DIVISION ONE
FILED: 07/12/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	) 1 CA-CV 11-0504
	)
ANDREW SURNAMER,	) DEPARTMENT B
	)
Petitioner/Appellant,	) **MEMORANDUM DECISION**
	) (Not for Publication -
v.	) Rule 28, Arizona Rules
	) of Civil Appellate
JON ELLSTROM,	) Procedure)
	)
Respondent/Appellee.	)
	)

Appeal from the Superior Court in Maricopa County

Cause No. FN2011-001019

The Honorable Thomas L. LeClaire, Judge

REVERSED AND REMANDED

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J O H N S E N, Judge

¶1 Andrew Surnamer appeals the superior court's order denying his petition for annulment and refusing to approve his property settlement agreement with Jon Ellstrom. Because we

conclude that annulling a same-sex marriage is consistent with Arizona's constitutional and statutory provisions prohibiting such marriages, we reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 Surnamer and Ellstrom are Arizona residents who were married in Canada in 2005. On March 10, 2011, Surnamer filed a petition for annulment on the ground that the marriage is void under Arizona law. He also asked the court to divide certain joint property and debts in accordance with the parties' agreement. Ellstrom did not contest the petition.

¶3 The superior court denied the petition, holding that because the parties' same-sex marriage was "void and prohibited" under Arizona law, the court lacked authority to annul the union. The court reasoned that because "no marriage exists in Arizona, there is nothing to dissolve or annul."

¶4 Surnamer timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (West 2012).[1]

DISCUSSION

¶5 Surnamer challenges the superior court's determination that it lacked authority to annul his marriage and enforce the

[1] Absent material revision after the relevant date, we cite a statute's current version.

property settlement agreement.[2] We review questions regarding the superior court's jurisdiction *de novo*. *State v. Donahoe ex rel. County of Maricopa*, 220 Ariz. 126, 127, ¶ 1, n.1, 203 P.3d 1186, 1187 (App. 2009).

¶6 Since 2005, same-sex partners legally may marry in Canada. *See* Civil Marriage Act, S.C. 2005, c. 33 (Can.). Subject to the exception noted in the next paragraph, the common-law rule is that a marriage valid where celebrated will be recognized as valid everywhere. *Gradias v. Gradias*, 51 Ariz. 35, 36-37, 74 P.2d 53, 53 (1937) ("The question of the validity of the marriage . . . depends upon the place where it is contracted, and not the place where an action for divorce is brought."); *Horton v. Horton*, 22 Ariz. 490, 494, 198 P. 1105, 1107 (1921); *see also* Restatement (Second) of Conflict of Laws § 283(2) (1971).

¶7 The exception to this rule is when the marriage is contrary to a strong public policy of the forum state. *In re Mortenson's Estate*, 83 Ariz. 87, 90, 316 P.2d 1106, 1108 (1957); *Cook v. Cook*, 209 Ariz. 487, 492, ¶ 17, 104 P.3d 857, 862 (App.

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[2] Ellstrom executed an acceptance of service but otherwise has not appeared in this action, either in the superior court or on appeal.

2005).[3] Historically, this exception has been applied rarely and only when the strongest of public policies is implicated. *See Mortenson's Estate*, 83 Ariz. at 90, 316 P.2d at 1107 (refusing to recognize a New Mexico marriage between first cousins who were Arizona residents because Arizona law declared such marriages void and they were contrary to Arizona's strong public policy); *Vandever v. Indus. Comm'n of Ariz.*, 148 Ariz. 373, 376, 714 P.2d 866, 869 (App. 1985) ("The only marriages validly contracted in another jurisdiction that are denied recognition in Arizona are those involving the marriage of persons with a certain degree of consanguinity."). Surnamer contends that Arizona's public policy prohibiting same-sex marriage is sufficiently strong that Arizona will not recognize his marriage to Ellstrom, even though it was legal when solemnized in Canada.

¶8 As evidence of this public policy, Surnamer points to Article 30, Section 1, of the Arizona Constitution, and two statutes, A.R.S. § 25-101(C) (West 2012) and § 25-112(A) (West

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[3] The legislature has "the power to enact what marriages shall be void in this state, notwithstanding their validity in the state where celebrated . . . ." *Horton*, 22 Ariz. at 495, 198 P. at 1107. Thus, Arizona does not strictly follow Restatement § 283(2) but will apply Arizona law to determine whether a particular out-of-state marriage is valid in Arizona. *See Cook*, 209 Ariz. at 492, ¶ 17, 104 P.3d at 862. Of course, this power may be subject to the full-faith-and-credit clause of the United States Constitution. We need not consider that clause or the Defense of Marriage Act, 28 U.S.C. § 1738C (West 2012), because Surnamer and Ellstrom were married in Canada.

2012). The constitutional provision states, "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." To the same effect are the statutes: "Marriage between persons of the same sex is void and prohibited," A.R.S. § 25-101(C), and "[m]arriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by § 25-101," A.R.S. § 25-112(A).

¶9 We agree with Surnamer that these provisions evidence a strong public policy in Arizona that same-sex marriages will not be recognized as valid in this state even if they are valid in the jurisdiction where celebrated. *Cf. In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 669 (Tex. App. 2010) (common-law principles must yield to Texas's statute declaring that same-sex marriages are contrary to Texas public policy and Texas's constitutional provision stating that marriage "shall consist only of the union of one man and one woman"). Granting a request for an annulment by a party to such a marriage (on the ground that under Arizona law, the union is void), is consistent with that public policy.

¶10 The superior court seemed to conclude that it could not annul the Surnamer/Ellstrom marriage because that would mean recognizing the marriage as valid in the first place. We disagree. Some courts in states that, like Arizona, do not

recognize same-sex marriages have refused to dissolve such marriages. These courts reason that granting dissolution would impermissibly give effect to the marriage. *Marriage of J.B. and H.B.*, 326 S.W.3d at 667 ("A person does not and cannot seek a divorce without simultaneously asserting the existence and validity of a lawful marriage."); *Kern v. Taney*, 11 Pa. D & C 5th 558, 561-62 (Pa. Ct. Com. Pl. 2010); *see also Chambers v. Ormiston*, 935 A.2d 956, 967 (R.I. 2007). *But see Christiansen v. Christiansen*, 253 P.3d 153, 157 (Wyo. 2011) (court has subject-matter jurisdiction to dissolve a same-sex marriage lawfully performed in Canada, even though state law prohibited same-sex couples from entering a marital contract in Wyoming).

¶11 By its nature, however, an action to annul a marriage does not recognize its validity; to the contrary, it is premised on the notion that the marriage is not valid, but void.[4] "[T]he actions for annulment and divorce are two different and distinct actions, one based upon a valid marriage, and the other based upon a marriage that may be void or voidable." *Means v. Indus.*

[4] The Texas Court of Appeals suggested that an action to have a same-sex marriage declared void would be appropriate even though Texas does not recognize same-sex marriages. *Marriage of J.B. and H.B.*, 326 S.W.3d at 667 (action to have a same-sex marriage declared void under Texas law would not "give effect" to the marriage); *see also Kern*, 11 Pa. D & C 5th at 576 ("While it is true that Pennsylvania cannot grant [the petitioner] a divorce, there is no reason why she cannot seek relief . . . requesting the court to have her [same-sex] marriage declared void.").

Comm'n of Ariz., 110 Ariz. 72, 75, 515 P.2d 29, 32 (1973); *see* 55 C.J.S. *Marriage* § 70 (2012) ("[T]he theory of an action to annul is that no valid marriage ever came into existence.").

¶12 In Arizona, the superior court "may dissolve a marriage, and may adjudge a marriage to be null and void when the cause alleged constitutes an impediment rendering the marriage void." A.R.S. § 25-301 (West 2012). The court's power to annul also exists irrespective of statute because "under general equity powers [courts] have inherent jurisdiction to entertain and adjudicate actions for annulment of marriage." *Means*, 110 Ariz. at 74, 515 P.2d at 31. Thus, "any grounds rendering the marriage void or voidable should be available to grant an annulment of marriage." *Id.* at 75, 515 P.2d at 32.

¶13 In sum, as Surnamer argues, his marriage to Ellstrom, while valid under Canadian law, is void under Arizona law. A.R.S. §§ 25-101(C) and -112(A). Accordingly, the superior court had the power to annul the marriage. A.R.S. § 25-301; *Means*, 110 Ariz. at 75, 515 P.2d at 32.

¶14 Further, Arizona law authorizes the superior court to divide the parties' property upon annulment. A.R.S. § 25-302(B) (West 2012) ("If grounds for annulment exist, the court to the extent that it has jurisdiction to do so, shall divide the property of the parties . . . ."). Indeed, the Arizona Supreme

Court has recognized that even when no valid marriage exists, a party may have a "claim for labor and money contributed during the course of the purported marriage" that enriched the other party. *Cross v. Cross*, 94 Ariz. 28, 32, 381 P.2d 573, 575 (1963). "Based on general principles of law and equity and without resort to the existence of the marital status [that party] may recover the value of these contributions," and the superior court has authority to conduct a proceeding to determine any such claim. *Id*.

CONCLUSION

¶15 Under Arizona law, Surnamer's petition stated a ground for annulment of his marriage, and the court had authority to grant the relief the petition sought. We therefore reverse the court's judgment dismissing Surnamer's petition for annulment and remand this matter for further proceedings consistent with this decision.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
JON W. THOMPSON, Judge