Appeal Nos. 2011AP1176
2011AP1177

Cir. Ct. Nos. 2009PR25
2009PR26

WISCONSIN COURT OF APPEALS
DISTRICT II

NO. 2011AP1176

IN RE THE ESTATE OF NANCY ELLEN LAUBENHEIMER:

JOSEPH MCLEOD,

PETITIONER-RESPONDENT,

V.

PATRICIA MUDLAFF N/K/A PATRICIA GUSKE, BARBARA NIGH AND MILLARD LAUBENHEIMER,

OBJECTORS-APPELLANTS.

NO. 2011AP1177

IN RE THE ESTATE OF NANCY ELLEN LAUBENHEIMER:

PATRICIA MUDLAFF N/K/A PATRICIA GUSKE, BARBARA NIGH AND MILLARD LAUBENHEIMER,

APPELLANTS,

V.

JOSEPH MCLEOD,

RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Pursuant to WIS. STAT. RULE 809.61 (2009-10)[1], these appeals are certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

WISCONSIN STAT. § 767.313(2) provides that "[a] judicial proceeding is required to annul a marriage. A marriage may not be annulled after the death of a party to the marriage."

Appellants allege that Joseph McLeod removed Nancy Laubenheimer from a nursing home and married her at a time when Nancy was incompetent. Nancy died shortly thereafter. The children of Nancy's first husband asked the circuit court to void the marriage of Nancy and Joseph. The circuit court concluded that Nancy's death prevented the court from declaring the marriage void. In ***Ellis v. Estate of Toutant***, 2001 WI App 181, ¶16, 247 Wis. 2d 400, 633 N.W.2d 692, we held that a marriage can be declared null and void after the death of a spouse. The legislature amended the annulment statute after ***Toutant*** and removed the reference to a judicial proceeding being used to "void" a marriage. *See* 2005 Wis. Act 443, §§ 22, 23, 145.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

The issue presented in this certification is whether—in light of the legislature's change to the annulment statute—a court has the authority to entertain an action to declare a marriage void after one of the spouses has died.

SUMMARY OF FACTS

Joseph married Nancy on November 7, 2008. Nancy was living in a nursing home at the time of her marriage to Joseph. Four weeks prior to the marriage, Nancy's doctors opined that Nancy was unable to receive or evaluate information effectively and that she was unable to communicate her decisions. Nancy died on February 5, 2009. Nancy's will left the bulk of her estate to her first husband's children. Joseph filed the will but asserted his statutory right as a surviving spouse to a share of Nancy's estate. As Nancy never adopted her first husband's children, and as Nancy had no children of her own, Joseph's election entitled him to Nancy's estimated $768,000 estate. The children of Nancy's first husband objected and asked the court to declare the marriage of Joseph and Nancy void on the grounds that Nancy lacked the mental capacity to consent to marriage. As noted above, the circuit court concluded that it was without power to do so.

BACKGROUND

Nancy married Luke Laubenheimer on August 18, 1972. Nancy and Luke had no children. Luke had three children from a prior marriage. Nancy never adopted Luke's children. Nancy executed a will on October 13, 1999, leaving her estate to Luke, and in the event Luke predeceased her, the bulk of her estate was to go to Luke's three children. Luke died on August 24, 2001. Nancy never updated her will after Luke's death.

In January 2007, Nancy suffered a stroke and her health began to decline. The facts are not clear as to when Joseph came into Nancy's life, but by March 2007 Joseph and Nancy were living together. On October 1, 2008, Nancy suffered another stroke. On October 11, 2008, Nancy's doctors signed a "statement of incapacitation" opining that Nancy was "unable to receive and evaluate information effectively or to communicate decisions," and that she lacked "the capacity to manage health care decisions." The statement of incapacitation activated Nancy's health care power of attorney which named Nancy's cousin, Diane Kulpa, as her agent for health care decisions. On October 13, 2008, Nancy was admitted to a nursing home. On November 3, 2008, Joseph removed Nancy from the nursing home to obtain a marriage license and on November 7 Joseph and Nancy married.

Luke's daughter Patricia filed a petition on January 13, 2009, seeking guardianship for Nancy. Patricia's petition alleged that Nancy "suffers from severe cognitive disability due to several strokes." The petition alleged that Joseph had removed Nancy from the nursing home against medical advice and that Nancy needed a guardian to readmit her to the nursing home. The petition contained an examining physician's report dated January 15, 2009, which opined that Nancy was incompetent and in need of a guardian.

The circuit court appointed a temporary guardian on January 27, 2009, finding that there was a "reasonable likelihood" that Nancy was incompetent. Kulpa was named temporary guardian of the person and Nancy's sister was named temporary guardian of the estate. Nancy died nine days later on February 5, 2009.

On June 9, 2009, Joseph filed a petition for the formal administration of Nancy's estate and requested the court to appoint him as personal representative of the estate. Joseph filed Nancy's 1999 will with the court but also asserted his WIS. STAT. § 853.12 right to a share of Nancy's estate. Section 853.12(1) provides that if a testator executed a will prior to marrying the surviving spouse, the surviving spouse is entitled to a share of the estate. The surviving spouse's share is equal to what his or her share would be if the testator died intestate, minus devises made to the testator's children and their issue. Sec. 853.12(2). As Nancy did not have any children, Joseph argued that he was Nancy's sole heir.

Luke's daughter Patricia also filed a petition for the formal administration of Nancy's estate. Patricia argued that Nancy's marriage to Joseph was invalid on the grounds that Nancy lacked the requisite mental capacity to enter into a marriage, and therefore Joseph had no right to a surviving spouse's share of Nancy's estate.

The circuit court denied Patricia's petition on the grounds that WIS. STAT. § 767.313(2) prevents a court from annulling a marriage after the death of a party to the marriage. Patricia appeals.[2]

DISCUSSION

Background on Wisconsin Law

The circuit court relied on WIS. STAT. §767.313(2) in denying Patricia's petition. Section 767.313(2) provides that "[a] judicial proceeding is

[2] Luke's son Millard and Nancy's sister Barbara are Patricia's co-appellants. For ease of reference, we will collectively refer to them as "Patricia."

required to annul a marriage. A marriage may not be annulled after the death of a party to the marriage." Given Nancy's death and § 767.313(2), the court ruled that it was without the power to address Patricia's petition.

Patricia argues that while the court could not annul Nancy's marriage to Joseph it did have the power to *void* the marriage. Patricia points to various provisions of WIS. STAT. ch. 765 which state that a marriage is invalid if one of the parties was incompetent at the time of marriage: (1) WIS. STAT. § 765.01 ("Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife."); (2) WIS. STAT. § 765.02(1) ("Every person who has attained the age of 18 years may marry if otherwise competent."); and (3) WIS. STAT. § 765.03(1) ("A marriage may not be contracted if either party has such want of understanding as renders him or her incapable of assenting to marriage."). Per WIS. STAT. § 765.21, a marriage entered into in violation of these provisions "shall be void." Patricia argues that as Nancy was not competent when she married Joseph, the marriage was void from its inception, hence the court could void the marriage even though it could not annul the marriage.

We begin by stating some maxims of marriage law in Wisconsin. Requirements for marriage are determined legislatively. *See* ***Van Schaick v. Van Schaick***, 256 Wis. 214, 216, 40 N.W.2d 588 (1949) (noting that Wisconsin abolished common law marriages in 1917). Marriage is a legal status that can be terminated through either divorce or annulment. Death ends an action for both annulment and divorce. *See* WIS. STAT. § 767.313(2); ***Socha v. Socha***, 204 Wis. 2d 474, 479, 555 N.W.2d 152 (Ct. App. 1996). The jurisdiction and power of a court to annul a marriage or to terminate a marriage by divorce are statutory.

Lyannes v. Lyannes, 171 Wis. 381, 392, 177 N.W. 683 (1920). Circuit courts have no equitable powers to end a marriage by divorce or annulment. ***Id.***

The next portion of this certification will trace the historical development of the concepts of void marriages and annulments.

Early Period: 19th to Early 20th Century

Wisconsin's very first statutory compilation, enacted in 1849, stated, "When a marriage is supposed to be void, or the validity thereof is disputed … either party [to the marriage] may file a petition … for annulling the [marriage] … and upon due proof of the nullity of the marriage, it shall be declared void by a decree or sentence of nullity." WIS. STAT. ch. 79, § 3 (1849). The next section in the statute provided that when the "validity" of a marriage was doubted, one of the parties to the marriage could file a petition to "affirm" the marriage. ***Id.***, § 4. "Void" and "affirm" were treated as different marital statuses and a judicial process was required to have a marriage declared "void" or "affirmed."

In ***Williams v. Williams***, 63 Wis. 58, 75, 23 N.W. 110 (1885), the Wisconsin Supreme Court stated, "[W]hen the validity of the marriage itself is to be determined, then the action should be to affirm or annul the marriage." In ***Wheeler v. Wheeler***, 76 Wis. 631, 632, 45 N.W. 531 (1890), the appellant argued that a void marriage could not be annulled because no marriage existed to begin with. The court disagreed, concluding that annulment was the procedure utilized by the courts to declare a marriage void. ***Id.*** at 633. The ***Wheeler*** court also distinguished between annulment and divorce: Where a marriage is valid, the judgment is for a divorce; where a marriage is void, the judgment is to annul it. ***Id.***

The supreme court has defined three types of marriages: valid, void, and voidable. ***Lyannes***, 171 Wis. at 389-90. A valid marriage is where the parties were competent when they entered into the marriage and complied with all the statutory requirements. ***Id.*** at 389. A void marriage is where the parties "by reason of some positive inhibition of the law are absolutely disabled and prohibited from sustaining to each other the lawful relationship of husband and wife." ***Id.*** A void marriage "is an absolute nullity from its very beginning and cannot be ratified." ***Id.*** at 390. A voidable marriage is one "which, although improper, illegal, or irregular in its inception, may by the removal of the impediments then existing or by subsequent cohabitation or recognition of the relationship become valid."[3] ***Id.*** at 389-90. "[A]nnulment is the proper remedy to set aside both the void and the voidable marriage." ***Id.*** at 392.

At common law, a void marriage could be questioned at any time, even after the death of one or both parties to the marriage. *See* ***Lyannes***, 171 Wis. at 390; ***Williams***, 63 Wis. at 69. This differed from a voidable marriage, which could not be annulled after death. *See* ***Davidson v. Davidson***, 35 Wis. 2d 401, 406, 151 N.W.2d 53 (1967). Beginning in 1909, the legislature placed limits on when an annulment action could be brought. WISCONSIN STAT. ch. 109, § 2351(2) (1909) provided that in an action to annul a marriage on the grounds that a husband and wife were "nearer of kin than … second cousins," if "any such

[3] For examples of voidable marriages that later were validated, *see* ***Halker v. Halker***, 92 Wis. 2d 645, 655, 285 N.W.2d 745 (1979) (marriage entered into when both parties failed to wait the statutorily required six months after their divorces was valid because the couple lived together for four years); ***Smith v. Smith***, 52 Wis. 2d 262, 270, 190 N.W.2d 174 (1971) (wife's bigamous marriage became valid when her first husband died); ***Davidson v. Davidson***, 35 Wis. 2d 401, 408-10, 151 N.W.2d 53 (1967) (bigamous marriage became valid once husband's divorce to first wife was finalized and after statutory waiting period was met).

marriage shall not have been annulled during the lifetime of the parties, the validity thereof shall not be inquired into after the death of either party." The legislature thus has a track record going back more than a century of setting limits on when an annulment action could be brought.

1959 Statutory Changes

The annulment statute was amended in 1959 so that "[n]o marriage shall be annulled or held void except pursuant to judicial proceedings." 1959 Wis. Laws, ch. 595, § 44. An additional change to the 1959 version of the annulment statute was that a marriage could be annulled "[w]hen such marriage is prohibited or declared void under WIS. STAT. ch. 245 [now WIS. STAT. ch. 765] for any cause not enumerated herein." 1959 Wis. Laws, ch. 595, § 45. The language added in 1959 seemingly created a new cause of action to declare a marriage void which was separate from an annulment action.

Other statutory changes from 1959, however, give us pause that the legislature created a cause of action to void a marriage. WISCONSIN STAT. § 247.03 (1959) was created and entitled "actions affecting marriage." 1959 Wis. Laws, ch. 595, § 48. Section 247.03(1) (1959) listed five actions affecting marriage: affirming the marriage, annulment, divorce, legal separation, and support payments by a husband. "Voiding" a marriage was not included.[4] Not listing voiding a marriage alongside annulment and divorce as an action affecting marriage in § 247.03(1) (1959) can be read one of two ways: (1) the legislature

[4] While WIS. STAT. § 247.03 (1959) has since been renumbered and renamed "actions affecting the family," and the amount of actions has increased, "voiding" a marriage is still not listed as an action. *See* WIS. STAT. § 767.001(1).

did not include "voiding" a marriage because it would be redundant—annulment is the process used to void a marriage, or (2) the legislature did not include voiding a marriage in chapter 247 (now WIS. STAT. ch. 767) because an action to void a marriage came through WIS. STAT. ch. 245 (now WIS. STAT. ch. 765). We view either reading as a reasonable interpretation of the legislature's actions.

1977-2005

In 1977 the annulment statute was amended to prevent a marriage from being annulled "after the death of either party to the marriage." *See* 1977 Wis. Laws, ch. 105, § 9. Additionally, the 1977 change removed the catchall phrase in WIS. STAT. § 247.02(9) (1975-76) that allowed for an annulment when any "marriage is prohibited or declared void under WIS. STAT. ch. 245 for any cause not enumerated herein." *See* 1977 Wis. Laws, ch. 105, § 9. The annulment statute was not amended again until 2005.

This court issued three opinions interpreting the annulment statute during this period. In ***Falk v. Falk***, 158 Wis. 2d 184, 186, 462 N.W.2d 547 (Ct. App. 1990), Robert and JoEllen Falk were married for sixteen years before divorcing in 1984. The divorce judgment required Robert to make maintenance payments to JoEllen. ***Id.*** at 187. JoEllen married Terry Utzig in 1988 in South Dakota. Like JoEllen, Utzig was also recently granted a divorce judgment in Wisconsin. ***Id.*** Utzig's divorce was less than six months prior to his marriage to JoEllen, a violation of WIS. STAT. § 765.03(2), which makes it "unlawful for any person, who is or has been a party to an action for divorce … to marry again until 6 months after judgment of divorce is granted." As § 765.03(2) states that any marriage entered into before this six-month waiting period "shall be void,"

JoEllen's marriage to Utzig was not a valid marriage in Wisconsin. ***Falk***, 158 Wis. 2d at 187.

When Robert discovered JoEllen's remarriage in 1989, he filed a motion to terminate his maintenance payments. ***Id.*** While the motion was pending, JoEllen moved to annul her marriage to Utzig. ***Id.*** The circuit court "granted the annulment on August 30, 1989, concluding that JoEllen's marriage to Utzig was void under [WIS. STAT. §] 765.03(2)." ***Falk***, 158 Wis. 2d at 187.

The issue on appeal was whether a void or voidable remarriage terminates a former spouse's obligation to pay maintenance. ***Id.*** We reiterated ***Lyannes***'s statement that annulment is the proper procedure for setting aside both void and voidable marriages. ***Falk***, 158 Wis. 2d at 189. Additionally, we held that the statutory requirement that maintenance payments must be terminated in the event of remarriage is unconditional and must apply even though the second marriage was void or voidable under Wisconsin law. ***Id.*** Thus, "JoEllen's remarriage to Utzig, though void as a result of the annulment, was sufficient to terminate Robert's maintenance obligation." ***Id.*** at 191.

In ***Sinai Samaritan Medical Center, Inc. v. McCabe***, 197 Wis. 2d 709, 711, 541 N.W.2d 190 (Ct. App. 1995), Morgan McCabe appealed a judgment against him that awarded Sinai Samaritan expenses incurred in the treatment of Morgan's deceased wife Jean. He argued on appeal that the circuit court erred in concluding that he and Jean were married at the time she was treated by Sinai Samaritan. ***Id.*** Morgan argued that Jean's Mexican divorce from her prior husband was invalid and therefore he was never legally married to her. ***Id.*** at 711-12. We held that Morgan could have sought annulment of his marriage to Jean prior to her death on the grounds that her Mexican divorce was invalid, but that

Jean's death "closed that avenue." ***Id.*** at 713. As Jean's death meant there was no genuine issue of material fact as to whether she was legally married to Morgan at the time of her death, the circuit court appropriately decided the issue on summary judgment. ***Id.*** at 713-14. We also stated that while a marriage may be "void," it still governs the legal relations of the parties unless it is annulled. ***Id.*** at 713 n.3.

Toutant, however, conflicts with the notion that annulment is the only way to declare a marriage void. In that case, John Ellis married Marjorie Toutant one month after he was granted a divorce from his previous wife. ***Toutant***, 247 Wis. 2d 400, ¶6. Toutant died two weeks later. ***Id.***, ¶7. Toutant's son Kevin, who was named as the personal representative in Toutant's will, filed a petition for the administration of his mother's will. ***Id.***, ¶8. Ellis filed a surviving spouse's selection of personal property. ***Id.*** The circuit court declared that Ellis's marriage to Toutant was void because the marriage violated Wisconsin's waiting period between a divorce and a subsequent marriage. ***Id.***, ¶11.

On appeal, Ellis argued that the circuit court did not have the authority to annul the marriage because a marriage cannot be annulled after death. ***Id.***, ¶15. We stated that while we agreed that a marriage could not be annulled after death, Toutant's son was not asking for an annulment, but rather that the marriage be declared null and void. ***Id.*** At the time ***Toutant*** was decided, the annulment statute read: "No marriage may be annulled or held void except pursuant to judicial proceedings. No marriage may be annulled after the death of either party to the marriage." *See* ***id.***, ¶16. In analyzing the statute, we stated, "While the first sentence expressly prohibits both the annulment or voiding of a marriage except pursuant to court proceedings, the second sentence pointedly prohibits only annulment after the death of either spouse. Thus, a marriage can be declared null and void after the death of a spouse." ***Id.***

2005 Statutory Changes

In 2005, the legislature changed the annulment statute a final time and removed any reference to a judicial proceeding being used to "void" a marriage. 2005 Wis. Act 443, §§ 22, 23, 145. Had the language about "voiding" a marriage not been removed, ***Toutant*** would clearly govern this case. The revised statutory language, however, calls into question whether ***Toutant*** applies.

The bill that changed the language of the annulment statute contains an explanatory note, which says: "Reference to voiding a marriage is not included in the restated language because [WIS. STAT.] ch. 767 does not include actions to void a marriage." 2005 Wis. Act 443, § 145. This ambiguous note can be read two different ways. Patricia argues that this note is evidence that the legislature was specifying that an action to void a marriage comes through WIS. STAT. ch. 765, not ch. 767. Another reading of the note is that it represented the legislature's intent to eliminate *any* action to void a marriage because annulment is the only process used to declare a marriage void, and that if the legislature intended the note to preserve a statutory right to void a marriage, it would have inserted such language into ch. 765. We presume that the legislature means what it says in a statute and that every word excluded from a statute is excluded for a reason. *See* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶14 n.9, 316 Wis. 2d 47, 762 N.W.2d 652. WISCONSIN STAT. § 765.03(1) states that "[a] marriage may not be contracted if either party has such want of understanding as renders him or her incapable of assenting to marriage." A marriage entered into in violation of this requirement "shall be void." WIS. STAT. § 765.21. This is clear language, yet nowhere in ch. 765 is there a mechanism for declaring a marriage void as there is in ch. 767 for annulling a marriage.

We are respectfully divided over how to read the 2005 legislative changes and whether the legislative note should be considered evidence of the legislature's intent. If we interpret the 2005 legislative changes in a way that prevents a marriage from being voided after death, we are effectively overruling ***Toutant***. While this very well may have been what the legislature intended to do, we are hesitant to come to this conclusion, as only the Wisconsin Supreme Court can overrule one of our decisions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We therefore ask for guidance from our high court.

CONCLUSION

Our analysis of case law and statutory changes covering three different centuries has not clarified whether "void" is a marital status that flows from an annulment or a separate process outside of annulment. The answer to this question has ramifications far beyond this case. We need not look any further than our favorite celebrity gossip magazines to discover an interesting fact pattern. John and Betty Witherspoon, parents of Hollywood starlet Reese Witherspoon, married in 1970 and separated in 1996, although they never divorced. Zach Johnson, *Reese Witherspoon's Father John Sued for Bigamy by Wife Betty*, US WEEKLY (May 10, 2012, 2:17 p.m.), http://www.usmagazine.com/celebritynews/news/reese-witherspoons-father-john-sued-for-bigamy-by-wife-betty-2012105; Cathy Scott, *Reese Witherspoon's Mom Aims to Annul Estranged Husband's New Marriage to Protect Him*, FORBES (May 11, 2012, 1:57 p.m.), http://www.forbes.com/sites/crime/2012/05/11/reese-witherspoons-mom-heads-to-court-to-annul-estranged-husbands-new-marriage-for-fear-new-wife-is-a-gold-digger/. Betty learned via a newspaper announcement that in January of this year John married Tricianne Taylor, a woman ten years his junior. Scott, FORBES. Betty filed a petition to annul John's second marriage on the grounds of bigamy.

Johnson, US WEEKLY. The petition alleges that John might be suffering from dementia, that he does not remember marrying Tricianne, that Tricianne has tried to take out a loan as John's wife, and that Tricianne had John sign a new will. Scott, FORBES.

If this scenario occurred in Wisconsin and John were to die before his second marriage was annulled, it is unclear whether Betty or Tricianne would be considered his wife for probate purposes. On the one hand, his marriage to Tricianne is clearly void on bigamy grounds.[5] *See* WIS. STAT. § 765.03(1). On the other hand, if annulment is the only process to void a marriage, Betty would have no recourse once John died. *See* WIS. STAT. § 767.313(2). A void marriage continues to govern the parties' legal relations until it is annulled. ***Sinai Samaritan***, 197 Wis. 2d at 713 n.3.

We do not know nor can we infer from the facts of this case whether Joseph took advantage of Nancy, whether he comforted her in her difficult final years, whether Nancy was competent when she married Joseph, or whether Nancy's step-children are attempting to claim what is not theirs. We also do not know whether the legislature intended to prevent a court from making this sort of inquiry or whether it intended that an unlawful marriage could still be declared void after the death of a spouse. If chapters 765 and 767 are read such that annulment is the only process available to void a marriage, Wisconsin law would protect the unscrupulous Lothario or seductress who woos and marries a

[5] Assuming John was competent when he married Taylor, their marriage could eventually become valid. *See* WIS. STAT. § 765.24 (laying out the steps for how a bigamous marriage can become lawful).

terminally ill and mentally infirm individual. Conversely, the legislature may have wanted to prevent a party from contesting the validity of a marriage after death to prevent him or her from gaming the tax code in probate court. We respectfully request the Wisconsin Supreme Court to grant certification and provide guidance to our courts.