

Legitimacy of Children of Void or Voidable Marriages - Milton v. Escue

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Family Law Commons](#)

Recommended Citation

Legitimacy of Children of Void or Voidable Marriages - Milton v. Escue, 13 Md. L. Rev. 261 (1953)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol13/iss3/8>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

LEGITIMACY OF CHILDREN OF VOID OR VOIDABLE MARRIAGES

*Milton v. Escue*¹

Plaintiff-appellant, natural daughter of decedent, filed this declaratory proceeding against defendants-appellees,² the brother and three sisters of the decedent, and the Maryland ancillary administrator of his local real estate, for a declaration that she is the legitimate daughter of the decedent, and entitled to inherit his Maryland real estate to the exclusion of the defendants-appellees. Plaintiff alleged that she was born out of wedlock to the decedent, who had never married her mother, other than by a subsequent non-ceremonial ("common law") marriage in Virginia, which by Virginia law was ineffectual to make her father and mother husband and wife, but which she contended was sufficient to legitimate the plaintiff as the daughter of her father. The trial court sustained a demurrer to, and dismissed, the petition, but, on appeal, the Court of Appeals remanded, with permission to the plaintiff to amend to make a more specific allegation about the marriage between her parents, in which case and upon sufficient proof thereof, she would be entitled to claim as the legitimate daughter, under the normal rule that legitimacy or legitimation by the law of the domicile of the father will be recognized in Maryland.

While the case specifically is concerned with Maryland's recognition of legitimacy or legitimation, by the applicable law of the domicile, even though such result would not have been reached had Maryland law been applicable, yet it is proposed principally to discuss the implications of the case, and of the different Virginia law, with reference to the present Maryland law of the subject and the possibility of improving that local law, perhaps along the lines of the Virginia legislation. On the particular conflict of laws point, the Court merely followed and clarified its previous ruling in the important case of *Holloway v. Safe Deposit & Trust Co.*,³ where, at least for the devolution of personal property, it had recognized legitimation under the laxer rules of an-

¹ 93 A. 2d 258 (Md., 1952).

² As was pointed out in the opinion, *ibid.*, 265, the mother of the appellant was not a necessary party, inasmuch as the case involved merely plaintiff's legitimacy, as against her father, and not whether the father and mother were husband and wife.

³ 151 Md. 321, 134 A. 497 (1926), ap. dismissed, 274 U. S. 724-5 (1927).

other state which were applicable because that was the domicile of the father (and of the child)⁴ at the time.

In the *Holloway* case, legitimation by the applicable law of Nevada, which did not even require the pretense of a marriage between the parents, but merely recognition by the father, was held sufficient to entitle the child to claim as the legitimate child of the father for purposes of Maryland litigation. This, of course, went much farther than the Maryland law, which requires a valid marriage to the mother, as well as recognition by the father, in order to achieve legitimation. In the *Milton* case, the Court made it clear that it was prepared to extend the idea of recognition of foreign legitimation to the devolution of Maryland real estate, as well as to personal property, and it specifically rejected any distinction between the two problems, and accepted the modern view that foreign legitimation should as well be recognized for real property as for personal property.

Turning now to the principal scope of discussion, it should be noted, as pointed out above, that Maryland law requires a valid marriage to the mother, as well as recognition, in order to achieve retroactive legitimation of a child born out of wedlock. Prior to 1949, it regarded the issue of a void marriage, or a voidable one which was annulled, as illegitimate. But Virginia law, as applied here is much more liberal in both respects, for that Virginia law will recognize, either for purposes of initial legitimacy of a child born after a questionable marriage, or for subsequent legitimation by such a marriage after the birth of the child, not only a valid marriage sufficient to create the relationship of husband and wife, but an invalid marriage of the void or voidable type. This includes a so-called "common law" marriage, by simple contract without any ceremony at all, which is insufficient to create the relationship of husband and wife, but is sufficient to achieve legitimacy or legitimation.

By a statute enacted in 1949,⁵ and very slightly clarified in 1950,⁶ Maryland adopted a partial version of the Virginia

⁴ It will be noted that the Maryland Court, in both the *Holloway*, *ibid.*, and *Milton*, *supra*, n. 1, cases, stressed the domicile of the father *and* the child. General law is concerned only with that of the father; Restatement of Conflicts, Secs. 137-140; STUMBERG, CONFLICT OF LAWS (2nd ed., 1951), 330 *et seq.*

⁵ Md. Code (1951), Art. 16, Sec. 36; Md. Laws 1949, Ch. 29.

⁶ Md. Laws 1950, Ch. 33, which struck out the following second sentence:

"In such event, if it shall appear that such marriage was contracted in good faith by one of the parties thereto, and in ignorance of any obstacle to its validity, that fact shall be found and declared in the decree."

leaving the statute as now quoted, *infra*, n. 8.

idea, in an attempt to preserve the legitimacy of the children of defective marriages which are annulled, although it left uncertain whether a similar result will follow for the issue of marriages totally void and not annulled by any proceeding. The issue of merely voidable marriages not annulled by any proceeding, would, no doubt, be regarded as legitimate under common law principles.⁷ Furthermore, it is not clear under the current Maryland legislation whether the child must be born subsequent to the marriage, or whether such defective marriages as are within the scope of the statute will also count for purposes of retroactive legitimation under our present rules concerning that.

The statute in question now reads as follows:⁸

“This section shall apply whenever any criminal or equity Court of this state has for any reason annulled a marriage, and declared it to be null and void, or whenever any equity Court of this state has decreed a divorce *a vinculo matrimonii* for any cause which by the laws of this state render a marriage null and void *ab initio*. In such case the issue of such a marriage shall be deemed and declared to be the legitimate issue of the parents thereof.”

It is the belief of the writer of this note that this legislation, while attempting to serve a desirable policy, does not go far enough, and does not fully carry out the indicated intention. It is plausible to argue that, under it, the resulting legitimacy, where that would not result at common law, only happens when the defective marriage is actually annulled by a proceeding. Thus the issue of totally void marriages which are not annulled by a proceeding (as they do not have to be because total voidness may be asserted collaterally), would be worse off, because there was no annulment, than if there were an annulment.

But this is just the opposite of the situation at common law for the issue of merely voidable marriages, because they are regarded as legitimate unless there has been a proceeding, in which case the effect of the annulment is to render the issue illegitimate *ab initio*.⁹

⁷ Cf. Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment*, 2 Md. L. Rev. 211, 213 (1938).

⁸ *Supra*, ns. 5 and 6, discussed also in Strahorn, *Fifteen Years of Change in Maryland Marriage and Annulment Law and Domestic Relations Procedures*, 13 Md. L. Rev. 128, 129 (1953).

⁹ *Supra*, n. 7.

If this interpretation be correct then it would seem that some amendment of the Maryland statute would be indicated in order to carry out more clearly the legislative policy of preserving the legitimacy of the children of invalid marriages. That result should obtain whether the marriage be void or merely voidable, and, in either event, whether there be an annulment proceeding or not.

For it would seem to make no difference, if it is to be the State policy to preserve the legitimacy of the children of invalid marriages, whether the defect be one making the marriage totally void or merely voidable, or whether there is a proceeding, if one is either permissible or necessary.

Therefore, it is suggested that an amended statute, going as far as the Virginia one,¹⁰ is desirable, and some such language as follows would seem to effectuate that policy:

"The issue of marriages, including marriages which are invalid for lack of proper solemnization, which are voidable, or null and void in law, or annulled by an equity or criminal court, or by a divorce for the reason that the marriage is void *ab initio*, shall nevertheless be the legitimate issue of both parents, and any such marriage aforesaid shall be sufficient to legitimate prior born issue under the provisions of Article 46, Section 6, of this Code. Whenever the legitimacy or legitimation of issue shall be governed by the laws of this State, the above provisions shall apply regardless whether the marriage was contracted within or without this State or annulled or terminated by proceedings in a court of this State or elsewhere."

It will be noted that the last sentence above tries to make it perfectly clear that legitimacy shall be recognized in the cases provided whenever the quality of legitimacy is governed by the law of Maryland, regardless whether the marriage was performed or contracted in Maryland or the proceeding, if any, was in Maryland or elsewhere. It would seem sensible to make this perfectly clear, to guard against

¹⁰ Code of Virginia (1950) :
Section 64-6:

"When marriage legitimates children. — If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after marriage, shall be deemed legitimate (Code 1919, Sec. 5269)."

Section 64-7:

"Issue legitimate though marriage null. — The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate (Code 1919, Section 5270)."

any too-narrow interpretation that would require either the contract of marriage, or the particular annulment proceeding, if any, to occur in Maryland, so long as the law of Maryland, as the law of the domicile at the appropriate time, shall be the governing law as to initial legitimacy or subsequent legitimation.

It will be noted also that the proposal makes specific what is the case law of Virginia, under its legislation, as decided in the principal case, that the idea of a marriage invalid in law goes even to marriages invalid solely for lack of ceremony, i.e., "common law" marriages. Virginia,¹¹ like Maryland,¹² rejects common law marriage as a way of becoming husband and wife *inter sese*, although Maryland is a little bit stricter about the ceremony,¹³ in that it requires a religious ceremony, and has no provision for a civil ceremony. Maryland is like Virginia in the rejection of the idea of common law marriage, except that Virginia now accepts such a marriage for purposes of legitimacy of the child of the father, even though it will not do so for the relationship of husband and wife.

There would seem to be no reason why Maryland should not do likewise, if it is going to extend and clarify the policy already announced in the 1949 and 1950 legislation¹⁴ now under discussion, and it would seem desirable to make this explicit in any amended statute, rather than to run the gauntlet of judicial interpretation.

Other jurisdictions have gone much farther in the way of ameliorating illegitimacy, some like Nevada,¹⁵ as was recognized in the *Holloway* case, by requiring mere recognition without even a pretended marriage to the mother. It is not here suggested that Maryland should go *that* far, but rather that it should go only as far as Virginia has gone in making it clear that the offspring of any defective marriage, even those lacking ceremony, shall be legitimate, whether the defect makes it void or voidable, and whether there be a proceeding or not, or one is required or not.

Doing as is suggested in the proposed statute would merely make more explicit the general policy indicated by the present Maryland attempt to handle the problem of legitimacy of the issue of invalid marriages. It is to be

¹¹ *Offield v. Davis*, 100 Va. 250, 40 S. E. 910 (1902).

¹² *Denison v. Denison*, 35 Md. 361 (1872).

¹³ Virginia regards the license as mandatory, *Offield v. Davis*, *supra*, n. 11, where Maryland regards the religious ceremony as mandatory, *Denison v. Denison*, *ibid.*, n. 12.

¹⁴ *Supra*, ns. 5, 6, 8.

¹⁵ Nevada Compiled Laws (1929), Sec. 9483.

hoped that we shall profit by following the example we have from Virginia in the principal case.

It would seem better to draft practically a brand new statute rather than merely to add clauses to the statute as it now reads, because this would require awkward and extra terminology to achieve the same end. So it is proposed that some such language as above would be more desirable to carry out a policy of clarifying the legislation already enacted.

It is interesting to note, in sampling the similar legislation of other states¹⁶ than Virginia and Maryland, how those states which have in some way tried to deal with preserving the legitimacy of the issue of defective marriages have done so. Very frequently one finds statutes doing so only for marriages defective in a certain named way, with no provision for marriages invalid for other reasons. This would seem to indicate that the draftsman was thinking of a very narrow problem, and not of the whole matter of legitimacy of the children of all types of invalid marriages.

The question whether the little understood provision for absolute divorce for any ground making the marriage void *ab initio* was a way of trying to save the legitimacy of the issue of such marriages is now moot,¹⁷ since the 1949 and 1950 legislation in Maryland. It is now made explicit that such issue shall be legitimate after a divorce for that reason, and thus we shall probably never have a judicial ruling¹⁸ whether the divorce statute itself, without the subsequent legislation now under discussion, did or did not achieve the effect of preserving legitimacy.

It would be interesting to speculate as to other aspects of marriage and annulment law, if such a clarified statute as proposed above is to be passed. There are those who believe that many rulings on the merits of annulment cases, or cases of collateral attack on marriage, have been influenced by a judicial desire to preserve the legitimacy of the offspring of the marriage who would otherwise be found illegitimate, if the ruling were in favor of the annulment or of total voidness.

¹⁶ VERNIER, *AMERICAN FAMILY LAWS*, Vol. 1 (1931), Sec. 48, Vol. 4 (1936), Sec. 247, and Supp. (1938); 56 Harv. L. Rev. 624 (1943); 84 A. L. R. 499.

¹⁷ Cf. Strahorn, 2 Md. L. Rev. 211, 213, *supra*, n. 7, and 13 Md. L. Rev. 128, 129, *supra*, n. 8.

¹⁸ There is still a slight possibility of such a ruling in the event that Md. Code (1951), Art. 16, Sec. 36, is determined not to be retroactive. Such a situation would arise if either the marriage were performed or the divorce granted prior to the effective date of the statute, whereupon, in the event of the necessity for such a ruling, the prior law of legitimacy would still have to be applied.

If a clear cut statute is passed that will preserve the legitimacy of such issue if an annulment is granted, or if a marriage be declared totally void on collateral attack, then that need for adjusting the marriage law to the realities of the legitimacy situation will be obviated. It may be that some different substantive annulment and marriage validity law will result in a framework where there is not the same disastrous consequence of ruling against the validity of a marriage.

Be that as it may, now that we have set up a State policy of preserving the legitimacy of the children of invalid marriages, at least where there is some stated form of annulment proceeding, it would seem consistent and desirable to go the whole way and to straighten out all other possible difficulties mentioned above, including (1) whether the law applies to totally void marriages which are not annulled, (2) whether legitimation as well as initial legitimacy may be accomplished by a defective marriage, (3) whether the idea extends, as it does in Virginia, to marriages defective for lack of ceremony, and, finally, (4) the conflict of laws difficulty.