

STATE OF MICHIGAN
COURT OF APPEALS

ELSON SUMMERS,

Plaintiff,

and

NANCY DUMAS and JUDITH FLANDERS,

Appellants,

v

KIMBERLY WOODS SUMMERS,

Defendant-Appellee.

UNPUBLISHED

November 20, 2007

No. 273226

Wayne Circuit Court

LC No. 06-612426-DO

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff Elson Summers filed this action for annulment of his marriage to defendant Kimberly Woods Summers, but died shortly after the complaint was served. The trial court initially entered an order allowing appellants Nancy Dumas and Judith Flanders, plaintiff's daughters, to substitute as parties, but later determined that the order was not "appropriate" and dismissed the case. Appellants appeal as of right. We affirm the trial court's dismissal order.

An action brought to annul a marriage is equitable in nature. MCL 552.12. This Court reviews equitable matters de novo. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 582; 458 NW2d 659 (1990).

Pursuant to MCR 2.202(A)(1), if a party to an action dies, "and the claim is not thereby extinguished, the court may order substitution of the proper parties." The issue to be determined, therefore, is whether plaintiff's death extinguished his claim for annulment.

It is well established in Michigan that a court is without jurisdiction to enter a judgment for divorce after the death of one of the parties. See, e.g., *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). However, Michigan law is not as clear regarding actions for annulment.

MCL 552.1 provides that a marriage is “absolutely void” if it is “prohibited by law” because of the relationship by consanguinity or affinity of the parties, because one or both parties is already married, or because either party was “not capable in law of contracting” at the time of marriage. Pursuant to MCL 552.2, “in case the consent of one of the parties was obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be deemed void without any decree of divorce or other legal process.” MCL 552.3, on which the trial court relied in dismissing this matter, provides:

When a marriage is supposed to be void, or the validity thereof is doubted, for any of the causes mentioned in the 2 preceding sections, either party, excepting in the cases where a contrary provision is hereinafter made, may file a petition or bill in the circuit court of the county where the parties, or one of them, reside, or in the court of chancery for annulling the same, and such petition or bill shall be filed and proceedings shall be had thereon, as in the case of a petition or bill filed in said court for a divorce; and upon due proof of the nullity of the marriage, it shall be declared void by a decree or sentence of nullity.

In his complaint, plaintiff did not plead any of the conditions in MCL 552.1. Rather, he alleged that defendant fraudulently induced him to marry her by a promise that she would care for him, and that she had breached that promise. Michigan case law has held that for fraud to rise to the level to support an order of annulment, it must be of a “nature wholly subversive of the true essence of the marriage relationship,” *Stegienko v Stegienko*, 295 Mich 530, 535; 295 NW 252 (1940), and must “affect the free conduct of the wronged party and be clearly established.” *Yanoff v Yanoff*, 237 Mich 383, 387; 211 NW 735 (1927). Plaintiff also maintained that the marriage was not consummated, but that alone is not grounds for annulment unless it is part of the fraud that induced the wronged party to consent to marriage and the parties did not cohabit after that fraud. MCL 552.2.

Appellants argue that the Supreme Court specifically held that an action for annulment survives the death of a party in *Romatz v Romatz*, 355 Mich 81; 94 NW2d 432 (1959), in which the Court overruled its prior decision that had reversed the circuit court’s grant of annulment.¹ The action had been brought by the guardian of the husband, who had been adjudicated incompetent shortly after his marriage. The husband died in the time between the publication of the two opinions, and the Supreme Court stated, in language relied upon by appellants here:

This brings us to the jurisdictional instrument itself; the bill of complaint filed in behalf of Anton Romatz in his lifetime. If that bill conferred requisite jurisdiction at the time, and we so hold, subsequent events -- such as Anton's death prior to hearing below -- have not destroyed such jurisdiction. [*Romatz*, *supra*, 355 Mich at 85.

Defendant argues that *Romatz* is distinguishable because the complaint in that case was filed under MCL 555.1 and involved a request to declare the marriage of an incompetent person

¹ *Romatz v Romatz*, 346 Mich 438; 78 NW2d 160 (1956).

void based on his lack of capacity to enter into a contract. In the present case, the complaint alleged that the marriage was voidable based on defendant's allegedly fraudulent promise to take care of plaintiff. According to defendant, where a marriage is merely voidable, the parties are married until a court enters a judgment of annulment. Because plaintiff died before any judgment by a court declaring the marriage voidable, the parties were married when plaintiff died, and the marriage ended with his death.

We believe that defendant has the better argument. Although not clearly laid out in Michigan law, legal authority and case law from other jurisdictions support this position. "The right to annul a voidable marriage is a personal right and the action for annulment of such a marriage can be maintained only by a party to the marriage contract or, where the spouse seeking annulment is under legal disability, by someone in his or her behalf." 4 Am Jur 2d, Annulment of Marriage, § 61, p 2, citing *White v Williams*, 159 Miss 732; 132 So 573 (1931); *In re Estate of Davis*, 55 Or App 982; 640 P2d 692 (1982). Further, "[a]n action to annul a marriage on the ground of fraud can only be brought by the defrauded spouse while both parties to the marriage are living; it cannot be annulled at the suit of the heirs of the spouse imposed upon or other third persons." 4 Am Jur 2d, Annulment of Marriage, § 62, p 2, citing *Norris v Harrison*, 91 US App DC 103; 198 F2d 953 (1952); *Gibbons v Blair*, 376 NW2d 22 (ND, 1985); *Johnson v Sands*, 245 Ky 529; 53 SW2d 929 (1932); *White, supra*.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray