from the fact that the license issues to one under the statutory minimum age.

²¹ As witness the discussion of the point in the REVIEW in 1937 and 1938 in the casenote and article cited, *supra* n. 7.
