

HOW CAN A MARRIAGE BE DECLARED NULL?

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Marriage First; Nullity Second

The faith community's understanding of marriage is steeped in 2,000 years of theological knowledge.

The theology of marriage has developed over the centuries through a broadening of horizons and a bridging of expanses. The writings on marriage could fill libraries. So let the reader beware! Though the following series may be somewhat informative regarding the nullity of marriage, it pales into insignificance in regard to the church's theology of marriage.

Our theology of marriage is like a coin. On one side there is an exposition of "what marriage is." When the coin is flipped over, the converse is established - "what marriage is not." This series will deal with the underside of the coin - what marriage is NOT in light of what it is.

Aware of the church's rich teaching on marriage the series situates marriage within its legal categories. A church law is referred to as a canon. I will reference key canons throughout the series [should the reader wish to investigate further!]. The specific canons, or laws, on marriage number one hundred and eleven. Admittedly, these laws are both dry and dense. Nonetheless they are rooted in the theological understanding of marriage. Some of our laws have been in existence for almost two millennia, and others are derived more recently from the teaching of the Second Vatican Council.

The series offers a cursory overview of tribunal proceedings regarding marriage nullity. Canons 1055-1062 set the stage. They define in legal categories, "what marriage is." Though marriage is a contract between two persons, it is much more. It is a covenant relationship

between a man and a woman that is ordered to their good and the procreation and education of children. When a baptized man and a baptized woman marry, it is a sacrament (c. 1055).

As the *Catechism of the Catholic Church* states: "The intimate community of life and love which constitutes the married state has been established by the Creator and endowed by him with its own proper laws God himself is the author of marriage (CCC, 1603)."

The law declares that marriage is brought about (c. 1057) through: (1) the consent of the parties (the bride and groom), (2) legitimately manifested, (3) by those qualified according to the law (again, the bride and the groom). So, if the consent was defective - marriage was NOT brought about. If the consent was NOT legitimately manifested - marriage was NOT brought about. If one or both of the persons was unqualified according to law - the marriage was NOT brought about. Each of these three concepts will be addressed fully.

Furthermore the teachings and laws of the church touch on all marriages to varying degrees, i.e., marriages between Roman Catholics, Protestants and non-Christians. This series will deal with each of these instances, but the initial presentations will focus on sacramental marriages. However, first an important presumption.

A legal presumption - marriage enjoys the favor of the law

Once a wedding ceremony has taken place the legal presumption is that there is a valid marriage union. Anything to the contrary is going to have to be proven. Marriage enjoys the "favor of the law" (c. 1060).

The ministers of marriage are the bride and groom. As the *Catechism of the Catholic Church* states: "In the Latin Church, it is ordinarily understood that the spouses, as ministers of God's grace, mutually confer upon each other the Sacrament of Matrimony by expressing their consent before the Church (CCC, 1623)."

So after these two ministers (the bride and groom) have stood up publicly, and made a manifestation of their consent, a presumption takes over in Church law. The presumption is: now we have a valid sacrament of marriage. The two ministers are old enough; capable according to church law; and they have said what needed to be said. So the faith community presumes the sacrament of marriage has come about (c. 1057).

Nevertheless, like any legal presumption in any legal system, it is a "presumption." It will yield to contrary evidence. Analogously, in American criminal law, a well known legal presumption is that you are innocent until you are proven to be guilty. The presumption is innocence. Yet if enough proof is brought forward to indicate otherwise, the presumption of innocence will yield to the verdict of guilt.

In much the same way, in church law any marriage (c. 1055) that takes place is legally presumed to be a valid sacrament. Yet if enough information is brought forward to indicate otherwise, the presumption of validity will yield to a declaration of nullity.

A declaration of nullity, not an annulment

The word annulment is not used in the universal law of the Church. It is not utilized because it is inappropriate. The word annulment implies that you are taking "something" and wiping it away. This is not what is being done when a declaration is granted.

The more apt term is declaration of nullity. The Church is really declaring, in hindsight, that on the day of the wedding these specific factors (consent, its legitimate manifestation, or the legal qualifications of the

ministers) prevented the two ministers from bringing about a valid sacrament - as had been presumed! The ceremony is not wiped away - all the guests saw it happen! The relationship of husband and wife is not wiped away - that remains the supposed relationship between the man and woman (c. 1061.3)! The children are not wiped away - they remain legitimate (cc. 1137 & 1138)! The declaration states that a valid marriage had not been brought about, as had been presumed.

Once a wedding has taken place, the legal presumption is that a marriage has been brought about. This presumption of validity stands in law, until contrary facts prove otherwise. The declaration of nullity affirms the contrary to be true.

Other Sacraments can also be declared null.

Declaring a sacrament null pertains not only to marriage but to the other sacraments as well. Furthermore, just as the word annulment is inappropriate in regard to marriage, so too would it be inappropriate in regard to other sacraments. The word annulment implies that you are taking "something" and wiping it away. This is not what is being done when a declaration of nullity is granted.

Keep in mind that when a marriage is declared null the Church is really stating, in hindsight, that on the day of the wedding certain factors (consent, its legitimate manifestation, or the legal qualifications of the ministers) prevented the two ministers from bringing about a valid sacrament - as had been presumed!

As legal procedures exist for a marriage case, so too do they exist for declaring the nullity of sacred ordination (cc. 1708-1712). These cases are handled by the appropriate congregation in the Roman Curia or by a tribunal designated by it. Many of the laws governing a tribunal investigation of marriage also apply to this process (cc. 1400-1500; 1501-

1670). When a declaration of nullity is granted in regard to sacred ordination, the Church is stating in hindsight that certain factors prevented the bringing about of a valid sacrament of ordination - as had been presumed!

Let's look at another sacrament for a clearer analogy to marriage. Let's take a hypothetical situation in regard to the Eucharist. Unlike marriage, the minister of the Eucharist is "solely a validly ordained priest" (c. 900). On a particular Sunday you go to Church, but the pastor is away. A visiting priest processes to the altar to lead the community in worship. The community prays together, the music is wonderful, the homily is terrific, everyone goes to Holy Communion. Off you go - it was a nice experience.

Two weeks later, it is discovered that the visiting priest wasn't a priest at all. It was a man named John DaSeever who played priest for the weekend! John could be severely punished in church law for his deception, including excommunication (c. 1378). Suppose the deception became public and thereby scandalous. In this case a public declaration of nullity would be warranted.

In hindsight, the Church would publicly declare the Eucharistic consecration null and void. As the *Catechism of the Catholic Church* states: "Only validly ordained priests can preside at the Eucharist and consecrate the bread and the wine so that they become the Body and Blood of the Lord (CCC, 1411)."

The legal presumption that day had been that bread and wine became the Body and Blood of Christ. Yet in reality that day bread and wine remained bread and wine. When everyone walked up to communion all they received was a piece of bread and a sip of wine. There had been no sacramental effect at the Mass that day. The Eucharist would be declared null. However, it would not be called an annulment of the Eucharist.

Keeping the two sacraments (marriage and Eucharist) in mind, better situates and expresses why the word annulment is

inappropriate. At that particular Mass, people gathered together to pray. They were inspired by the music. They may have been moved by the man's talk. They certainly received grace from God. God heard their prayers. They received grace when they approached God with open hearts. All the declaration states is that there was no sacramental effect in regard to the Eucharistic elements at that particular mass. Why? Because something was missing in this "minister" - ordination.

The ministers of marriage are the bride and groom, not the priest. In much the same way, a declaration of nullity in regard to marriage does not deny that one or both of the parties entered the marriage with good intentions. Presumably, they loved one another. They had hopes and dreams. They lived under the operation of God's grace. There were good times and bad times. There were children born of their union.

The declaration does not affect any of that. It simply states that the bond of marriage was not brought about that day. A marriage had not been brought about, as had been presumed. There may have been a defect of consent on the part of one or both ministers. Or, the consent was not legitimately manifested. Or, one or both of the parties may have been incapable according to law to exchange consent. The legal presumption of validity yields to a declaration of nullity.

More often than not, declarations of nullity are granted due to a defect of consent on the part of one or both of the ministers.

The Diamond of Consent.

Three factors are to be kept in mind regarding a valid sacrament of marriage. The law states that marriage is brought about (c. 1057) through: (1) the consent of the parties (the bride and groom), (2) legitimately manifested, (3) by those qualified according to the law (again, the bride and the groom).

Once the bride and groom exchange their vows, the marriage (c. 1055) that takes place is legally presumed (c. 1060) to be a valid sacrament. Yet if enough information is brought forward to indicate otherwise, the presumption of validity will yield to a declaration of nullity.

What kind of information is needed in a tribunal investigation regarding nullity? Information is gathered in regard to the consent of the parties, the manner in which the consent was manifested and the qualifications of the ministers to place an act of consent.

The consent of the parties

The most common nullity proceeding examines the first criteria, the consent of the two parties as it was exchanged on the wedding day. This is only logical as it was that consent which brought about the presumption of validity. This type of tribunal proceeding is commonly (though inappropriately) referred to as an annulment. As previously stated the better term is declaration of nullity.

Remember, marriage is brought about through the consent of the parties. However, if it can be proven that the consent was defective, on the part of one or both of the parties, then marriage was NOT brought about.

The bride and groom are the ministers of marriage

It is crucial to keep in mind that the bride and the groom are the ministers of the sacrament of marriage. The man gives the sacrament to the woman, the woman gives the sacrament to the man. As the *Catechism of the Catholic Church* states: "In the Latin Church, it is ordinarily understood that the spouses, as ministers of God's grace, mutually confer upon each other the Sacrament of Matrimony by expressing their consent before the Church (CCC, 1623)."

In spite of this theological tenet, more often than not, the priest or deacon at a wedding is considered by many to be the minister of the sacrament. Many call him the minister. Even his

liturgical gesture of extending his arm in blessing over the couple can look as if he is conferring the sacrament. However, he is not.

The priest or deacon is an "official" witness of the faith community. Along with the best man and maid of honor, he is one of the three individuals who witness what the two ministers are doing. Our theology teaches that it is the consent of the two ministers which brings about the sacrament of marriage.

Consent is an "act of the will." Now that's a nice philosophical concept and hard to get your fingers on. Yet the parties manifest what their wills desire when they say "I do" or repeat the marriage vow.

The ministers' consent (cc. 1095-1107) is like a diamond, insofar as it is multi-faceted. For instance, it is a free act of the will, not a forced act. There is an understanding of what marriage is all about with its essential elements of permanence, fidelity, and conjugal love (which is open to children). So it is presumed that the ministers marry according to the mindset of the church.

There is good discretionary judgment on the part of both parties as they consent to marriage. In other words, there are no red flags raised saying to the individuals, "don't get married at this point in your life"; "don't marry this particular person"; "don't marry as the relationship is seriously troubled"; etc.

It is presumed that neither minister suffers from a psychological anomaly. For example, they are not schizophrenic, paranoid, or suffer from multiple personalities. Obviously, untreated, these conditions would impact their will.

There is no fraud. There are no conditions placed on consent. There is no error about an essential quality of the person one is about to marry, or obviously an error in regard to the person (marrying the wrong identical twin!).

There is no deceit involved in consent. There is a willingness and capacity to fulfill the obligations of marriage. All of these facets of

consent and others are presumed to be healthy and active at the time of consent.

The proceedings surrounding a tribunal investigation circle the consent of both parties and put a question mark on it. The court officials look back in time and raise all kinds of questions about the two ministers. What were their families of origin like? What modeling regarding the role of husband and wife did they receive as children? What was their understanding of marriage at the time of consent? In accord with the mindset of the church, did the ministers intend a lifelong, monogamous union that was open to the gift of children? Were there any conditions placed on their consent? And so forth

What the proceedings attempt to determine is whether any facet of the diamond of consent was defective in one or both of the parties on the wedding day. The presumption is that everything was indeed present. The burden of proof is on the one petitioning for the declaration of nullity.

Any individual has the right to petition the church for a declaration of nullity (cc. 1674 & 1675). That is very different from saying one has a right to a declaration of nullity. One does not have such a right. However, if it can be proven that something essential was lacking in the consent of one or both of the parties, the Church will grant a declaration of nullity. This is the legal theory behind a declaration of nullity.

A Declaration of Nullity based on Force and Fear.

Recall from the last section that three factors are to be kept in mind regarding the legal presumption that once a marriage takes place it is a valid

sacrament. The law states that marriage is brought about (c. 1057) through:

- the consent of the parties (the bride and groom),

- legitimately manifested,
- by those qualified according to the law (again, the bride and the groom).

The last section addressed the theory of "the diamond of consent." Here we will concretize the theory with an example.

As the *Catechism of the Catholic Church* states: "The Church holds the exchange of consent between the spouses to be the indispensable element that 'makes the marriage.' If consent is lacking there is no marriage (CCC, 1626)."

Here is what you know ...

Let's suppose you were a friend of the groom's mother. You had attended the wedding of John and Susan in 1970. It was a beautiful ceremony. Both Susan and John looked so happy. The reception was one of the best parties you had ever been present at. Within the first year of marriage they had a son, John Jr.

Unfortunately, the marriage only lasted eight years when John and Susan divorced. However, you just heard that the church declared the marriage null. You can't believe it! You saw Susan walk down the aisle that day. You heard her and John, as the ministers, say, "I do." Susan and John were married and had a child. How can the church declare the marriage null? It's preposterous! Or, is it?

Here is what you didn't know ...

The investigation surrounding the proceedings for a declaration of nullity uncovered the following facts. Remember it was 1970. John and Susan were 18 year old seniors in high school. They had dated for only four months when she discovered she was pregnant. When she told her parents, they responded: "You have to get married. There is no question about it!" Her parents insisted that for the sake of the child she must marry her boyfriend.

Susan thought about her parents' directive for a few days. She went back to them and said: "I don't want to get married. I'm only eighteen. John is only eighteen. I don't love him

and I'm certain he doesn't love me. I'll have the baby without question, but there is no way I will go through with a wedding!"

Her parents responded in anger by saying, "Fine! It's your decision. You're an adult and we can't make you get married. However, if you don't get married, we don't ever want to see you again. Good-bye, good luck, you are on your own. That's how strongly we feel as adults regarding the legitimacy of our first grandchild!"

So the circumstances were: Susan was eighteen, pregnant, and going to be thrown out of the house and abandoned with an infant unless she went through with a wedding ceremony. It was under those circumstances that she walked down the aisle that day. As she told it: "I smiled all day and no one knew what I was really feeling."

In fact, only a few people knew what Susan was feeling. Everyone else at the church thought this was a wonderful experience for Susan. As soon as Susan had stood up publicly and said, "I do," those in attendance and the faith community at large presumed a valid sacrament of marriage had been brought about. The church presumed that Susan, as the minister, meant what she said, otherwise, why would she have said it?!

In the proceedings before the tribunal Susan was able to prove that she married only under the directives of her parents due to the fear of being abandoned with a child. Her brother knew of the exchange between her parents, as did her best friend. Through witness corroboration the fear brought to bear on the minister's consent was substantiated. So after the testimonies of the witnesses had been collected and the legal arguments had been put forward, the marriage was declared null by the church on the grounds of force and fear.

Everyone at the church that day had seen this young bride walk down the aisle. Everyone had heard Susan, as the minister, say: "I do." However, after examining this minister's

consent, as it had existed on the wedding day, it was clear she was acting against her will.

The sacrament can only be brought about by a free act of the will. Therefore, there could not have been an exchange of the sacrament on the wedding day, as the faith community had presumed.

Respecting the final judgment:

"OK", you say, "that's an easy example, the nullity is quite obvious." Yet it is only obvious because you know the facts. Remember, a few minutes ago, as the friend of the groom's mother, you couldn't believe it! You saw Susan walk down the aisle that day. You heard her and John, as the ministers, say, "I do." They were married and had a child. A few moments ago you thought a declaration of nullity was preposterous!

However, in light of the facts, you now see the declaration has merit. As the *Catechism of the Catholic Church* states: "The consent must be an act of the will of each of the contracting parties, free of coercion or grave external fear. No human power can substitute for this consent. If this freedom is lacking, the marriage is invalid (CCC, 1628)."

The *Catechism* goes on: "For this reason (or for other reasons that render the marriage null and void) the Church after an examination of the situation by the competent ecclesiastical tribunal, can declare the nullity of the marriage ... (CCC, 1629)."

The proceedings surrounding a declaration of nullity are governed by laws of confidentiality. Though the fact a declaration has been granted in the affirmative is a matter of record in the church, the facts of the case are not. The grounds, the acts and the proceedings themselves are not open to the membership of the church. The confidential nature of tribunal proceedings is intended to protect the good name and reputation of all the parties involved.

In coming to a judgment regarding the nullity of a marriage, tribunal officials examine all of the facts. They assess these facts in view

of the church's theology and laws on marriage. There are many checks and balances in the church's procedural laws. The decision of one judge is always scrutinized by other judges. The judgments of one court are always reviewed by an appellate court. The faith community at large is asked to respect these judgments. For remember, it is the courts alone that have all the facts.

Was there a legitimate manifestation of the ministers' consent?

Once again, three factors are to be kept in mind regarding a valid sacrament of marriage. The law states that marriage is brought about (c. 1057) through:

- the consent of the parties (the bride and groom)
- legitimately manifested,
- by those qualified according to the law (again, the bride and the groom).

Once the bride and groom exchange their vows, the marriage (c. 1055) that takes place is legally presumed (c. 1060) to be a valid sacrament. Yet if enough information is brought forward to indicate otherwise, the presumption of validity will yield to a declaration of nullity. For instance, if it is determined that the consent of the parties was not legitimately manifested, then marriage was NOT brought about.

The manner in which consent is manifested

Now we move away from the consent of the parties. We are no longer scrutinizing the act of the ministers' wills. Rather the tribunal investigation is concerned with the official who witnessed the exchange of consent.

As the *Catechism of the Catholic Church* states: "The priest (or deacon) who assists at the celebration of a marriage receives the consent of the spouses in the name of the Church and gives the blessings of the Church. The presence of the Church's minister (and also the witnesses)

visibly expresses the fact that marriage is an ecclesial reality (CCC, 1630)."

From external observances it is presumed that the parties' consent was legitimately manifested in the presence of a duly appointed priest or deacon. In other words the proper form governing marriage had been observed (cc. 1108-1123, 1127).

What is this "proper form" of marriage? Well, a baptized Catholic, who has not left the church by a formal act, must exchange consent in the presence of an authorized church official (unless this requirement is dispensed). In most cases this means that a Catholic is married in the presence of a duly appointed priest or deacon. The presence of this official is required for VALIDITY (c. 1108).

The faith community presumes that the official was indeed duly appointed to witness the minister's exchange of consent. A tribunal investigation which seeks to determine the opposite is called a proceeding regarding a "defect of form." Cases that require this type of investigation are rare.

The ministers' consent is not called into question, but rather the authority of the official who witnessed the consent is questioned. If it is proven after the fact that the official lacked authority, the marriage is declared null by reason of a defect of form. In other words marriage was NOT brought about as the official lacked the proper authority to witness the ceremony.

An example of a defect of form

In 1991, two Catholics, Tom and MaryBeth, wished to marry in her parish church in the presence of her uncle, Father Bill Suspension. Father Bill was from the mid-West. Three months before the wedding he had presented all of his credentials to the pastor and everything was in order. Indeed the wedding ceremony took place and was enjoyed by all. The presumption (c. 1060) was that a valid sacramental marriage (c. 1055) had been brought about (c. 1057).

Unfortunately two years later the couple divorced. Tom petitioned the church for a declaration of nullity based on "defect of form." It appears that after the divorce Tom was shocked to discover that Father Bill had been suspended from the ministry two weeks before the wedding. Therefore he was no longer authorized to witness marriages. The priest hadn't told anyone because he was embarrassed by these circumstances.

The tribunal investigation uncovers that this was indeed the case. Since the church official lacked the authority to witness the union, the marriage is declared null by reason of a defect of form. In other words marriage was NOT brought about as the official lacked the proper authority to witness the marriage. There had been no duly appointed official present.

Marriages of non-Catholic Christians (Protestant marriages)

Baptized Protestants are not bound by the Catholic form of marriage, i.e., they do not have to exchange their consent in the presence of a Catholic official. A baptized Catholic who left the church by a formal act and married after the year 1983 (the year the present code of law went into effect) is not bound by the form of marriage either.

The Catholic Church considers marriages of Protestants to be valid marriages. So if two Lutherans marry in the Lutheran church in the presence of a Lutheran minister, the Catholic Church recognizes this as a valid sacrament of marriage. If an Episcopalian man marries a Presbyterian woman before a Justice of the Peace, the Catholic Church recognizes this as a valid sacrament of marriage.

This is consistent with our theological understanding of marriage. Once the two ministers (baptized Christians) have exchanged their consent a valid, sacramental marriage (c. 1055) has been brought about. Indeed how odd it would be if the faith community only recognized the marriages of Roman Catholics as

valid sacraments. Baptism is the foundation of the Christian life (CCC, 1213 & 1617).

However, once the Catholic Church recognizes a marriage as a valid sacrament, any question of invalidity must come before a church tribunal. Marriage is both a private and public reality. An investigation of validity concerning a Protestant marriage occurs if a subsequent marriage involves a Catholic. The faith community at large is concerned for its individual members. The marriage of any member of the Church affects all the members (c. 1059).

So if two Lutherans marry and subsequently divorce, and the divorced man now wishes to marry a Catholic woman, he is not free to do so. He would only become free if the Church issued a declaration of nullity for his first marriage. Nearly twenty percent of formal marriage cases pending before the Boston Tribunal pertain to marriages of non-Catholic Christians.

Lack of form cases

This type of case is not judicial in nature, but rather administrative. In other words no judgment is required to overturn a presumption of validity. The invalidity of the marriage is obvious from the start.

As stated, a baptized Catholic, who has not left the church by a formal act must marry in the presence of a church official. This is the form of marriage and it is required for validity (cc. 1108-1123, 1127). If the proper form, being married in the presence of a priest or deacon, is not followed on the wedding day, the faith community does not recognize the union as a marriage. There is no presumption of validity in this instance. So there is no presumption in law to overturn.

For example, if two baptized Catholics decide to marry in the presence of a Justice of the Peace, instead of a priest, they have not observed the form of marriage. By choosing not to observe the proper form of marriage, they

have chosen not to have their union recognized as a valid marriage by the faith community.

A good deal of the work for the initiation of these cases is done on the parish level. Parochial ministers gather documents to establish that the parties did not follow the proper form at the time of the wedding ceremony. The documents also establish the civil marriage in question was never subsequently validated in a church ceremony. After this administrative process is completed by the tribunal there is an opportunity to admonish parents regarding the fulfillment their parental obligations to the children born of the union. The Boston tribunal handles many of these cases each year.

After the administrative process is completed, either party would be free to marry in the Church. Neither is bound to the previous union because there was never a sacramental marriage in effect. Remember, marriage is brought about (c. 1057) through: (1) the consent of the parties (the bride and groom), (2) legitimately manifested, (3) by those qualified according to the law (again, the bride and the groom). From the outset it was never legally presumed that marriage had been brought about, as the parties never observed the correct form of marriage when they exchanged consent.

Are the ministers qualified according to the law?

Remember that three factors are to be kept in mind regarding a valid sacrament of marriage. The law states that marriage is brought about (c. 1057)

through: (1) the consent of the parties (the bride and groom), (2) legitimately manifested, (3) by those qualified according to the law (again, the bride and the groom).

Once the bride and groom exchange their vows, the marriage (c. 1055) that takes place is legally presumed (c. 1060) to be a valid sacrament. Yet if enough information is brought

forward to indicate otherwise, the presumption of validity will yield to a declaration of nullity. For instance if one or both of the persons was unqualified by law to place consent - then marriage was NOT brought about.

The qualifications of the parties

A great deal of pastoral care and preparation is required before a couple celebrates their marriage (cc. 1063-1072). Part of this preparation is concerned with the ministers' legal qualifications to administer marriage. In some particular instances individuals are impeded from doing so.

Certain laws render a person incapable of contracting marriage validly (cc. 1073-1082). These laws are called diriment impediments. Many (though not all) of these impediments can be dispensed prior to the marriage. Once the requirement is dispensed, the person is then rendered capable of marriage. There are twelve specific diriment impediments listed in law (cc. 1083-1094).

A required age

One of the twelve impediments requires the minister must be a specific age. You may be amazed to hear that it is sixteen for a boy and fourteen for a girl! Before you fall off your chair remember that the law of the church is world-wide. As hard as it is to believe, these ages are acceptable in some cultures.

If someone below the stated age attempts marriage, they do so invalidly. Let's suppose a young man claims to be eighteen when in fact he is five days short of his sixteenth birthday. He marries an eighteen year old woman. The wedding is lovely and everyone presumes a marriage has been brought about.

A year later the couple divorces. The woman wishes to remarry, but is unable to do so because her prior bond is presumed to be valid. If she can prove in church court that the groom was not of legal age at the time of consent, the marriage would be declared null. The presumption that this was a valid marriage

yields to a declaration of nullity. The groom was in fact incapable by law of placing consent.

Sister Martha B. Badd ...

A person in sacred orders or religious vows who attempts marriage also does so invalidly. Suppose Sr. Martha B. Badd of Boston travels around the country a great deal in her apostolate. She meets, and over time, falls in love with a man from Denver. She neglects to tell him she is a religious woman. She also neglects to mention this to the priest who is going to officiate at their wedding in Denver. The priest (like the groom) is so taken by Sr. Martha's personality that he doesn't follow through on the necessary paperwork and the wedding occurs. Everyone assumes they have just witnessed a marriage.

A month later Sr. Martha can no longer live with her deception and confesses the truth. The marriage would be declared null because she was incapable by law from placing consent.

Protecting the common good

Marriage is more than a "private" act between two parties. It affects the faith community at large. These impediments exist to protect both the individuals involved and the wider community. Aside from those mentioned above other situations prohibit an individual from placing a valid act of consent on a wedding day. A person who commits the following two specific crimes in order to marry, does so invalidly: abducting the intended spouse; murdering the husband or wife of the intended spouse.

A valid, prior bond of marriage renders a person incapable of marriage. It has unfortunately happened that a person has lied about a previous marriage. Though pre-marital investigations attempt to address this type of deception, they are not always successful.

As an aside, you may read in the parish bulletin that two individuals are soon to be married. These are called the banns of marriage. This is more than a social announcement. It is a

legal observance to ascertain the freedom of both parties to marry. Remember, many laws exist simply in response to abuses. Sadly, people are not always honest about past marriages.

Pre-existing relationships between the parties may also render an individual incapable of marriage. For example, direct blood relationships - King Oedipus could not validly marry his mother! Some relationships through adoption and marriage ("in-laws") also may render one incapable of valid consent.

A Catholic who wishes to marry an unbaptized person must first receive a dispensation from disparity of cult. As the *Catechism of the Catholic Church* states this dispensation: "... presupposes that both parties know and do not exclude the essential ends and properties of marriage and the obligations assumed by the Catholic party concerning the baptism and education of the children in the Catholic Church (CCC, 1635)."

The legal presumption of validity will yield

The law presumes that the premarital investigations have determined the ministers are legally capable of marriage. However, if after a marriage, a couple divorces and they can prove that a diriment impediment existed at the moment of consent, the marriage is declared null.

More often than not the existence of a diriment impediment is discovered during an tribunal investigation of defective consent. If the impediment is proven, the formal processes regarding consent cease and the marriage is declared null by reason of the undispensed diriment impediment.

These cases are extremely rare - perhaps one or two a year. This fact bespeaks the great care priests, deacons and pastoral associates give to premarital preparation for the thousands of marriages that take place each year throughout the Archdiocese.

Marriage is forever ... or is it?

Not long ago, I read an editorial in *The Pilot*, entitled "Marriage is Forever." I stopped for a moment and pondered, "Well, on the one hand ... but, then again, on the other hand."

The phrase "marriage is forever" underscores our belief that marriage is indissoluble. In other words, marriage cannot be dissolved by any human power or for any reason other than death (c. 1141).

However, when affirming this truth it's important to know what we mean by the word "marriage." As the *Catechism of the Catholic Church* states: "The Lord Jesus insisted on the original intention of the Creator who willed that marriage be indissoluble. He abrogates the accommodations that had slipped into the old Law. Between the baptized, 'a ratified and consummated marriage cannot be dissolved by any human power or for any reason other than death' (CCC, 2382). The Church does not have the power to contravene this disposition of divine wisdom (CCC, 1640)."

The Catechism and the law (c. 1141) define a consummated and sacramental marriage as indissoluble. It is important to keep in mind that once the faith community defines what marriage is, conversely, it is defining what it is not. In the same manner once the faith community defines that this quality belongs to this particular marriage, it is conversely defining that the same quality is not identically attached to every type of marriage (c. 1056).

A consummated and sacramental marriage is indissoluble. So conversely, a non-consummated marriage is dissoluble. It can be dissolved. A non-sacramental marriage is dissoluble. It too can be dissolved.

A marriage which is not consummated can be dissolved by the Church

The Holy Father, for a just cause, at the request of one or both of the parties, will dissolve a valid, sacramental marriage that is not

consummated (c. 1142). He will also dissolve a valid, non-sacramental marriage that is not consummated (c. 1142).

There are specific legal procedures to be followed in these cases (c. 1697-1706). Ultimately, the Apostolic See alone adjudicates the case. However, the local tribunal instructs the initial phases of the case at the request of the bishop. Everything is then forwarded to Rome.

The present procedures respect the personal dignity of both parties. These cases are processed with a great deal of discretion and tact. They are in fact rare.

When an allegation of non-consummation surfaces, efforts are made to determine the parties' willingness to submit a petition of this nature to Rome. Given the sensitive nature of the case, parties may wish to exhaust another avenue first.

The law presumes consummation after the spouses begin living together (c. 1061). Rather than attempting to prove the contrary, parties may allege non-consummation as an indication of a defect of consent. In this instance the tribunal investigation would focus on the possibility of a declaration of nullity. If this declaration is in the affirmative, a case for non-consummation would be avoided.

A marriage which is not sacramental can be dissolved by the Church

A marriage is sacramental if both of the ministers are baptized Christians (c. 1055). So conversely, if one or both of the parties is not baptized, the marriage is not sacramental. It is however a valid marriage. Through their consent the parties have brought about a union of husband and wife. This union is blest by God. Whether the union is between Muslims, Jews, Hindus or Buddhists.

So for example, if a Jewish man marries a Jewish woman in the presence of the rabbi, the Catholic Church considers that to be a valid marriage. We would not call it sacramental however, as neither minister is Christian. Yet

"marriage is forever" and so the parties are bound to the commitment for life.

However, if they divorce and the Jewish man wishes to marry an unmarried Catholic he is unable to do so. The church considers him bound to his first marriage for life. Once the Church recognizes a marriage as a valid, any question of invalidity must come before a church tribunal. However, anyone whether baptized or not, can bring a case before a church court (c. 1476).

A petition of this sort would only occur if the subsequent marriage involved a Catholic. The faith community at large is concerned for its individual members. The marriage of any member of the Church affects all the members (c. 1059). Marriage is both a private and public reality.

In this instance of the Jewish marriage there are two options. The first is the formal procedure which calls into question the consent of the two parties as it existed on the wedding day - a declaration of nullity. The second option involves a dissolution of the Jewish marriage. It is possible to dissolve a non-sacramental marriage according to church law.

There are two processes in church law which dissolve non-sacramental marriages. One procedure is called the Pauline Privilege and supervised by the bishop (cc. 1143-1147). The other procedure is referred to as a Favor of the Faith. In this instance the pope dissolves the marriage in question. Respect for a person's ability to practice the faith is an underlying principle of these legal proceedings. The Boston Tribunal processes a small number of these cases each year.

Why Tribunals?

Divorce is usually a very painful experience for individuals. After that pain has been endured, the idea of petitioning for a declaration of nullity seems insurmountable to people. Can't the church simply accept the civil divorce? Furthermore,

marriage is a private thing! Why does the church involve itself?

The Church, like the state ...

The church, like the state, considers marriage to be a public act. Marriage is not simply a private matter between two individuals. It has many public ramifications for both the civil and church societies. There is the good of the spouses, the welfare of children and the cohesive nature of the societies as a whole. Families are the bedrock of societies and so societies regulate the institution of marriage.

As the *Catechism of the Catholic Church* states: "The well-being of the individual person and of both human and Christian society is closely bound up with the healthy state of conjugal and family life (CCC, 1603)." We refer to the family as the "domestic church."

Premarital requirements are placed on the bride and groom by both societies. Without a civil license there can be no civil recognition of marriage. Two Catholics must marry in the presence of a priest or deacon and two witnesses. If they do not there is no church recognition of a marriage.

Civily, if persons are already married, they cannot marry another. If they attempt to do so, they commit the crime of bigamy, and the second marriage is not recognized as valid by the state. The same is true in the church. A person who is already married cannot marry another. They are incapable of doing so because of the prior bond. The attempted second marriage would not be recognized as valid in the faith community.

Civil divorce

But, you say, "The state allows divorce!" It will dissolve the first valid bond of marriage for various reasons. Once the marriage is dissolved, the person is then no longer bound to the first marriage contract. With this contract dissolved the state permits the parties to remarry. It all sounds so "civil", this power to dissolve!

Though the state no longer considers the divorced partners husband and wife, the faith community does. This is where the church and state are at variance. The faith community holds that a valid, consummated sacramental marriage can never be dissolved "... by any human power or for any reason other than death" (c. 1141). Church law does not recognize the legal effects of a civil dissolution of marriage.

A declaration of nullity

No human power can dissolve a valid, consummated sacramental marriage. This statement is rooted in the church's scriptural, theological and canonical traditions (CCC, 1640 & 2382).

A declaration of nullity is not a dissolution of marriage. It is not a church divorce! Rather, it is a judicial pronouncement that a valid marriage had not been brought about (c. 1057), as the faith community had presumed. It is a pronouncement decreed within the church's judicial system.

Tribunals

What is the tribunal? It is the church's court in which legal acts and procedures are observed to solve disputes and questions. Who comprises it? It is composed of judicial personnel, i.e., judges, advocates, defenders, and others. What is done there? Judicial trials are undertaken to pursue or vindicate rights, to declare juridic facts or to impose penalties.

In regard to marriage, the *Catechism of the Catholic Church* states: "... the Church after an examination of the situation by the competent ecclesiastical tribunal, can declare the nullity of [the] marriage ... (CCC, 1629)."

Anyone, whether baptized or not can bring a case before a church court. All of the Christian faithful have access to the courts to vindicate and defend their rights. Church courts are carefully regulated by canon law. There are three levels of church courts in law: the first is diocesan (titled The Metropolitan Tribunal here in Boston), the second is regional (titled the

Court of Appeal), the third is the Roman Rota. Diocesan courts, in actual practice, are occupied primarily with matrimonial cases, i.e., adjudication of the validity or nullity of marriages.

The diocesan bishop has chief oversight for the diocesan court (c. 1419 & 1420). There are various officials at the court. The judicial vicar heads the diocesan court and is assisted by the associate judicial vicar and judges of the tribunal. The defender of the bond argues to uphold the bond of the marriage that is in question. Procurators represent and act on behalf of parties, while advocates ensure that the rights of the parties are upheld. All exercise judicial authority in accord with canon law.

The legal professionals who serve on the church court here in Boston are both men and women, in full time and part time capacities.

They hold license degrees, or in addition, doctoral degrees in canon law. They are assisted by a support staff of six dedicated individuals.

Marriage trials in general

A trial concerning marriage nullity follows three stages. First, a person initiates a case. The tribunal officials determine the nature of the case. It may focus on the parties consent, or the legitimate manifestation of that consent, or the parties qualifications to place consent. The judge decides the court's jurisdiction, the petitioner's standing and whether the case has merit. The judge then contacts the other party to the case and fixes the legal grounds on which the case is to proceed.

Second, evidence is gathered from the parties, witnesses and relevant documents. Third, the entire case, including arguments submitted by advocates and the defender of the bond, is discussed orally or in writing. Then the judges render a decision. All judgments are forwarded or appealed to the next level, the regional tribunal. Once confirmed, the decision of the judges is final.

The children are legitimate!

When a marriage of parents is declared null by the church many people are confused about its impact upon the legitimacy of the children. In fact a judicial sentence which declares the nullity of a marriage does not affect the legitimacy of children born of that union. Any statement or belief to the contrary is simply wrong.

Tragically for children, it is a common misconception that a declaration of nullity renders them illegitimate in the eyes of the faith community. The laws of the Catholic Church clearly state that this is not the case (canons 1137 & 1138). I believe the misconception is derived from two perspectives.

First, this harmful fallacy is derived from the use of the word "annulment." The word is inappropriate when discussing proceedings of nullity before a church tribunal. In fact, the word annulment is not used in the law of the church. Rather, a trial proceeding which declares the nullity of marriage (canons 1673, 1677.3, 1682, 1684 & 1690) is more aptly referred to by the term, "declaration of nullity".

The word annulment implies that you are taking "something" and wiping it away. When this erroneous word is applied to a declaration of nullity, it signifies that the entire relationship between the spouses is wiped away or erased, including the legitimacy of children. This is one reason the word is wrong and not used in church law. Rather a marriage that is declared null is thereafter referred to as a putative, or "supposed," marriage (canon 1061.3). It was a marriage contracted in violation of an impediment, condition or defective consent, but in good faith on the part of one or both of the contracting parties.

Second, the misappropriation of the term illegitimate indicates a misunderstanding of legitimacy. Legitimacy is a legal term, or construct, that is held by many legal systems throughout the world. The term indicates knowledge of a child's paternity. The maternity

of a child [the Latin word for mother is "mater"] is obvious. The issue of the child's paternity [the Latin word for father is "pater"] can be less so. The term legitimacy connotes that a child's father is the husband of the child's mother at the time of birth. In no way could a declaration of nullity deny a child's paternity. At the time of birth, the legally presumed relationship between the child's father and mother was indeed that of husband and wife. A declaration of nullity does not deny this. Since there was a putative marriage, the legitimacy of the child cannot be affected.

Legitimacy is one of the first issues addressed to parties who are involved in tribunal procedures regarding marriage. The misconception is so pervasive that it needs to be confronted. Unfortunately, it is not uncommon for spouses who have obtained a civil divorce to continue ex-spousal hostilities in the post divorce situation. These hostilities can surface in the parental relationship, and clearly the children suffer. There are few things more heart wrenching to tribunal officials than to discover that a child has been told by a parent that the Church is going to render him or her "illegitimate" through the granting of a declaration of nullity. Informed parents who make such a statement have allowed anger at another adult to triumph over the well being of the child.

The church promotes the dignity of children in many arenas, including its legal structures. It is imperative to state clearly and unambiguously that children born of a marriage that has been declared null are legitimate. There is no room for misconceptions.

Misconceptions about Declarations of Nullity

There are many misconceptions which surround declarations of nullity. You may have heard some of them. The process takes years to complete! It

costs thousands of dollars! It only matters who you are, or, who you know!

Misconceptions need to be confronted. So let me address some of the more prevalent ones and refute them.

1. Declarations take years to complete - NO.

Tribunal officials begin with the premise that the marriage in question is indeed a valid sacrament. Anything contrary is going to have to be proven. The burden of proof is on the Petitioner. There are certain time limits throughout the proceedings in which individuals have the right to take actions or respond (c. 1465-1467). Cases are tried in the order they are presented (c. 1458). On average, a marriage proceeding before the Boston Metropolitan Tribunal takes approximately one year, as is in accord with the law (c. 1453).

2. Declarations cost thousands of dollars - NO.

There are court costs associated with the processing of trial proceedings (c. 1649). The cost is not a donation to the Church. Rather, it is a fee for services rendered.

There are various fees for differing types of cases. Formal cases involving investigations of a defect of consent are the most common type of cases. Presently in Boston (Cleveland, too) the estimated cost to a Petitioner (c. 1649.1) of processing this type of investigation is \$ 450.00. This reflects only half of the actual case expenditures, as the archdiocese assumes the other fifty percent of the costs.

There is discretion on the judge's part regarding a reduction of the fee (c. 1649.1). Furthermore, if there is a need to pay in installments, over time, the person is accommodated. The monies support the operation of the church court- salaries and building expenses.

3. It only matters who you are, or, who you know - NO.

It does not matter the name or position of the Petitioner, Respondent or any witness.

Everyone is treated with the same procedural rights in law. No one is penalized for being well known. No one is penalized for being unknown. Everyone is treated fairly and in accord with the norm of law. No officer of the court is permitted to take part in a case in which there is a family relationship, close friendship, animosity, or desire to profit or avoid a loss (c. 1448).

4. Declarations render children illegitimate - NO.

A declaration of nullity does not affect the legitimacy of children born of that union. Any statement or belief to the contrary is simply wrong.

The laws of the Catholic Church clearly state that legitimacy is not called into question (cc. 1137 & 1138). Tragically for children, this misconception is too common. For the dignity of our children this fallacy needs to be confronted.

5. Declarations are "Catholic divorce" - NO.

No human power can dissolve a valid, consummated sacramental marriage. This statement is rooted in the church's scriptural, theological and canonical traditions. A declaration of nullity is not a dissolution of marriage. It is not a "church divorce."

Rather, it is a judicial pronouncement that a valid marriage had not been brought about as the faith community had presumed. The law states that marriage is brought about (c. 1057) through: (1) the consent of the parties (the bride and groom), (2) legitimately manifested, (3) by those qualified according to the law (again, the bride and the groom).

If a tribunal investigation determines: (1) the consent was defective, then marriage was NOT brought about, (2) if the consent was NOT legitimately manifested, then marriage was NOT brought about, (3) if one or both of the persons was unqualified according to law, then the marriage was NOT brought about.

In each situation there is a judicial determination that marriage had not been

brought about as had been presumed. There is no dissolution of a marriage bond.

6. In granting a declaration the Church doesn't care about all I endured in my marriage - NO.

The Church cares a great deal for persons who have suffered in marriage. Petitioners, Respondents and witnesses are treated with pastoral care and sensitivity by tribunal personnel.

In addition, when a declaration is granted, both parties are free to marry again in the Church UNLESS either is restricted from doing so (cc. 1684 & 1685). The right to marry is based in the natural law. However, it is not a limitless right - certain restrictions may be placed upon its exercise (for example, the diriment impediments discussed in a previous part of this series).

A tribunal investigation may surface patterns of physical, sexual, chemical, or emotional abuse. Patterns of self-destructive behavior may also be evident. Individuals may suffer from untreated, though diagnosed, psychological illnesses. These instances, and others, may warrant a restriction regarding a future marriage until the issues are satisfactorily addressed. The good of the individual, future spouse and children, and the sanctity of the sacrament demand this cautionary tool.

7. In granting a declaration the Church doesn't care about all the children endured - NO.

The Church is very concerned for the welfare of the children of divorce. The Church insists that parents do all in their power to provide for the physical, social, cultural, moral and religious upbringing of their children (c. 1136).

Judges admonish parents to fulfill both their civil and ecclesial obligations to children when a declaration of nullity is granted (c. 1689). Parents must also verify that their

obligations to children are met before they remarry in the church (c. 1071.1).

8. One court's decision renders a marriage null - NO.

The Church declares a marriage null only after two concordant affirmative decisions. It is incorrect to state that a marriage has been declared null after the decision of one court. Due process involves the decision of the First Instance Court (titled The Metropolitan Tribunal here in Boston) and the decision of an Appellate level Court (either Provincial or Roman). A case is pending under procedural law until the Appellate Court's decision brings about a final judgment (cc. 1682-1684).

9. Declarations are always granted - NO.

It is important for divorced individuals to know that the Church affords them the legal right to petition for a declaration of nullity (cc. 1476 & 1674). No one has a right to a declaration of nullity, but rather, the right exists to petition for one.

The burden of proof is on the Petitioner. The legal presumption is that the marriage in question is valid (c. 1060). Certainly, if a marriage has ended in divorce, something has gone wrong. The tribunal investigation seeks to determine if anything was defective at the start. The answer may be in the affirmative. It also may be in the negative.

10. Only a marriage of short duration, without children, can be declared null - NO.

As stated, the Church affords any divorced person the right to petition for a declaration of nullity. The length of the marriage or presence of children does not prevent the acceptance of a petition.

However, with that said, the longer the duration of marriage the more difficult it is to overturn the presumption. Every case requires witness testimony. The presumption of validity cannot be overturned on the testimony of one

party. There must be corroborative proof (c. 1678-1680).

So common sense indicates that the further you move away from the moment of consent, the more difficult it is to overturn the presumption of validity. Witnesses have died or are unlocatable, or, they may no longer remember the circumstances as the wedding happened long ago.

Nonetheless, as the Church affords individuals the right to petition, individuals should exercise this right.

11. Prior marriages of non-Catholics [whether Christian or unbaptized] are invalid - NO.

These marriages are valid marriages. If both ministers (bride and groom) are baptized Christians, they are valid sacramental marriages. Non-Catholics are not bound by the church laws which govern the form of marriage for Catholics. Obviously the faith community would not expect two Presbyterians to approach a Catholic priest to witness their exchange of vows. As long as they exchange consent, their marriage is considered a valid sacrament by the Catholic Church.

If two Jews marry before the rabbi that is considered a valid (non-sacramental) marriage by the Catholic Church. Any question of invalidity, or dissolution, must come before a church tribunal.

So if two Presbyterians marry and subsequently divorce, and the divorced man now wishes to marry a Catholic woman, he is not free to do so. He would only become free if the Church issued a declaration of nullity for his first marriage. For once the Catholic Church recognizes a marriage as a valid sacrament, any question of invalidity must come before a church tribunal.

This type of petition would occur if the subsequent marriage of the Protestant or non-baptized person involved a Catholic. The faith community at large is concerned for its individual members, as the marriage of any member of the Church affects all the members

(c. 1059). Nearly twenty percent of formal marriage cases pending before the Boston Tribunal pertain to marriages of non-Catholics.

12. It's easy to get a declaration in the United States - NO.

The process is involved. The Petitioner is asked to submit detailed testimony. The tribunal contacts the former spouse. Witnesses are required. An expert in the field of psychology may be required for an assessment. It is not an easy process. However, it is not impossible either.

The misconception that it is thought to be easy may rest in the increased number of declarations over the past twenty years. In 1968 the Boston tribunal processed 10 cases involving defective consent. In 1996 the same tribunal processed over 700 of these cases. The increase is due to a substantial change in the procedural law of the church. Cases are heard locally rather than in Rome. They may also be handled by single judges, rather than a tribunal panel of three judges. However, the sentence of every case is sent to the Appeal Court and reviewed by a tribunal, i.e., a panel of three judges.

13. There are too many declarations granted in the United States - NO.

The United States vs. other countries

In the last twenty years, the numbers of declarations are much higher in this country than they had been in the past. Yet this is due to the fact that the procedural laws governing marriage cases were expanded in the late 1960's. Cases no longer had to go to Rome. They could be adjudicated locally. The appellate system was also somewhat streamlined. Furthermore, Roman jurisprudence was expanded in the light of the teaching of the Second Vatican Council. Cases could be heard on new grounds of jurisprudence.

Tribunals across the United States are operative so that individuals may vindicate their rights. The bishops of our country have invested

personnel and resources to ensure the church's jurisprudence and procedural law are fulfilled. Unfortunately, such an investment in justice is not as evident in other parts of the world. This is why the numbers in the United States appear high. In fact they are skewed.

Cultural factors in the United States

There has been much written in the faith community that First World countries - especially the United States - have fallen into the trap of materialism and hedonism. The American culture is commonly referred to as pagan.

Once we admit to this we must also acknowledge the consequences. One obvious consequence is that the ministers of the sacrament of marriage live in this culture. They are formed and raised in this culture. This is a culture that says nothing is permanent. This is a culture that promotes sexual excess. This is a culture that perpetuates a contraceptive mentality. Our children and youth are bombarded with these pagan, cultural values.

The Church presumes that at the time of marriage, our ministers are committing to

permanence, fidelity, and conjugal love. That is the presumption. One can readily see in this culture how the presumption could be overturned subsequent to a wedding ceremony.

The greater number of declarations are therefore due to procedural law changes, an expansion of jurisprudence, and cultural changes in our society. It's interesting to note however that fewer than twenty percent of those who can petition, do petition. The vast majority of divorced Catholics do not.

Since over eighty percent of divorced individuals remarry, one can only assume most do so outside of the faith community. It is this reality which undermines the faith community, not the superficial notion that there are too many declarations of nullity.

With the continued commitment of bishops, canon lawyers and dedicated personnel who staff them, tribunals in the United States will continue to administer the church's justice. The legal work of these Christians ultimately fulfills the supreme law of the Church, the salvation of souls (c. 1752).