Mary's Advocates Observations:
Separation, Divorce, and Annulment

The Pastoral Care Described
in the Catechism and The Canon Law

and

the Prevalent Pastoral Practice
in the United States

8 September 2014
The Nativity of the Blessed Virgin Mary

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September 8, 2014

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Dear Mrs. Macfarlane,

Thank you for preparing this manuscript describing the marital processes that Catholic spouses experience in the United States. I believe it accurately describes the current processes in use and demonstrates those current processes are not always in conformity with canon law. In the United State, there is no doubt the procedures currently in use tend to promote divorce and annulment with very negative effects for the life of the "domestic Church" in the United States: broken families, broken homes, and broken lives.

I believe this manuscript raises some points that should be of concern to the fathers of the upcoming Synod of Bishops on the pastoral care of the family. The large number of marriages that are declared null by the local tribunals in the United States and the large percentage of affirmative decisions for nullity in the local tribunals in the United States that have been overturned by the Roman Rota raises the question about the fidelity of the local tribunals to the doctrine of the holy Catholic Church and the jurisprudence of the Roman Rota. I hope the synod fathers will not come to any conclusions about this question without a thorough investigation of the actual procedures and jurisprudence that are actually in use in the local tribunals. I also hope that if any deviations from sound doctrine and jurisprudence are found, the necessary corrections will be forthcoming from the Holy See.

The other concern raised by your manuscript is the possibility that the Church is actually promoting divorce by ignoring the canonical requirement that a spouse obtain the bishop's permission before approaching the civil forum for a decree of separation or divorce. I believe the current practice promotes divorce and subsequent annulment as the only just and viable solution for difficult marriages, even in cases when the marriage could be valid. It would be unjust to impose divorce and annulment as the solution for a difficult marriage that is valid, and I hope that your efforts to find a bishop or a group of bishops participating in the upcoming synods of bishops on the pastoral care of the family who are willing to speak up for the rights and concerns of spouses who want to try and save their marriages rather than sacrifice their marriages to the juggernaut of divorce and ecclesiastical annulment is successful.

Sincerely in Christ,

Charles Zmudzinski

Rev. Charles Zmudzinski, C.P.M., J.C.L.

Introduction

In the Third Extraordinary General Assembly of Bishops in October 2014, the synod fathers will thoroughly examine and analyze the information, testimonies and recommendations received from the particular Churches in order to respond to the new challenges of the family. When collecting the responses from the Bishops to the questions in the Preparatory Document, the General Secretariat of the Synod of Bishops also received responses from movements, groups, and ecclesial associations (categorized as observations).[1] The manuscript herein is a response from a group focusing on pastoral care provided to couples in crises situations, separated spouses, and those who are divorced.

Bishops were asked how the teaching on the family contained in the Church's *Magisterium* is diffused, particularly documents in the post-conciliar *Magisterium*; what pastoral care is provided to couples in crisis situations; and how the Church deals with separated spouses, or those who are divorced and remarried.[2]

From a layperson's point of view, there is a notable difference between the pastoral care described in the Catechism and the Canon Law, in contrast to the prevalent pastoral practice in the United States. Simply put, many of the faithful believe that divorce is a morally neutral occurrence, and many diocesan staff personnel seem to agree—separation of spouses, the break-up of marriages, and divorce are things that *just happen.* There are a number of diocesan and parish resources soliciting annulment petitions from those who are divorced after their marriages *break-up*. However, there is virtually no education about the morally legitimate reasons for separation of spouses. Nothing is taught about the parameters of a separation plan that would be in accord with divine law. Chanceries appear to have no system to assist bishops in weighing the special circumstances of a marriage before a spouse files for divorce or separation in the civil forum. This weighing of circumstances is required by canon law as described herein. Numerous faithful do not know or do not care that forcing divorce—outside of specifically limited circumstances—is immoral, contravenes the moral law, and is a grave offense against the natural law.

The Preparatory Document for the upcoming synod also asked bishops whether a simplification of the canonical practice in recognizing a declaration of the nullity of a marriage would provide a positive contribution to solving the problems of the persons involved. The perspective in this manuscript is that there is no need in the United States to simplify the process as it is currently defined in Canon Law and *Dignitas Connubii,* but what is needed is to actually follow that process.

If tribunals want to grant annulments based on the grave lack of discretion of judgment of the Petitioner, they should require the Petitioner to allege that he or she suffered from a grave psychic anomaly or mental illness at the time of the marriage, making it impossible for the Petitioner to

understand and exercise his or her will. This would reduce the number of petitions and the tribunals' workload. But that is not always the practice. Instead, Petitioners are made to answer lengthy questionnaires and tribunals apparently process cases in which neither the Petitioner nor the Respondent know which particular facts, in a general way, are being proposed to prove nullity of the marriage.

If tribunals want to grant annulments based on the grounds that one party simulated their vows when promising permanence, faithfulness, or openness to children, the bishop could suggest that the couples file in the civil forum for a civil annulment based on a fraudulent civil marriage contract. At least in that way, an innocent husband might be saved from paying spousal support or giving half his property to a woman who tricked him into a fraudulent marriage.

For those who withdraw from marriage for no morally legitimate reason, if bishops would authoritatively instruct them of their obligation to restore common conjugal life, then a number of families could be saved from no-fault divorce. The person deserting the marriage could choose to work with those experienced in helping marriages, rather than hiring divorce lawyers. For Catholics who enter adulterous relationships, or for those who have dangerous temper outbursts, if bishops would instruct them about the parameters of a separation plan that is not contrary to divine law, then innocent spouses and children could possibly be saved from unjust decrees in the no-fault divorce civil forum. Recognizably, all marital abandoners will not obey authoritative instructions from the Church, but at least scandal could be prevented. A diocesan *hands-off* policy with respect to separation and divorce gives scandal to everyone because everyone understandably concludes that there is nothing wrong with leaving one's spouse.

Mrs. Marie (Bai) Macfarlane

Founder: Mary's Advocates
8 September 2014
The Nativity of the Blessed Virgin Mary

The mission of Mary's Advocates is to strengthen marriage, to eliminate forced no-fault divorce, and to support those who have been unjustly abandoned by their spouse.

Publisher: "The Gift of Self, A Spiritual Companion for Separated and Divorced Faithful to the Sacrament of Marriage." USCCB For Your Marriage book of the Month in June 2014[3]

Table of Contents

Method

The purpose of these observations is to show the apparent contrast between the prevalent pastoral care provided to those in serious marital difficulties, in contrast to pastoral practices described in canon law. The text is not a persuasive essay, but rather, it is a list of observations. The Observations are organized around two flow chart diagrams. The first flow chart is on page 3, "Pastoral Practice in Accord with Canon Law." The second is on page 21, "Prevalent Practice." Each diagram shows in chronological order the sequence of events that could occur in a couple's relationship. Events include the premarital investigation, separation, divorce, and annulment.

Also included are examples of statements from diocesan websites, and "Supporting Resources" which are a lengthy set of excerpts from *Magisterial* documents and recognized scholars.

On the flow chart diagrams, in little circles are various letters that correspond to the different headings throughout the text in the Observations. The numbered paragraphs in the Observations could be read without studying the diagrams. Many of the ideas discussed in the Observations are too complex to fit on the two diagrams that are simply a high-level overview.

At some stages, the diagram shows a diamond shape with a simplistic question from which arrows lead in several different directions. For example, on page 3, "Pastoral Practice in Accord with Canon Law," the first item in the Separation event, shows, "Spouse has reason to separate?" This represents the question of whether one spouse is in a situation wherein the second spouse has committed offenses severe enough to justify separation of spouses. If the answer is yes, then following the arrow labeled "Yes" points to "Morally Licit Separation." If the answer is no, then following the arrow labeled "No" points to "Malicious Abandonment."

Pastoral Practice in Accord with Canon Law

Premarital Investigation

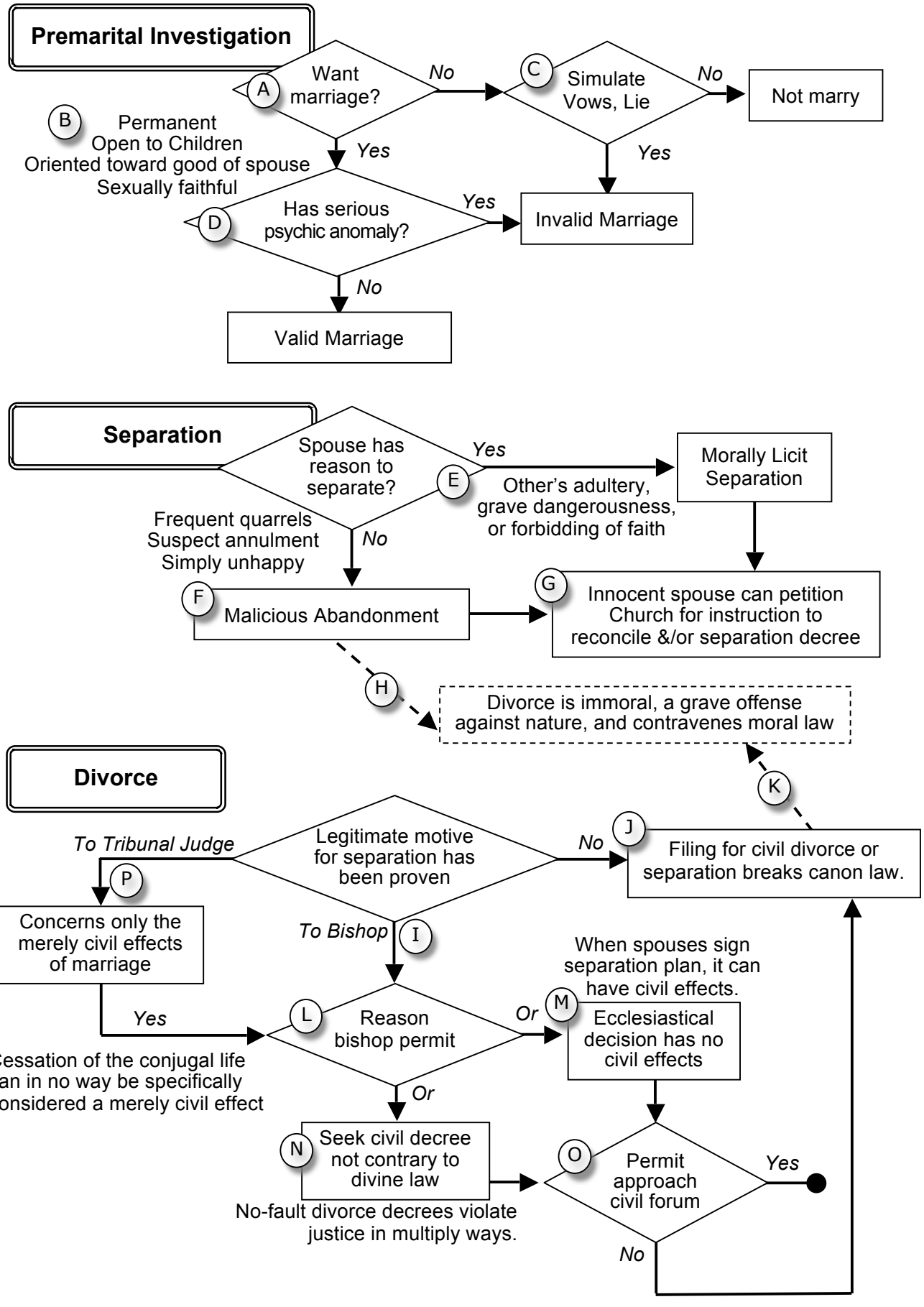
A. Do Parties Want Marriage?

1. Before a couple marries, the priest is supposed to find out if the couple wants Catholic marriage by conducting an investigation of the parties. Canon law requires, that, "Before a marriage is celebrated, it must be evident that nothing stands in the way of its valid and licit celebration" (c. 1066); "The conference of bishops is to establish norms about the examination of spouses" […] "All the faithful are obliged to reveal any impediments they know about to the pastor or local ordinary before the celebration of the marriage" (cc. 1067, 1069). The priest is expected to learn whether both parties intend and want marriage itself, including its essential elements, properties, rights, and obligations. He sometimes collects signed statements from parents of the bride and groom, or close friends, attesting that both parties are free from serious psychological problems and are known to want to marry as the Catholic Church understands marriage.

B. What are the Essentials of Marriage?

2. When a pastor is determining with a man and women whether or not they want to enter Catholic marriage, obviously the three of them must have a definition of what constitutes Catholic marriage, so they can measure whether or not their intentions satisfy the required criteria. If there were no universally defined criteria, nobody would know whether or not parties were entering Catholic marriage or not.

3. The Catholic Church defines canonically required elements of marriage. "The essential properties of marriage are unity and indissolubility" (c. 1056). The essential elements of marriage include permanence (indissolubility) faithfulness (exclusive right to the conjugal act) and openness to children. Relative to the canonically required essentials, marriage is ordered to the good of the spouses and the procreation and education of offspring (cf. c. 1055). Both parties must want a marriage that is permanent, open to children, and sexually/romantically exclusive, and oriented toward the good of each other.


Premarital Investigation
A
Want marriage?
No
C
Simulate Vows, Lie
No
Not marry
Yes
Yes
B
Permanent
Open to Children
Oriented toward good of spouse
Sexually faithful
D
Has serious psychic anomaly?
Yes
Invalid Marriage
No
Valid Marriage
Separation
Spouse has reason to separate?
E
Yes
Other's adultery, grave dangerousness, or forbidding of faith
Morally Licit Separation
Frequent quarrels
Suspect annulment
Simply unhappy
No
F
Malicious Abandonment
G
Innocent spouse can petition Church for instruction to reconcile &/or separation decree
H
Divorce is immoral, a grave offense against nature, and contravenes moral law
K
Divorce
To Tribunal Judge
Legitimate motive for separation has been proven
No
J
Filing for civil divorce or separation breaks canon law.
P
Concerns only the merely civil effects of marriage
To Bishop
I
When spouses sign separation plan, it can have civil effects.
Yes
L
Reason bishop permit
Or
M
Ecclesiastical decision has no civil effects
Cessation of the conjugal life can in no way be specifically considered a merely civil effect
Or
N
Seek civil decree not contrary to divine law
O
Permit approach civil forum
Yes
No-fault divorce decrees violate justice in multiply ways.
No

4. Catholic marriage includes promising to be married for better, for worse, for richer, for poorer, in sickness and in health, or in good times and in bad.[4] Entering Catholic marriage never guarantees parties will achieve a happy relationship in which they are achieving improved satisfaction, growth, enrichment, and fulfillment. But one of the six editors who worked with Saint John Paul II in drafting the Code of Canon Law, made a serious complaint against canon lawyers who were alleging that parties who did not achieve a successful marriage must have had an invalid marriage based on the supposed fact that the parties must have been incapable of fulfilling this *so called* essential obligation of marriage (See "Roman Rota Judge, Editor of Canon Law, Cardinal Edward Egan, 1983" page 37).

C. What Happens if Either Party Does Not Want Marriage?

5. If a person engaged to be married does not want openness to children, permanence, exclusiveness, or to participate in a relationship ordered towards the good of the spouses, then that person does not want Catholic marriage. If such a person is honest during the premarital investigation, he or she will choose to not marry in the Church, or the priest would instruct the person that they have demonstrated that they do not want Catholic marriage. No one has an unlimited right to a Catholic wedding. In his 2011 Address to the Tribunal of the Roman Rota, Pope Benedict XVI taught, "The right to contract marriage presupposes that the person can and intends to celebrate it truly, that is, in the truth of its essence as the Church teaches it. No one can claim the right to a nuptial ceremony. Indeed the *ius connubii* [right to marriage] refers to the right to celebrate an authentic marriage" (See "Pope Benedict XVI, 2011 Address to the Roman Rota" on page 40).

6. If someone goes through with the wedding ceremony that does not want authentic marriage, his or her consent would be invalid. As described in canon 1101 §2, if "either or both of the parties by a positive act of the will exclude marriage itself, some essential element of marriage, or some essential property of marriage, the party contracts invalidly." In civil law, contract fraud occurs if one party enters into a contract because of the intentional misrepresentation or deceit of the other party; no valid contract occurs between the two because of fraud. In canon law, "the internal consent of the mind is presumed to conform to the words and signs used in celebrating the marriage" (c. 1101 §1). But if one party feigned his or her vows while willfully excluding marriage or essentials of marriage, then simulation occurs, and the marriage is invalid.

7. Cardinal Raymond Burke, the Prefect of the Supreme Tribunal of the Signatura gave instruction about simulation of marriage consent on 10 August 2011 at a canon law conference. The Signatura is responsible for the correct administration of justice in the Church. Cardinal Burke said that any nullity decision based on simulation must be supported by, "the confession of the simulating party corroborated by testimony, the reason why the marriage was nonetheless celebrated, the reason

for the simulation, and the circumstances preceding, accompanying and following the marriage which support the presumed exclusion." He talked about the *so-called new ground of nullity* (the Intention against the Good of the Spouses), pointing out "that there is not an established Rotal jurisprudence regarding this *so-called new ground of nullity* which represents a development at lower tribunals without respect for the rule of Rotal jurisprudence." Lower tribunals are supposed to write their decisions based on the application of canon law by the Roman Rota. According to Burke, it would be rare for a bride or groom to decide to exclude the orientation toward the good of the spouses (*bonum conjugum)*:

> The exclusion of the *bonum conjugum* as a ground of nullity of marriage would therefore indicate the decision existing at the moment of the celebration of the marriage not to foster in any way the well being of the spouse. This could be the only meaning which this ground has. It cannot be used as a kind of net in which is placed any kind of difficulty in the marriage that is then construed as being against the good of the spouses. …
>
> The essence of the *bonum conjugum* is the intention to promote the good of the spouse and the *exclusio bonum conjugum* is a positive intention to exclude the good of the spouse. The fact is that it would appear to be very rare that someone enters marriage with the intention not to promote in any way the good of the spouse (See "Prefect of Signatura on Simulation, Cardinal Raymond Burke" on page 43).

D. Are Parties Free From Serious Psychic Anomaly?

8. It is not the purpose of these observations to discuss all grounds for nullity, but only grounds that seem to be incorrectly used by U.S. tribunals, about which the Holy See is offering instructions. Authorities from the Holy See have repeatedly written about declarations of nullity due to psychological problems. If either of the parties suffers from a serious psychological anomaly of a particular type, then he or she cannot validly consent to marriage. A pastor would want to, as much as possible, ensure that this particular type of psychic anomaly is not present. For a party to suffer from a grave lack of discretion of judgment (c.1095, 2º), as taught by Saint John Paul II in his 1987 Address to the Roman Rota, a psychological anomaly "The hypothesis of real incapacity is to be considered only when an anomaly of a serious nature is present, which, however it may be defined, must substantially vitiate the capacity of the individual to understand and/or to will." Relative to this canon, in 1988, Saint John Paul II taught, "only the most severe forms of psychopathology impair substantially the freedom of the individual" (See "Saint John Paul II on psychic anomaly, Address to the Roman Rota 1988 on page 46).

9. The Tribunal of the Roman Rota provides authoritative application of the canon law relative to grave lack of discretion of judgment, and incapacity to fulfill obligations of marriage (c. 1095 2º,

3º). In jurisprudence from the Rota, it shows that the psychological problem must be known to "relate to the essential rights/obligations of marriage, and not just to its incidental duties, rights, or expectations" (See "Roman Rota Sentence about psychic anomaly, 12 December 1996" on page 48). The discretion of judgment that would be most important to a priest during his premarital investigation would be the discretion relative to the essential rights and obligations of marriage, not the discretion in choosing a particular person for a spouse. Jurisprudence from the Roman Rota makes that distinction when overturning a nullity decision by a first-instance tribunal judges:

> "The judges make the issue of a 'wrong' or 'poor' marital choice central to their conclusion regarding the petitioner's invalid consent. This, as we have remarked in our theoretical considerations, confuses a possible lack of prudence in the choice of one's partner with the juridic concept of an invalidating defect of discretion of judgment" (See "Roman Rota, Psychic Anomaly, Discretion of Judgment, 17 April 1997", Part 18, on page 50).

10. During the premarital investigation, the priest can observe whether or not the bride and groom suffer from serious psychic anomaly that would make it impossible for them to exercise their will to choose marriage. He can make this determination either by his own judgment, through questioning the parents of the bride and groom or their close friends, or from premarital inventory assessments. If no such anomaly exists, then a grave lack of discretion of judgment would not stand in the way of the parties' valid celebration of marriage. If parties are not feigning their marriage vows, and do not have other issues present that would invalidate marriage consent, then their marriage will be valid. See all impediments for valid marriage consent listed in canons 1073–1107.

Separation

E. What are the Morally Legitimate Reasons for Separation of Spouses?

11. Those interested in entering Catholic marriage would know that, "Spouses have the duty and right to preserve conjugal living unless a legitimate cause excuses them" (c. 1151). Conjugal living refers to living in the same home. "Only by reason of legitimate separation or some other just cause" can spouses have "their own domicile or quasi-domicile;" otherwise, "spouses are to have a common domicile or quasi-domicile" (c. 104).

12. Historically, the jurisprudence of the Church describes morally legitimate reasons for an innocent spouse to separate from the other:

- If the other spouse is committing adultery, the innocent spouse does not condone or accept it;
- If the other spouse is making it impossible for the innocent spouse or the children to practice their faith;
- If the other "causes grave mental or physical danger" to the innocent spouse or to the offspring or "otherwise renders common life too difficult" (See "Canon 1152, 1153, promulgated year 1983" on page 52).

13. Grave mental or physical danger has been a longstanding basis for morally legitimate separation. The current code from the year 1983 repeats this basis for separation that was in the code from 1917. (See "Canon law from year 1917, canon number 1131 on Separation of Spouses" on page 52.) An English translation is available from Msgr. William Doheny, Advocate and Procurator of the Tribunal of the Apostolic Signatura. Msgr. Doheny explained the meaning of "unbearable cruelty which renders conjugal life insupportable:"

> The Latin term *saevitia* means excessive or unbearable cruelty, harshness, extreme severity, fierceness, and barbarity. What is called cruelty, by way of travesty, in modern divorce courts could not be viewed as *saevitia,* in the sense of canon 1131 §1. Hence, the so-called incompatibility of temperament, divergence of views, and the like would not be considered sufficient to invoke separation (See "Advocate/Procurator Tribunal of the Signatura, English canon 1131, year 1944" on page 52.)

14. Primary sources defining authoritative principles for applying canon law are the Pope's annual addresses to the Tribunal of the Roman Rota, instruction from the Supreme Tribunal of the Signatura, and the jurisprudence of the Roman Rota.

15. Canonically lawful reasons for issuing decrees of separation, according to the jurisprudence from the Roman Rota, include malicious abandonment, mental abnormality that is conjoined with

implacable hatred, and the constant practice of onanism (See Other Canonically Lawful Reasons for Decree of Separation, Gibbons, 1947 on page 54).

16. Other sources of instruction for applying canon law are published collections of commentary or annotations. The “Exegetical Commentary on the Code of Canon Law,” from the University of Navarra, shows that three conditions are necessary before separation for making living together too difficult: “it must be grave, such that it makes common life dangerous for the spouse or children; it must be repeated, because if it were merely occasional, it would not create the fear for future common life, which justifies the separation; and separation must constitute the only means of avoiding the danger involved in common life” (See “Exegetical Commentary Canon 1153 §1, grave danger, Ivars” on page 54).

F. Malicious Abandonment: No Morally Legitimate Reason to Separate

17. When there is no morally legitimate reason for separation of spouses, if a spouse chooses to separate, his or her action would be characterized as desertion, or malicious abandonment. Reasons that a spouse might use to erroneously justify his or her separation from the marital life could include frequent quarrels, simple unhappiness, or the suspicion that one’s marriage is invalid.

18. “Frequent quarrels, in themselves, are not regarded by the Holy See as a ‘just cause’ even for a temporary separation” (See “Roman Rota, Frequent Quarrels, year 1936 & 1938, Gibbons Citations” on page 55).

19. Pope Francis, in his homily on 22 January 2014, when speaking to spouses said, "It is normal for you to argue, it is normal” as reported by *L'Osservatore Romano*. “Seeing a smile from several couples who were present at morning Mass, he reminded them that ‘in marriage there are arguments, and sometimes even plates go flying.’”

20. Spouses must maintain a common conjugal life and “when there is question of an alleged nullity of the marriage, private authority is not recognized as an adequate basis for establishing a legitimate separation” (See “Question of nullity not basis for separation, Roman Rota Judge, 1935” on page 56).

21. When the 1983 Code of Canon Law was promulgated, Professor Javieer Hervada, was Dean of the Canon Law school at the University of Navarra. He contributed to "Code of Canon Law Annotated," which was endorsed by the President of the Pontifical Council for the Interpretation of Legislative Texts (See “Canon Law Annotated, c. 1153, Blameless Unhappy Situations, Hervada” on page 58):

> Blameless, unhappy situations not only fail to constitute reason for suspension of the right and obligation to common life in its sense of solidarity and of sharing, but they also

> represent cases in which one of the ends of marriage, mutual assistance, must manifest itself in all its width and depth. It is not in the hands of the spouse nor in the power of human judges to suspend an obligation of natural law which has been imposed not only for favorable times, but also for the difficult and painful circumstances of life, when help is most needed from the person who is of the same flesh as the one suffering the misfortune ("[...] to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health [...]" Rite of Marriage 25).

G. Church Intervention, Instruct Obligation to Reconcile, Separation Decree

22. Marriage is an institution that affects the public good and the Church has protections in canon law to both prevent scandal and allow opportunities for the faithful to receive instruction for their particular circumstances. A separated spouse who wants his or her family reconciled can ask the Bishop to issue a singular precept instructing the other spouse to uphold the lawful obligations to maintain common conjugal life, citing canons 49, and 57, 1695, and 104. In the Code of Canon Law, the book on procedure (*De Processibus*) has a chapter on separation of spouses that includes canon 1695: "Before accepting the case and whenever there is hope of a favorable outcome, the judge is to use pastoral means to reconcile the spouses and persuade them to restore conjugal living."

23. The year after the 1983 code of canon law was published, the Vatican's publishing house, *Libreria Editrice Vaticana* promulgated an instruction about separation of spouses. It described the efficacious" […] "service in the pastoral organization of the diocese for the faithful who find themselves in this conflictive matrimonial situation." The instruction published by *Libreria Editrice Vaticana* emphasizes the importance of reconciling couples:

> [If] this service of assistance does not exist, it must be created if the ecclesiastical judges and ministers in charge of pastoral ministry at the diocesan level are incapable or have great difficulties in attending these problems, which emerge between the spouses. Precisely, such a desire to offer a pastoral solution to the differences and conjugal conflicts makes it necessary to impose upon the Judge a specific obligation, not proceeding from a juridical nature, but pastoral; this is according to Can. 1695" (See "*Libreria Editrice Vaticana,* Cases of Separation of Spouses, Diego-Lora 1984" on page 59).

24. Canon 104 states, "Spouses are to have a common domicile or quasi-domicile; by reason of legitimate separation or some other just cause, both can have their own domicile or quasi-domicile." Professor Father Amadeo de Fuenmayor, who was Dean of University of Navarra Canon Law School for nineteen years, provided exegetical commentary on canon 104:

> The legislator shows in numerous places of the Code his great preoccupation for avoiding the separation of husband and wife and to achieve the reestablishment of common life. Normalcy is to be reestablished through the return to cohabitation. And it is also

> desired to avoid the serious risk that separation could be the road leading to divorce. One of the reasons allowed today by most civil laws to grant a divorce is separation; not only judicial, but also separation in fact.
>
> 5. Canon 104 only speaks of the duty that the couple has to maintain a common domicile or quasi-domicile, without indicating the routes to reestablish cohabitation in case of a break. These routes are in the canons that regulate pastoral action with which the Church cares for the faithful in their marital crises. A brief reference to them will be sufficient.
>
> Canon 1695 provides that before accepting a case of separation and as long as there is hope for success, the judge must employ pastoral means so that the couple reconcile and be induced to reestablish conjugal community, if it has been in fact interrupted (See "Exegetical Commentary Canon 104, Dean Navarra Canon Law School" on page 62).

25. The role of the church in reconciling couples is restated by Rev. Phillip Brown JCD, who became the President of the Canon Law Society of America in 2013, in his article about separation cases before tribunal judges wherein there are accusations of grave abuse:

> Canon 1695 requires the judge to use pastoral means to attempt to bring about a reconciliation of the parties and persuade them to restore conjugal living before the case is accepted whenever there is hope a favorable result. Similarly, canon 1659 §1 impliedly requires the judge to attempt mediation according to the norm of canon 1456 before notifying the respondent of the petition and calling forth a response [citing c. 1659]. Thus, the judge is to exhort the parties to seek an equitable solution to their differences by discussing the matter with them, even employing reputable persons to mediate between the parties [citing c. 1446 §2] (page 248).[5]

26. Rev. Phillip Brown also emphasizes the Church's concern for those whose misdeeds cause the other spouse to have a moral reason to separate:

> However, those who perpetrate acts of violence and abuse should not be excluded from pastoral care and concern on the part of ministers of the Gospel. The goal of providing meaningful pastoral care requires that serious efforts be undertaken to make available to perpetrators the kinds of assistance that can lead to understanding and changing destructive behaviors as well. It is important for perpetrators to be provided with the kinds of assistance that can lead to spiritual conversion, repentance, reparation of harm done (to the extent possible), and that can bring about acceptance and reincorporation into the community when there is sincere repentance, conversion, acceptance of forgiveness and necessary changes in attitudes and behavior (ibid page 217-218).

27. If one or both of the spouses refuse to cooperate with ecclesiastical authorities who exhausted their pastoral means to reconcile the spouses and persuade them to restore conjugal living, then the innocent spouse can ask that an ecclesiastic separation decree be issued. The Promoter of

Justice must take part in the case because it pertains to the public good (cf. can. 1696). In the year 1984, some elements of an ecclesiastic separation decree were described in the instruction published by the Vatican's publishing house, *Libreria Editrice Vaticana*. The instruction describes canon 1692 §1:

> This is analogous to the following: all the separations of the baptized spouses are to be decided either through the administrative process that culminates with the decree of the diocesan Bishop, or through the judicial process, which culminates with a constitutive sentence pronounced by the competent judicial body (Diego-Lora, page 393)
>
> … This decree must be well founded and it will identify the legitimate motive or motives for the separation according to can. 1152 and 1153 respectively; it will also include, at the same time, these opportune measures that require the due sustenance and education of the children (page 400. See "*Libreria Editrice Vaticana*, Cases of Separation of Spouses" on page 59).

28. Lawful (or legitimate) basis for separation decrees are found in the canon law and jurisprudence from the Roman Rota. Canon 1152 lists adultery. Canon 1153 lists causing grave mental or physical danger to the other spouse or to the offspring, and rendering common life too difficult.

29. Desertion or abandonment is another lawful basis for an ecclesiastic separation decree. Advocate and Procurator of the Supreme Tribunal of the Signatura and Roman Rota, Rev. William Doheny, in his 1944 work on Matrimonial Cases, taught, "the reasons authorizing separation are not *taxative propositae* [solely to the proposed] in Canon 1131 §1." […] "For instance, desertion has been adjudged by the S.R. Rota as a cause sufficiently grave to authorize separation for an indefinite period of time."

30. Jurisprudence from the Roman Rota defines conditions necessary before a separation decree for the reason of malicious abandonment could be issued. Doheny, citing a 1917 Rota decision, shows that in cases of desertion, permission for separation is not granted to the innocent party until after the abandoning party refuses to return when instructed by the judge to return (See "Advocate and Procurator of the Tribunal of the Signatura, canon 1131, year 1944" on page 52).

31. Adultery is the only lawful basis for permanent separation. For other causes of separation, canon 1153 §2 specifies, "when the cause for the separation ceases, conjugal living must be restored unless ecclesiastical authority has established otherwise." A Petitioner for a separation decree could request that the ecclesiastic authority include in his decree the obligation for the guilty party to resume common conjugal life after the reason for separation ceases. For example, if the lawful basis for separation decree is abandonment, the Petitioner could ask for a decree that instructs the abandoner that when he/she elects to reform his/her ways, the common conjugal life must be restored; in other words the parties must live in the same home.

32. According to “Exegetical Commentary on the Code of Canon Law,” the character and treatment of malicious abandonment, "is the result of a work of jurisprudence and doctrine with the intent of specifically protecting compliance with every conjugal and family duty, and penalizing their omission." […] "there is an attempt to declare guilty the spouse who has maliciously been absent and to obtain the legal declaration of separation for the one who has been abandoned" (See “Exegetical Commentary Canon 1153, Malicious Abandonment, Ivars” on page 65).

33. Canonical separation cases are decided either by the Bishop with an administrative decree, or by a tribunal with a judicial sentence.

> Can. 1692 §1. Unless other provision is legitimately made in particular places, a decree of the diocesan bishop or a judicial sentence can decide the personal separation of baptized spouses according to the norm of the following canons (See “Canon 1692 §§ 1-3” on page 66)

34. If the case is decided by a judicial sentence, the case can be processed either by the oral contentious process, or by the ordinary contentious process. Rev. Phillip Brown JCD (President of the Canon Law Society of America in 2013), published work in 2008 about canonical separation of spouses in cases involving serious mistreatment or abuse of one spouse by the other. He provides a thorough description of the steps for cases decided by a judicial sentence according to the oral contentious process (See “Oral Contentious Judicial Process for Separation Cases, Brown 2008” on page 66).

H. Divorce is Immoral, Grave Offense against Nature, Contravenes Moral Law

35. The Church makes the distinction between the spouse who sincerely tries to be faithful and the one who destroyed his or her own valid marriage. One spouse has contravened moral law; one has not. The separation of spouses *can be legitimate* in certain cases provided in canon law; it must consequently not be legitimate in other cases. Canon 1060 requires that all marriages must be presumed valid until proven otherwise. With the exception of limited circumstances, divorce is immoral and a grave offense against nature (See “Catechism 2382-2386 offenses against marriage, Canon 1060” on page 68).

36. Before the publication of the universal code of canon law in 1917, there were other sources to which the bishops and canon lawyers of the world looked to find the application of church law, discipline and dogma (such the Decree of Gratian, Council of Trent, and Papal writings). In the United States, with the decrees of the Third Plenary Council of Baltimore, the Holy See approved in 1885 particular laws for the United States including Act Number 126, stating that anyone who petitions in the civil forum for separation [including divorce] without the ecclesiastical permission incurs the guilt

of grave sin (See “Council of Baltimore 1885, Decree No. 126 on page 69). The 1917 Code of Canon Law covered legitimate basis for separation of spouses (cc. 1129-1132).

37. The promulgation of the 1917 Code of Canon law did not abrogate Act Number 126 of the Third Plenary Council of Baltimore. The U.S. bishops still taught that it was a grave sin to file for divorce in the civil forum without first having the bishop’s permission. In 1948, Bishop of Albany gave an imprimatur to statement:

> Moreover, we have in this country particular legislation on this point that is not explicitly mentioned in the Code: the decree of the Third Plenary Council of Baltimore is still binding on us. It reads: 'We command all (i.e. baptized) married persons that they must not go to the civil courts to obtain a separation from bed and board without previously receiving permission from the ecclesiastical authority. Should anyone attempt this, let him know that he incurs the guilt of grave sin and that he is to be punished as the Bishop shall decide.'[6]

38. In 1962, Cardinal Archbishop of St. Louis gave imprimatur to similar statement: "It is a grave sin for a validly married Catholic to institute divorce proceedings against a partner without permission of the bishop of the diocese."[7]

39. In the 1940’s and 1950’s in the United States, the grounds used in the civil forum for cases regarding the separation of spouses and divorce were generally parallel with the legitimate reasons for separation according to canon law (adultery, grave abuse, criminal behavior, extreme cruelty). However, in 1969 that all started to change, with the enactment of unilateral no-fault divorce laws. When the 1983 Code of Canon was issued, it covered the grounds for separation (cc. 1152-1155). In 1997, the Catechism of the Catholic Church was promulgated reiterating how separation is not allowed except in certain circumstances delimited in canon law.

Divorce

I. Prove to Bishop Reason for Separation Before File in Civil Forum Divorce/Separation

40. Before a spouse files for divorce or separation in the civil forum, he or she must demonstrate to the bishop that there is a morally legitimate reason for separation. Approaching the bishop or the tribunal judge starts an ecclesiastic separation case. Permission to approach the civil forum can only be granted by the bishop. See canon 1692 in section "L. Reasons Bishop can Permit Party to Approach the Civil Forum." Catholics are bound by the obligations established in canon law (cf. c. 224).

41. When Saint John Paul II promulgated the Code of Canon Law in 1983, he emphasized the importance of canon law in his introduction:

> Since the Church is organized as a social and visible structure, it must also have norms: in order that its hierarchical and organic structure be visible; in order that the exercise of the functions divinely entrusted to it, especially that of sacred power and of the administration of the sacraments, may be adequately organized; in order that the mutual relations of the faithful may be regulated according to justice based upon charity, with the rights of individuals guaranteed and well-defined …

J. Filing for Civil Divorce or Separation Breaks Canon Law, if not Approved by Bishop

42. The judges in the civil forum (i.e. family court, domestic relations court, or district court) have no morally legitimate authority to relieve parties from their obligation to maintain a common conjugal life, in other words, to live in the same home with each other and any children. None-the-less, the civil forum issues decrees separating parties, and in most cases the decrees grant a civil divorce that gives parties freedom to civilly marry a different person.

43. Canon 1692 §§ 2 &3 require the bishop's approval before a party can approach the civil forum and the reason is explained in the Navarra "Code of Canon Law Annotated" which is recommended by the President of the Pontifical Council of Legislative Texts:

> Paragraphs 2 and 3 consider some cases where the spouses, after obtaining authorization from the diocesan bishop of their place of domicile, bring their case before the civil forum. Since divorce laws have proliferated in many countries, the need to request the diocesan bishop's authorization is a necessary precaution, which prevents the fostering of trials whose judgments violate precepts of divine law, to the detriment of the spouses and with the risk of scandal to others.

44. Commenting on canon 1692, in instruction published by the Vatican Publishing House (*Libreria Editrice Vaticana)*, the author states, "Can. 1692 §2 seems to require the previous permission

of the Bishop of the diocese of the residence of the spouses – *perpensis peculiaribus adiunctis* – so that the spouses can approach the civil forum." (English Translation of Diego-Lora, page 391).

45. Even before the Holy See published the Code of Canon Law in 1917, Pope Leo XIII, in his 1880 Encyclical "*Arcanum* on Christian Marriage," taught that Catholics could not hand their marriage contract to the civil rulers.

> Let no one, then, be deceived by the distinction which some civil jurists have so strongly insisted upon - the distinction, namely, by virtue of which they sever the matrimonial contract from the sacrament, with intent to hand over the contract to the power and will of the rulers of the State, while reserving questions concerning the sacrament of the Church.

46. When the 1917 canon law was in effect, Advocate and Procurator for the Supreme Tribunal of the Roman Rota, in "Canonical Procedure in Matrimonial Cases," noted how ecclesiastic permission is required before beginning a suit in the civil forum. If a spouse began a civil suit without the required permission, according to the 1884 III Plenary Council of Baltimore, the spouse was gravely guilty (See "Prefect, Advocate Signatura, permission required for civil action, year 1944" on page 71).

47. Anyone with a Catholic marriage, who petitions for separation or divorce in the courts of the civil forum without first having the bishop's permission is breaking canon law.

K. Divorce is Immoral

48. Except in limited circumstance, forcing separation or divorce on one's family is immoral, a grave offense against nature, and contravenes moral law (See Section "H. Divorce is Immoral, Grave Offense against Nature, Contravenes Moral Law").

L. Reasons Bishop can Permit Party to Approach the Civil Forum

49. Canon 1692, §§2 & 3 give parameters wherein those with Catholic marriage can approach the civil forum. As defined in canon 86, neither the bishop nor married parties have permission to disregard canon 1692 if it is categorized as a code that defines things that are essentially constitutive of juridic acts. If canon1692 is categorized as a procedural law, neither the bishop nor married parties have permission to disregard it as specified in canon 87.

50. If the legislator (the Pope) intended for the Bishop to give permission *carte blanch* to everyone to approach the civil forum for a decree of separation or even divorce, there would be no reason for canon 1692 to exist. When there is no morally legitimate reason for separation of spouses, if the bishop were to give permission for a particular spouse to approach the civil forum for a decree of

separation or divorce, then the bishop would be giving the spouse permission to invoke the civil authorities to officially ratify the spouse's marital desertion or marital abandonment.

51. Canon 1692 gives the bishop two possible reasons that he might grant someone permission to approach the civil forum.

> Can. 1692 §1. Unless other provision is legitimately made in particular places, a decree of the diocesan bishop or a judicial sentence can decide the personal separation of baptized spouses according to the norm of the following canons.
>
> §2. Where an ecclesiastical decision has no civil effects or if a civil sentence is not contrary to divine law, the bishop of the diocese of the residence of the spouses, after having weighed the special circumstances, can grant permission to approach the civil forum.

52. Obviously, the bishop could refuse to grant permission to approach the civil forum, instructing parties of their obligation to maintain common conjugal life. A person can be punished with a just penalty who does not obey a legitimate precept of the Ordinary (local bishop) and who persists in disobedience after a warning (cf. c. 1371, º2). If a person approaches the civil forum for a separation or divorce decree without the bishop's permission, he or she is breaking canon law (See Section "J, Filing for Civil Divorce or Separation Breaks Canon Law, if not Approved by Bishop"). If a person has no moral reason for separation and approaches the civil forum for divorce, he or she is also acting immorally, committing a grave offense against nature, and contravening the moral law (See "H. Divorce is Immoral, Grave Offense against Nature, Contravenes Moral Law"). Canon 915 instructs, "Those "[…] "obstinately persevering in manifest grave sin are not to be admitted to Holy Communion."

M. Ecclesiastical Decision has No Civil Effects

53. After a husband or wife has proven to the bishop that he or she has a morally legitimate reason for separation of spouses, one of the reasons that the bishop can grant permission for a party to approach the civil forum would be if the ecclesiastic separation decree has no civil effects. According to the instruction published in 1984 by the Vatican Publishing House, the ecclesiastic separation decree, "will also include, at the same time, these opportune measures that require the due sustenance and education of the children (cf. can. 1154)" (Diego-Lora, page 400. See "*Libreria Editrice Vaticana,* Cases of Separation of Spouses, Diego-Lora 1984"on page 59).

54. The fact that spouses must tend to their mutual material or corporal perfection is an informing principle of marriage listed in the "Exegetical Commentary on The Code of Canon Law" (Navarra): "This rule implies that spouses must help each other in the maintenance and improvement of the material aspects of their personal life. It also refers to the fact that matrimonial life must not involve a detriment to the corporal or material good of the other spouse" (See "23. Exegetical

Commentary Canon 1151, Right/Duty to Commonality of Life, Ivars" on page 71). According to natural law, it seems that the spouse who wrongfully gives cause for separation of spouses should not be relieved of his/her obligation to contribute his/her share to the material good of the innocent spouse. Fair-minded judges should not force the innocent spouse to pay for the wrongful behavior of the other spouse, thus enabling cohabitation with an adulterous partner or malicious abandonment.

55. Canon 1154 states, "After the separation of the spouses has taken place, the adequate support and education of the children must always be suitably provided." Canon 1154 in the code form year 1983 correlates to canon 1132 from the code promulgated in the year 1917. Procurator and Advocate for the Supreme Tribunal of the Signatura, Rev. William Doheny, in his work, "Canonical Procedures in Matrimonial Cases" gave English Translation of canon 1132 of the *CIC/1917*:

> This Canon states that 'after the separation is arranged, the educational rearing of the children is to be entrusted to the innocent consort. If one of the consorts is a non-Catholic, this right belongs to the Catholic consort, unless in either case the Ordinary decides otherwise for the good of the children, while always safeguarding their Catholic education (Doheny, page 648).

56. In cases of morally legitimate separation, one spouse is "guilty" of adultery, grave abuse, abandonment, or other misdeeds recognized by canon law and jurisprudence from the Roman Rota. Tradition dictates according to *CIC*/1917 canon 1132, that by default, the rearing of children is to be entrusted to the innocent consort. From the time after the Council of Trent to the 1917 Code of Canon Law, "the judge was normally to give the children over to the care of the innocent party and they were to be reared at the expense of the guilty partner" according to a series of decisions cited by King (See "Canonical Procedure in Separation of Spouses (re. Children) King, 1952" on page 72)

57. Though an ecclesiastic separation decree must include opportune measures for the education of children and sustenance, the ecclesiastic forum does not have the mechanism in place to facilitate that these measures are undertaken or ratified in the civil forum. The bishop could give permission to a person to approach the civil forum if the bishop believed that the civil forum would make his ecclesiastic separation degree have civil effects. If both parties are professed Catholics respecting authority of the Church, between the two of them, they can make the ecclesiastic separation decree have civil effects if they both agree to abide by the obligations toward each other and their children provided in the ecclesiastic separation decree. In the civil forum, married parties can enter into their own separation agreement defining plans for custody (or parenting) and support.

N. Civil Sentence is Not Contrary to Divine Law

58. Canon 1692 §2 shows that the bishop can give a party permission to approach the civil forum if the decree forthcoming from the civil forum is not going to be contrary to divine law.

59. In the United States, when there is a morally legitimate reason for separation of spouses, such as unrepentant adultery by one party, a decree issued in the civil form will routinely have the children live with or spend overnight visits with the adulterous parent and the new sex partner. This gives serious scandal to children and seems contrary to divine law.

60. In the United States, no-fault divorce practitioners separate families whenever one spouse files for divorce or separation regardless of whether or not separating would be contrary to divine law. After one spouse files in the civil forum against another spouse who has committed no misdeeds meriting separation of spouses, the one who has done nothing bad to justify separation and does not want a separation, routinely has many simple freedoms violated. Stephen Baskerville, author of "Taken Into Custody: The War Against Fathers, Marriage, and the Family," listed some of these violation against freedom when he spoke at the World Congress of Families in Amsterdam in 2009 (See "World Congress of Families 2009, Stephen Baskerville" on page 76).

> Parents are ordered out of their homes ("divorce"); Parents are told they may not see their children, on pain of arrest and incarceration ("child custody"); Children are summarily removed from their parents, with no evidence of wrongdoing ("child abuse"); Parents find their property, including their homes, are summarily confiscated ("division of property"); Parents are summarily ordered to pay huge sums to officials they have not hired for services they have neither received nor sought, on pain of incarceration ("reasonable attorneys' fees"); Parents are summarily ordered to pay staggering sums to which they never agreed, assigned "debts" they did nothing to incur, and their wages are confiscated, all on pain of incarceration ("child support").

O. Permit to Approach the Civil Forum

61. For either of the two reasons described in canon 1692 §2 ("M" Ecclesiastical Decision has No Civil Effects; or "N" Civil sentence is not contrary to divine law) the diocesan bishop can grant permission for party to approach the civil forum. See canon 1692 §2 in section "L. Reasons Bishop can Permit Party to Approach the Civil Forum."

P. Concerns Only the Civil Effects of Marriage

62. Canon 1692 §1 shows that cases of separation of spouses are only to be decided by either the bishop or tribunal judge(s). A spouse cannot independently on one's own authority decide to separate from the other except in limited circumstances relative to adultery that is not condoned by innocent

party and relative to temporary separation due to immediate danger in delay (See Section “E. What are the Morally Legitimate Reasons for Separation of Spouses?” and “Canon 1152, 1153, promulgated year 1983” on page 52). However, in no circumstances can a spouse independently, on one’s own authority, decide to petition the civil forum for separation or divorce.

63. If an ecclesiastic separation case was already in process in the tribunal judge(s) forum, in contrast to the bishop’s forum, the tribunal judge cannot even grant a party permission to approach the civil forum to petition for civil separation or divorce. If the tribunal judge(s) concludes that the case concerns only the merely civil effects of marriage, a party could be authorized to approach the civil forum only by the bishop. Before the bishop can give his permission, he must weigh the special circumstances of the case and consider whether a civil decree will be contrary to divine law, and whether ecclesiastic separation decree would have civil effects.

64. Canon 1692 §3 states, “If a case concerns only the merely civil effects of marriage, the judge, after having observed the prescript of §2, is to try to defer the case to the civil forum from the start.” From the minutes of the drafting committed that wrote this canon law, it is clear that a tribunal judge has no authority to give permission for a spouse to file in the civil forum for divorce or separation (See Consulters Drafting Canon Law, canon 1692 §3” on page 78).

65. The question of whether a couple is still obligated to maintain the common conjugal life is not a question regarding the “merely civil effects of marriage.” Exegetical Commentary on the Code of Canon Law, published in English in 2004, shows "since the transformation of the obligatory content of the bond is not limited to the civil effects of marriage, c. 1692 §1 implicitly establishes that cases of personal separation of the baptized must be taken to the canonical forum, ‘unless lawfully provided otherwise in particular places’” (can. 1692). In the United States there is no canonical provision to dispense canon 1692.

66. Citing *Acta Apostolicae Sedis (AAS)* from 1929 and 1934, Rev. Marion Gibbons describes the same principle: “Even the temporary interruption as well as the perpetual cessation of the conjugal life by way of a separation of the parties, though not affecting the bond of marriage, can in no way be specifically considered a merely civil effect over which the State has any native authority” (See “Separation cannot be specifically considered a merely civil effect, Gibbons, 1947” on page 78).

67. If a party’s separation case was being adjudicated by tribunal judge(s) and the party filed in the civil forum for divorce or separation without the bishop’s permission, the party would be breaking canon law. See Section “J. Filing for Civil Divorce or Separation Breaks Canon Law, if not Approved by Bishop.”

Prevalent Practice

Separation

Q. One or Both Spouses Choose to Separate and will not try to reconcile

68. Any separation of Catholic spouses begins when one spouse chooses to separate and acts on that choice. He or she may want to separate for any reason whatsoever and might say, "our marriage is over," or "I do not love you anymore." One might separate because he or she is simply dissatisfied and knows others who easily were granted annulments. The person choosing to separate wants to get his or her annulment, too. A number of these spouses refuse to cooperate with anyone experienced in helping couples strengthen their marriage. They may have started a serious romance with a new sex partner and choose to leave behind their spouse.

69. Sometimes a spouse chooses to separate to be safe from a gravely dangerous abuser. Occasionally the separation will begin when both spouses choose to separate from each other.

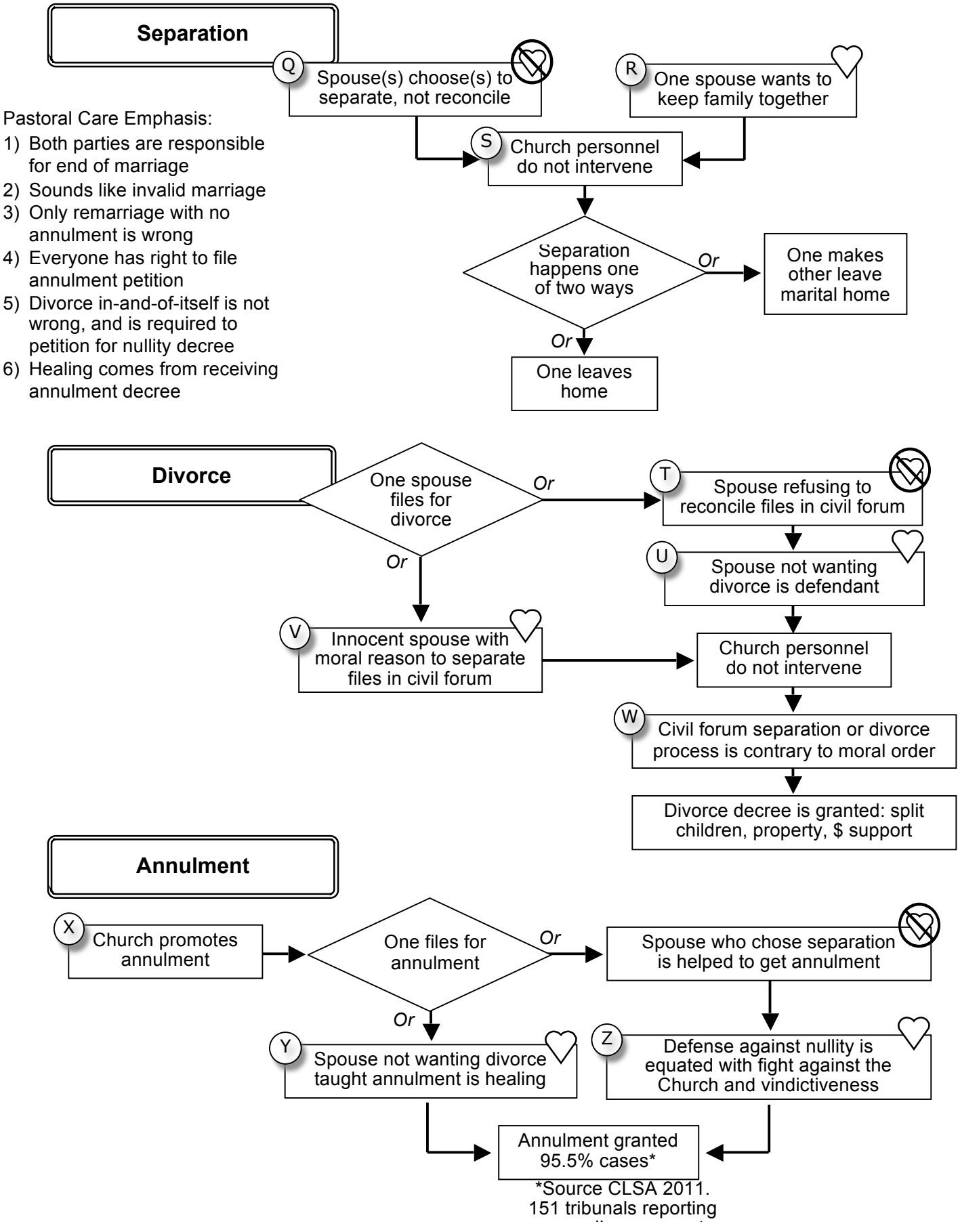
R. One Spouse Wants to Keep the Family Together

70. When one spouse chooses to separate because he or she has decided, "our marriage is over," or feels for no morally legitimate reason, "I cannot stay with you anymore," the other spouse is left wanting to keep the family together.

S. Church Personnel do not Intervene as Separations Occur

71. Separation begins in either of two ways: the one choosing the separation leaves the marital home: the one wanting separation makes the other leave, either with persuasion, coercion, threats, or by eliciting the civil divorce lawyers and judges with their sheriffs and police.

72. In the United States, there is no notion that the Catholic Church will intervene when a separation is about to occur or has already occurred. Very rarely does a diocesan website make any distinction between the morally licit reasons to separate and simple marital abandonment. Though programs like *Retrouvaille* exist to help couples, and is publicized by many dioceses, those in leadership positions do not proactively reach out to a spouse choosing to separate to ask him or her to reconcile and give *Retrouvaille* a try.


Separation
Q
Spouse(s) choose(s) to separate, not reconcile
R
One spouse wants to keep family together
S
Church personnel do not intervene
Separation happens one of two ways
Or
One makes other leave marital home
Or
One leaves home
Pastoral Care Emphasis:
1) Both parties are responsible for end of marriage
2) Sounds like invalid marriage
3) Only remarriage with no annulment is wrong
4) Everyone has right to file annulment petition
5) Divorce in-and-of-itself is not wrong, and is required to petition for nullity decree
6) Healing comes from receiving annulment decree
Divorce
One spouse files for divorce
Or
T
Spouse refusing to reconcile files in civil forum
U
Spouse not wanting divorce is defendant
Or
V
Innocent spouse with moral reason to separate files in civil forum
Church personnel do not intervene
W
Civil forum separation or divorce process is contrary to moral order
Divorce decree is granted: split children, property, $ support
Annulment
X
Church promotes annulment
One files for annulment
Or
Spouse who chose separation is helped to get annulment
Or
Y
Spouse not wanting divorce taught annulment is healing
Z
Defense against nullity is equated with fight against the Church and vindictiveness
Annulment granted 95.5% cases*
*Source CLSA 2011.
151 tribunals reporting

73. In the U.S.A., ideological themes spread often by Church personnel show the Church's disinterest in becoming involved when a spouse chooses to separate:

- Neither party is particularly responsible for the failure of a marriage; both are responsible.
- A marriage has ended when one feels either that the love between the spouses is dead or the relationship is no longer life-giving.
- Sometimes marriages just end, with no notion of the possibility that either spouse did anything particularly wrong.
- Being separated or divorced, on its own, does not affect one's status in the Church. Catholics who happen to be divorced are full members of the Church with all of the same rights as any other member of Christ's faithful, including receiving Holy Communion.
- All divorced persons may receive the sacraments of the Church, however, there is a problem when a divorced person enters a second marriage without a declaration of nullity.
- Separating is never wrong as evidenced by the fact that there is no canonically required punishment for anyone who separates.
- When a spouse chooses to separate, it is very plausible that he or she should separate because the marriage is likely not valid and a tribunal will likely decree the marriage is invalid.
- Family and friends should not judge anyone who is separating, but only be supportive of whatever decision a separating person makes.
- It is scornful to want to stay married to a person who does not want to be married anymore.
- It is bad (uncharitably judgmental) to suggest that one spouse is innocent and the other guilty when a separation occurs.
- A marriage had failed if one's spouse committed adultery, and an annulment is virtually guaranteed to one who discovered adultery and plans to get civilly divorced and submit petition to tribunal.
- Those who do not want marital separation should be ready to docilely accept a decree of nullity that is likely to be granted by a tribunal, and to do otherwise would be to defy the Church.
- After a marriage has died, the pastoral recommendation is for the parties to start life over again as single persons, get an annulment, and if either wants to be married, they should eventually find a new partner.
- Everyone has the right to get a no-fault divorce from the civil forum, because everyone has the right to petition for a decree of marriage invalidity; tribunals require that the civil divorce be completed first.

Divorce

T. Spouse Refusing to Reconcile files in the Civil Forum

74. Any spouse might approach the civil forum for divorce even when the other has committed no wrongdoing morally deserving of separation or divorce. The spouse approaching the civil forum (when the other did nothing seriously wrong) plainly refuses to reconcile. Diocesan staff people act like the Church only has interest in whether a party attempts to enter a second marriage, but no interest when a party files in the civil forum for divorce. Apparently, citing one phrase from canon law, out of context, and interpreted incorrectly, diocesan personnel say that divorce, "concerns only the merely civil effects of marriage" (See "Canon 1692 §§ 1-3" on page 66).

U. Spouse not Wanting Divorce is Defendant in Civil Forum

75. After one spouse files in the civil forum for divorce, the other spouse is the defendant or respondent. With no-fault divorce (also referred to as unilateral divorce), there is nothing a defendant/respondent can do to stop the civil judge from issuing a divorce decree. There is no notion that Church personnel do anything to intervene on behalf of a Catholic defendant/respondent in a no-fault divorce. In the United States, there is no publicized practice of Church personnel questioning the spouse who wants a divorce, and thereafter, discovering that there is no morally licit reason for separation. There is no notion of Church personnel officially instructing the spouses wanting the divorce that it is wrong to divorce in their circumstances. Months or years after the divorce is granted, if the spouse who wanted the divorce realized he or she did something wrong, Catholic writings in the U.S. describe how the person can be absolved of any sin associated with divorcing in the Sacrament of Reconciliation, but no mention is made of the obligation to reconcile, or to restore and maintain a common conjugal life. Apparently, diocesan ministries in the U.S. for divorced Catholics ignore the fact that only in situations wherein the other spouse has committed particular wrongdoings justifying separation, is it morally licit to separate or divorce.

V. Innocent Spouse with Reason to Separate, Files in the Civil Forum

76. In circumstances wherein one spouse commits wrongdoings justifying separation, the blameless spouse might petition in the civil forum for divorce. Wrongdoings include grave abuse, having an adulterous relationship, marital abandonment, refusing to let the family practice the faith, and others covered in jurisprudence from the Roman Rota.

77. There is no publicized practice of Church personnel intervening when there is a morally legitimate reason for separation. Nothing is taught explaining the parameters of a separation plan that would be "not contrary to divine law," though canon 1692 emphasizes this requirement. Ministries for divorced Catholics are well publicized by dioceses in the U.S. and have the following characteristics:

- are not known to provide any Catholic teaching about separation plans not contrary to divine law;
- emphasize how divorced Catholics need to be at peace with being single again;
- neglect the possibility of participants being faithful to marriage, and open to reconciliation after divorce;
- conclude with teaching that the recommended pastoral care for a divorced Catholic is to be healed by receiving an annulment by baring one's heart to the diocesan tribunal.

W. Civil Forum Divorce Process Contrary to Moral Order

78. No One is Blamed: In the civil forum, especially with no-fault divorce (better named unilateral divorce), no distinction is made between the spouse who committed wrongdoings serious enough to deserve separation of spouses, and the spouse who did not. Understandably no one is perfectly innocent in their marriage because everybody, at times, offends their spouse. For clarity in this discussion, when distinguishing between the spouse who committed wrongdoings justifying separation and the other spouse, the latter shall be identified as the innocent spouse. In the civil forum, when one spouse reneges on his/her marital promises (by either committing adultery, abandoning the marital life, or gravely wounding the other spouse or children), the rest of the family wants the wrongful behavior to stop. But in the civil forum, adulterers and abandoners are never instructed of their obligation to amend their wrongful ways and work toward reconciling their marriage.

79. Catholic Lawyers: Catholic divorce lawyers regularly disregard Saint John Paul II's instruction given during his 2002 address to the Roman Rota saying that Catholic lawyers must not work for clients whose intention is the break-up of their marriage.

80. Cruelty to Children: If a spouse forces the break-up of the marriage with divorce, when the other spouse has done nothing serious enough to justify separation, splitting of the family is cruel to the children and the innocent spouse. Routinely, children are forcibly separated from the natural day-to-day interactions that they were having with the innocent spouse even though the children pray that the wrongdoer (parent committing adultery, being gravely dangerous, or abandoning marriage) would work to stop his or her wrongdoing. The Pontifical Council of the Family in 2002 taught about the damage caused by those who justify divorce with the excuse that they must follow one's "real feelings" and emotions:

> Divorce is immoral also because it introduces disorder into the family and into society. This disorder brings grave harm to the deserted spouse, to children traumatized by the separation of their parents, and often torn between them and, because of its contagious effect which makes it truly a plague on society" […] *Opposed to the civilization of love* is certainly the phenomenon of so-called "*free love*"; this is particularly dangerous because it is usually suggested as a way of following one's "real" feelings, but it is in fact destructive of love. How many families have been ruined because of "free love"!" […] "there is an attempt to 'soothe' consciences by creating a 'moral alibi'. But not all of the consequences are taken into consideration, especially when the ones who end up paying are, apart from the other spouse, the children, deprived of a father or mother and condemned to be in fact *orphans of living parents*.[8]

81. The prefect of the Congregation for the Doctrine of the Faith, Cardinal Mueller, in a June 2014 interview spoke about the children of divorce:

> Cardinal Mueller also tackled the issue of the poor, so pivotal in Pope Francis' teaching.
>
> The prefect said that "among the poor of the third and fourth world," those relegated to the "existential peripheries," there are "the children who must grow up without their parents," the "orphans of divorce," who are perhaps "the poorest of the poor of the world."
>
> These poorest of the poor, these orphans of divorce, are most often found, not in materially impoverished nations, but in Europe and North America – some of the world's wealthiest places.
>
> "These orphans of divorce, sometimes surrounded by many goods and with much money available, are the poorest among the poor, because they have many material goods yet are deprived of the fundamental good: the self-giving love of two parents who deny themselves for their children."[9]

82. Squander Marital Assets: Divorce litigation is very, very expensive. Each lawyer charges between $150 and $400 per hour, though the average annual personal income in the U.S. is about $43,000, which is less than $21 per hour with a full time job. Civil judges regularly order both parties to pay for court appointed psychologists, children's attorneys, guardian *ad litems*, visitation supervisors, etc. After divorce, because there are two households instead of one, the family's spending is nearly doubled for housing, furniture, utilities, and childcare.

83. Coercive Tactics: To defer costs, the innocent spouse who does not want the divorce, is often coerced into signing a divorce agreement, when all he or she really wants is reconciliation. The innocent spouse is also coerced to sign a financial plan wherein all the family assets are split between the two spouses.

84. Wrongdoer Financially Rewarded: The divorce court, by default, takes from the innocent spouse half the marital property and gives it to the spouse who forced divorce. Even a spouse who is

criminally abusive or committing adultery will be financially awarded with half the marital property. No longer are both spouses working together to maintain one household; instead they will support two. The innocent spouse is routinely ordered to financially support a second household where the spouse wanting divorce lives with the children, where the innocent spouse is not allowed to enter. In the civil forum, there is no sense that an abandoning spouse still has a lifetime obligation to provide his or her share to the material wellbeing of the innocent spouse and children. On the contrary, in the civil forum, whoever can convince the judge that he or she should win custody or primary residency of the children will also be financially rewarded because the court will order the loser to pay the winner child support. If the innocent spouse will not *agree* to sign a divorce plan, the civil judge will force a plan on the family anyway. A huge infrastructure exists to enforce the plan, connecting banks, support collectors, sheriffs, and police, etc.

85. Children Scandalized: In the civil forum, no consideration is given to protecting children from the scandal given by the parent who is forcing divorce when the other spouse is innocent. Children could just as likely spend most of their overnights with the parent who chose to live with a new adulterous partner, as with the innocent spouse.

86. Forbidding Children from being Taught About Indissolubility of Marriage: If the civil judge, the court appointed psychological custody evaluator, or court appointed children's attorney learns that the innocent spouse is teaching the children that it is wrong for the other spouse to force the break-up of the marriage, the innocent spouse is risking being punished in the civil forum. The innocent spouse can be found guilty of alienating the children against the parent wanting divorce, so the judge can punish the innocent spouse by not letting him or her see the children, or only letting the party see the children under supervision or until the party promises to never teach the children that forcing divorce in their circumstances is wrong. Teaching the children that the other parent is doing something immoral (as defined by Catholic's understanding of marital obligations) is often not tolerated in the civil forum.

87. Civil Divorce Judges Disdain the Indissolubility of Marriage: The objective of the divorce judge in the civil forum is to grant a decree that achieves four ends: 1) change the civil status of the parties from married to unmarried, 2) generate a custody arrangement (parenting plan) in which children are required to spend time in two different households, 3) split the assets of the married couple, 4) generate a support plan that includes child support and/or spousal support (alimony). If a party objects to the granting of the divorce decree, he or she likely faces the judge's irritation and wrath.

Annulment

X. Catholic Dioceses Promote Annulment

88. Most U.S. dioceses seem to have webpages teaching that a decree of marriage nullity is the pastoral care the Church provides to those who are divorced. Tribunals require a civil divorce before a petition for nullity of marriage can be accepted, but make no mention that the bishop's permission is required before anyone can petition in the civil forum. They do not mention that before a bishop can grant said permission, he needs to have "weighed the special circumstances" of each family (c. 1692 §2). Tribunal personnel conduct publicized educational sessions in which participants are invited to apply for decrees of nullity of their marriage. Diocesan websites contain fill-in-the-blank petitions for decrees of nullity (See "Examples of Statements/Practice on Diocesan Websites" on page 33).

89. No statistics appear to be available showing which spouse typically petitions for a decree of nullity: the spouse who caused separation (by wrongful abandonment, adultery, or abuse, etc.), or the spouse who did not want divorce and wanted to work to keep the family together. Diocesan annulment websites rarely, if ever, make this distinction at all.

90. Some dioceses emphasize that the nullity investigation is not a judgment against either party, it is only and investigation of the marriage. Annulment *publicists* say this, even though the popular ground for nullity (grave lack of discretion of judgment – c.1095 §2) is only supposed to apply to people who had a grave psychic anomaly or mental illness making it impossible for them to freely choose. Those pushing annulments say a nullity investigation is not a judgment against a party even though the grounds may be that someone lied during the wedding by saying he/she wanted to be married for life, but never meant it.

Y. Spouse Not Wanting Divorce is Taught Annulment is Healing Offered by Church

91. If a person never wanted a divorce, and had it forced upon him or her, the person will regularly learn from Church personnel that it is time to move on, and recognize that he or she is single again and has the right to find his or her true soul mate. Petitioning for nullity is encouraged so that the person will be free to date and find their new partner. It is also encouraged because, supposedly, answering the annulment questionnaire will help the petitioner heal from the wounds of their broken, failed marriage. Answering the questionnaire is sold as a way to learn from one's mistakes, so to increase one's chances of starting a valid marriage the next time.

Z. Defense Against Charges of Nullity are Equated with Fighting the Church

92. In an annulment case, when the petitioning-spouse was the cause of separation, the respondent-spouse may be the one who never wanted separation or divorce. For example, a woman who forced the break up of her family could be the petitioner, even though her husband committed no wrongdoings justifying separation. The respondent-husband could know there was no moral reason for his wife to separate, and be confident that their marriage is valid. Or, a man who entered into an illicit sexual relationship with another woman could be petitioning for nullity, and the respondent-wife could have earnestly pleaded with him to break off the affair with the other woman.

93. Diocesan personnel caution respondents like those in the above-mentioned cases against having any conviction that their marriage is valid. If one believes his or her marriage is valid, he or she will be advised against "holding on to anger, restricting the ex-spouse from finding happiness, or mistrusting the Church to do its job." At best, diocesan personnel are confounded when facing a divorced or separated person who is convinced that his or her marriage is valid.

94. Practices of tribunals are unacceptable when they deny the respondent of his/her right of legitimate defense. These rights are specified in the 1983 Code of Canon Law and again in 2005 by the Pontifical Council for Legislative Texts in *Dignitas Connubii,* their "Instruction to be Observed by Diocesan and Interdiocesan Tribunals in Handling Causes of the Nullity of Marriage." Unacceptable practices can be corrected during the appeal process, such that if the right of defense was denied, the entire process resulting in the first tribunal's decision will be voided (a.k.a. nullity of sentence). The law dictates that whenever a diocesan tribunal concludes that a marriage is invalid, the decision is not final unless a second tribunal of another diocese also confirms the decision after studying the case. Either party can name the Tribunal of the Roman Rota as the second tribunal. After the Roman Rota, the next level of appeal is the Supreme Tribunal of the Apostolic Signatura.

95. In a case decided by the Signatura in 1987, they summarized some key components of the denial of right of defense (See "Apostolic Signatura. The Denial of the Right of Legitimate Defense 1987" on page 80). A number of U.S. tribunals' policies are problematic.

96. Lack of Legitimate Citation: By law, a nullity of marriage case must start with the petitioner's petition (also called *libellus).* The petitioner must describe in a general way the facts and proofs that he or she proposes will prove nullity of the marriage. A copy of this petition must be given to the respondent in the citation wherein the respondent is informed that the validity of the parties' marriage is being challenged.

97. When the respondent does not know the general facts that are being alleged to prove nullity, the respondent can not know which witnesses would be helpful to counter allegations. Nor could the respondent have the option of offering such strong proofs that the case could be stopped in the

beginning. If the petition contains no general facts and proofs, or if petition is not given to the respondent in his or her citation, the process is void, because of lack of legitimate citation. See *Dignitas Connubii* Art. 116 §1, 127 §3, 128, and canon law *CIC* can. 1504, 1511.

98. If diocesan tribunals require the petitioner to answer a questionnaire, and tribunals require the answers as part of a Petition for decree of nullity, then the answers should be attached to the respondent's citation, because the petition is supposed to be given to the respondent during citation. If tribunals use the answers to the questionnaire as the testimony (proofs) of the petitioner, this is problematic because proofs are not to be collected until after two other procedures have been completed: first, the respondent is properly cited; and second, the tribunal sets by decree the grounds for nullity that will be investigated for a particular case. Some authors refer to the preliminary collection of proofs as a "fishing expedition." The law does allow that for grave reasons the petitioner's *libellus* could be kept secret from the respondent until after the respondent gives his own testimony (or proofs). But it would be unfair for a tribunal policy in all cases to keep secret from the respondent the *libellus* of the petitioner during the citation of respondent, but some do. (See Lack of Legitimate Citation, Canon Law and *Dignitas Connubii* on page 82).

99. Psychologist, Petitioner, Defender of the Bond, records kept Secret: For cases on incapacity to consent, the tribunal is supposed to have an expert witness psychologist review the record of the case (a.k.a. acts) and give a report and testimony about whether the record shows grave psychological problems (*D.C.* Art. 209 §1). When tribunals keep the psychologist's report and testimony secret from the respondent, according to Msgr. Cormac Burke who has thirteen years of experience as a Roman Rota judge, the tribunals are placing the respondent in a situation that is unjust according to the norms of Church law (See "Respondent's right to read Psychologist Report and Testimony, Burke 2012" on page 83). In the U.S., tribunals might justify their policy of keeping the expert witness psychologist's report secret from the parties by maintaining that to do otherwise would be a violation of federal privacy rules. But this position is questionable because federal privacy rules limit the medical practitioner, the psychologist, or a health insurance company from given information to others. To avoid violating the federal privacy rules, the *psychologist* would need to obtain from the party alleged to have the psychological problem his or her permission for the *psychologist* to give the *tribunal* information about the party's mental health. But the federal privacy rules are not applicable to an ecclesiastic entity to which a psychologist gives information.

100. After all the proofs are collected, and before the tribunal makes its decision, the law requires a tribunal staff person (Defender of the Bond) to submit his observations that must support the validity of the marriage. The law also gives the petitioner the option to have an advocate submit a brief supporting the petitioner's allegations about the nullity of the parties' marriage. The Respondent has

the right to read these documents that become part of the record of the case. But tribunals have their own policy of keeping these documents hidden from the respondent, which leaves the respondent ill-equipped to know whether there is a basis to appeal against certain procedural violations, or defend against points raised by the petitioner's advocate (See "Respondent's right, Petitioner Brief & Defender Observations. *Dignitas Connubii*" on page 88).

101. Arrange for Parties to Unknowingly Waive Right to Represent Themselves: When tribunals arrange for parties to sign generic pre-printed statements, tribunals can arrange for both petitioner and respondent to waive their right to represent themselves without ever informing the parties of this loss. While this does make the process more expedient for the tribunal staff, it seems to interfere with the discovery of the truth. For example, tribunals get parties to mandate procurators who can create a paper trail claiming that the parties are not interested in reading the record of the case. Procurators keep secret from the respondent the full definitive sentence wherein the tribunal describes, with law and fact, their basis for deciding the marriage was invalid. *Dignitas Connubii*, gives the job description of the procurator in Article 104 § 2: "It pertains to the procurator to represent the party, to present the libellus or recourses to the tribunal, to receive its notifications, and to inform the party of the state of the cause; but those things pertaining to defense are always reserved to the advocate." Commentary on *Dignitas Connubii,* published by the Canon Law Society of America, further describes the responsibility and power of a procurator:

> The actions of the procurator are taken as if they had been placed personally by the one represented. The person represented need not act in person, although here, as opposed to when a guardian is appointed, the person remains free to do so. However, the party cannot recall or challenge an act once it is placed by a legitimately appointed procurator. (Ludicke, page 181 on *D.C.* Art 101)[10]

102. Canon law allows a party to be represented by a procurator that can sign the petition (*libellus)* instead of the petitioner, and receive the definitive sentence on behalf of the party. For tribunals that regularly issue decrees of nullity based on the petitioner's defective consent in accord with canon 1095, 2º, (grave lack of discretion of judgment on behalf of the petitioner), the petition is supposed to allege that the petitioner suffered a grave psychic anomaly. If the petitioner would never agree to this allegation, the tribunal arranges to have the procurator make the allegation against the petitioner, sign on behalf of the petitioner (*D.C.* Art 116, 5º), and keep secret from the petitioner that the tribunal is getting ready to issued a decree of nullity based on the petitioner's grave psychic anomaly at the time of marriage.

103. Arrange for Respondent to Unknowingly Waive Right to Have a Canon Law Brief Submitted on His Behalf: When a tribunal has pre-printed forms that parties are instructed to sign, the

tribunal can get the parties to sign a statement wherein they "entrust themselves to the knowledge and conscience of the judge." By doing so, the respondent waives his right to have an expert in canon law write a brief on his behalf supporting his position (*D.C.* Art 245, §2). The law requires that parties have the right to have an advocate (expert in canon law) assist them in defending their position. If the tribunal never informs the respondent of that right, and instead has the respondent sign a document stating that the respondent entrusts himself to the knowledge and conscience of the judge, then the respondent unknowingly waives a right he never knew he had.

104. Interfere with Respondent's Ability to Adequately Defend Self by forbidding note-taking: During the reading of the acts (record of the case), tribunals refuse to let the respondent keep any of his own notes, which restricts the respondent's ability to offer follow-up proofs or compose his own observations in his brief or at later phases in the appeal process. No respondent can defend what he cannot remember. By law, both follow-up proofs and respondent observations are allowable. There is no provision in the law that a respondent cannot take notes sufficient for him to prepare his defense. The law specifies that, before the inspection of the acts, the tribunal can require the parties to take an oath or make a promise, that parties will use the knowledge gained through this inspection of the acts only for their legitimate defense in the canonical forum (*DC* Art 232. can. 1455, §3). Tribunals, however, even after the respondent has signed such a promise, have a policy forbidding the taking and keeping of notes.

105. Full Copy of Definitive Sentence not sent to Parties: The law requires that both petitioner and respondent should be given a copy of the full definitive sentence of the first instance tribunal. In the definitive sentence, the first instance tribunal has to show their decision of whether or not the nullity of the marriage was proven, and show how the law and facts supported their conclusion. If the respondent chooses to appeal the first instance decision, he needs his own copy of the full definitive sentence in order to draft an appeal. Some tribunals have the policy of never giving the respondent a copy of their definitive sentence. Other tribunals work at the beginning of all cases to get all respondents to agree on paper to have a procurator represent them; then the tribunal lets the procurator see the full sentence; and has a policy that the procurator should never give a copy to the respondent.

106. Alleging that the break-up of the marriage proves nullity: In the Popes' annual addresses to the Tribunal of the Roman Rota, both Saint John Paul II, and Pope Benedict XVI have corrected tribunals for giving annulments just because a marriage broke up:

> (JPII, 1990) A valid marriage, even one marked by serious difficulties, could not be considered invalid without doing violence to the truth and undermining thereby the only solid foundation which can support personal, marital, and social life.

> (Benedict XVI, 2009) To speak of capacity or incapacity, therefore, is meaningful to the extent that it concerns the act itself of contracting marriage," [...] "and its continuing validity does not depend on the subsequent conduct of the couple during their married life." [...] "First of all, there is a need for a new and positive appreciation of the capacity to marry belonging in principle to every human person by virtue of his or her very nature as a man or a woman. We tend in fact to risk falling into a kind of anthropological pessimism which, in the light of today's cultural context, would consider marriage as practically impossible.

107. The vast majority of petitioners are granted declarations of nullity of their marriage in the United States. The Canon law Society of America (CLSA) publishes summary reports of diocesan tribunals that provide data. Of the 151 dioceses that reported to CLSA in 2011, over half of the tribunals decided that the marriage was invalid for over 97% of the petitioners. Eighty-five percent of the tribunals showed that they decided the marriages were invalid for 90% or more of the petitioners.[11]

108. The Roman Rota judge who was one of the six editors who worked with Saint John Paul II in drafting the Code of Canon Law, wrote in 1984:

> Most people today" […] "are sophisticated enough to know that most marriages are valid because most men and women, however pleasant or unpleasant, however educated or uneducated, are able to marry." […] "The vast majority of marriages are valid, the vast majority of people know it, and they know we know it too (See "Roman Rota Judge, Editor of Canon Law, Cardinal Edward Egan" on page 37).

Examples of Statements/Practice on Diocesan Websites

Toledo, Ohio

Petition for nullity requires procurator, and that civil divorce already be obtained.
http://toledodiocese.org/images/uploads/page_assets/TRIBformalapplicationannulment1.pdf
http://toledodiocese.org/images/uploads/page_assets/TRIBligamen2011.pdf

Allentown, Pennsylvania

Petitioner must present certain documents including a copy of the final divorce decree.

Quotes from Petition for Nullity Frequently Asked Questions page:

"As soon as the Tribunal is able, an Advocate is assigned to the Petitioner who will receive a letter to schedule an appointment for the formal interview at the Tribunal. The formal interview — In order for us to gain a thorough understanding of the former marriage, the Petitioner must appear in person at the Tribunal for an interview. At that time testimony will be taken by an Advocate."
http://www.allentowndiocese.org/the-diocese/the-tribunal/annulment-faqs#q3

Detroit, Michigan

Petition for nullity requires procurator and first step to an annulment is to obtain a civil divorce.
http://www.aod.org/being-catholic/marriage-and-family/annulment-information/
and
http://www.aod.org/~/media/Files/AOD/Ministries/Marriage and Family/Annulment/Application for Declaration of Nullity.ashx

Quote from LINK webpage:
"What is the status of a divorced Catholic in the Church?

"The Church does not teach that civil divorce is grounds for excommunication. Catholics who are divorced and who have not entered another civil union are encouraged to practice their faith, including reception of the sacraments. Being separated or divorced, on its own, does not affect one's status in the Church. Catholics who happen to be divorced are full members of the Church with all of the same rights and duties as any other member of Christ's faithful."

Chicago, Illinois

Application for nullity requires "field advocates" that appears to be empowered with rights of procurator. In answer to question 9, in Frequently Asked Questions, "How is a formal declaration of nullity procedure started? A civil divorce must first be finalized before this process can begin."
http://www.archchicago.org/departments/tribunal/pdf/TribunalMarriageCaseApplicationFAQFees_en.pdf

Quote from LINK webpage:

"Divorce is never part of your plan for life. When you married, you intended it to last a lifetime. Now, there are serious complications in your relationship or you may be divorced, and it may be a time of grief and pain.

"The Catholic Church is present during these difficult times, and offers guidance, support, and resources through Divorce Ministry for divorced Catholics and non-Catholics that wish to obtain the strength needed to move forward through the journey of personal growth."

Milwaukee, Wisconsin

Petition for nullity requires procurator (page 8). Before tribunal will begin process of reviewing marriage for possible declaration of invalidity, tribunal requires a civil divorce be already granted (page 1, n. 3).
http://www.archmil.org/Resources/PetitionforChurchDeclarationofInvalidityAnnulment.htm
and http://www.archmil.org/ArchMil/Resources/Annulment-Petition-English.pdf

Quote from LINK webpage

"When Mom & Dad Break Up … She went on to explain to her children that a church annulment doesn't mean that the Church thinks she and their father are bad people, or that the marriage never existed. While the Church teaches that marriage should last one's lifetime, some married couples can't achieve that goal. 'If we're granted the annulment, it will have less of an effect on you two than our divorce did,' she reassured them.'"

Austin, Texas

Petition for nullity authorizes tribunal to mandate procurator. Petitioner waives right to read the acts of the case personally. Case cannot be accepted without certified copy of civil divorce decree.
http://www.austindiocese.org/sites/default/files/content/users/user56/47. Full Formal Case %281-14-14%29.pdf

Cleveland, Ohio

Petition for nullity requires procurator. With petition must be attached copy of divorce decree.
http://www.dioceseofcleveland.org/tribunal/index.php/procurator-forms
and [download form]
http://www.dioceseofcleveland.org/tribunal/index.php/component/docman/doc_download/15-formal-petition-form-t101?Itemid=

Quote from LINK webpage:

"Status of Divorced People in the Catholic Church: Divorced Catholics who have not remarried outside the Church are full members of the Church with the same rights as those of any other Catholic."

Quote from Tribunal Procedures LINK webpage:

"The staff of the Tribunal of the Diocese of Cleveland is grateful for the assistance of the women and men in parish ministry who continue to provide guidance and support to those individuals who have experienced divorce." […] "PUBLICATION. When all the proofs have been gathered, the parties and/**or** their procurators/advocates, must be permitted to inspect the proofs that will be used to decide the case. (Emphasis not in original. The "or" indicates that the procurator is allowed to read, or waive the right to read, the acts on behalf of the party)"

Lansing, Michigan

Petition for nullity requires procurator who can also name his own replacement (9.3 Petition for Declaration of Invalidity, Formal Case (6)(4))
http://www.dioceseoflansing.org/lansing/sites/all/themes/lansing/pdf/TRIBUNAL_GUIDE.pdf
SECTION 9.5, 9.3 page 4 (procurator advocate)

Los Angeles, California

Petition for nullity requires procurator and procurator can read acts on party's behalf.
http://www.la-archdiocese.org/org/tribunal/Documents/FORMAL TRIAL OF NULLITY.pdf

Quote from LINK webpage:

"Among the people for whom Jesus showed special care were those who suffered from the breakdown of the marriage relationship. Separation and divorce are difficult and usually grievous losses, yet filled with potential for vibrant new growth and responsiveness to grace."

Rockford, Illinois

Tribunal policy shows "Typically, the Petitioner agrees to assign the right to examine testimonies received in the course of the investigation to a Church official known as an Advocate."
http://www.rockforddiocese.org/pdfs/tribunal/invalidity.pdf

Quote from LINK webpage:

"Divorce is unique among life experiences. There is no precedent that can prepare an individual for it. Divorce is a process-not an event. Legal divorce can be pinpointed to a moment in time...to the signing of a court decision; but, not so the experience of divorce. The experience of divorce is the result of a series of incidents that eventually erode a relationship between a husband and a wife. The ending of any marriage that has endured long enough for the two partners to invest portions of their lives, money, emotions, and dreams is often a devastating experience."

Fort Worth, Texas

Quote from LINK webpage:

"Catholic Divorce Ministry; Who We Are: Catholic Divorce Ministry is the ministry of the North American Conference of Separated and Divorced Catholics, Inc., working since 1974 to create a network of support for families experiencing separation and divorce. CDM speaks to the Church with the united, collective voice of separated and divorced Catholics."

Kansas City, Kansas

Quote from LINK webpage:

"If I am divorced, but not remarried, may I receive Communion?

"Yes. A divorced Catholic, in the state of grace, who has not remarried outside the Church, is in full communion with the Church and may receive Communion."

Seattle, Washington

Quote from LINK webpage:

"What is divorce? Divorce is a purely civil ruling determining civil marital status, rights and obligations between spouses, and obligations regarding children. Because the Catholic Church understands marriage to be a permanent bond established by God, it does not recognize the authority of the State or the spouses to terminate that bond. Therefore, the Church presumes the divorced parties are still bound in marriage until proven otherwise by a Church process. Nevertheless, the Church does recognize the purely civil effects of divorce."

Supporting Resources

Premarital Investigation

1. Roman Rota Judge, Editor of Canon Law, Cardinal Edward Egan, 1983

Cardinal Edward Egan, one of the six editors who worked with Saint John Paul II in drafting the Code of Canon Law, was both a judge on the Roman Rota and taught canon law at the Pontifical Gregorian University in Rome.[12] When the 1983 code was published, the scholarly journal of the Roman Rota, *Ephemerides Iuris Canonici,* published Egan's work about lack of due discretion of judgment and insanity, wherein he taught about the essential elements of marriage:

> (page 9) Over the past several years, the Canon Law Faculty of the Pontifical Gregorian University in Rome has been offering a special course for judges and others engaged in marriage tribunal work, in order to review the basic principles of matrimonial and procedural law and as well to explain new developments and approaches in both these fields. It has fallen to me to teach the section of the course entitled << Amentia et defectus debitae iudicii discretionis>>. What follows is a summary of my lectures, a summary that has been requested by many of the hundreds of students who have participated, in the course.
>
> As in the lectures at the Gregorian, so here too I will proceed by discussing five preliminary themes, four general rules, and three particular conclusions concerning insanity; and lack of due discretion of judgement. It is my hope that with these twelve points of reference in mind those who work in diocesan tribunals will be and will feel more secure both in their handling of these grounds for the nullity of marriage and in their further study of them.
>
> … (page 36) VII. - The vast majority of adults are capable of a valid marriage, and the vast majority of marriages are therefore valid.
>
> There are a number of ways to attack the doctrine of the indissolubility of marriage. The best and most worthy is to draw up an argument derived from Scripture, Tradition, and reason, and attempt to show that it demonstrates that the teaching of the *Magisterium* has been wrong about the permanence of the marriage bond. The worst and most unworthy is to concede the doctrine in words but deny it in fact by pretending that a valid marriage is beyond the capacities of most mortals.
>
> Marriage is indeed a « great mystery », a partnership of two human beings ordered to the procreation of other human beings in cooperation with the Creator Himself, a holy state, the magnificent gift of a God Who recognized that it is not good for man to be alone ». All the same, marriage is also a commonplace in the scheme of Nature, the usual way in which most people are to work out their lives and their salvation. Virtually all men and women are attracted to it. Few children can develop properly except in the environment which it

creates. In fact, no state, no community of any kind, can long endure without marriage of some sort. It is part and parcel of the ordinary flow of things this side of eternity. Consequently, unless the Creator and the Nature He has brought into being are to be judged outrageously deficient in things essential, marriage must be something that almost every adult who is not obviously gravely defective in mind or body can do.

All of this should be kepte ver before the attention of officials in ecclesiastical tribunals which accept cases concerning the nullity of marriage because of insanity or lack of due discretion of judgement. For such cases are inviting fields of battle for the second species of attack on indissolubility. And the reason is plain. A judge in a case of this kind is in the final analysis engaged in a work of evaluation in which he compares that magnificent commonplace which is marriage with that often elusive reality which is psychological capacity for marriage, and more often than not compares them years after their one relevant encounter as far as the nullity of marriage is concerned, that is, when the marriage consent seemed to have been given. In such a situation, it is easy to slide across realities, overstate indications, inflate proofs, and thus manufacture certitudes which are certain not at all.

In so doing, one might resolve the personal problems of one or two or even several individuals; and one might have the feeling that all of this is very << pastoral>>. However, at the same time, one might also be reducing the religious commitment of the Faithful as a whole to the permanence of the marriage bond and, as a consequence, raising doubts about the solidity of all other elements of the Gospel message as well, an extraordinarily unpastoral enterprise which, for some melancholy reason, has not of late been accorded the attention and censure it would seem to merit.

Most people today who live in areas of the world where ecclesiastical marriage tribunals are active **are sophisticated enough to know that most marriages are valid because most men and women, however pleasant or unpleasant, however educated or uneducated, are able to marry** [bold not in original]. These people can understand an extraordinary case, something unusual having happened in peculiar circumstances, in a word, an exception; and they can admit that exceptions are at times operative even in the doing of something as ordinary and plain as marrying. However, when the exception becomes the rule, they may remain silent; but they are not without thoughts. **The vast majority of marriages are valid, the vast majority of people know it, and they know we know it too** [bold not in original].

…. (page 52) Final Note: In the opening section of this study it was stated that psychic disorders can lead to the nullity of marriage either because of an incapacity to posit an act of consent such as would be required by a commitment as serious as marriage or because of an incapacity to carry out that to which the consent was given, that is, to fulfill the essential obligations of marriage. Our assignment was to explore the first of these two incapacities, and this we have done. Now, however, we presume to attach a brief note about the second as well. For it is closely bound up with the first and has, moreover, recently replaced the first as *the* <<caput nullitatis matrimonii>> in the ecclesiastical tribunals of many nations.

Marriage, according to the natural and the divine positive law, is a relationship (society, communion, partnership) between a male and female, which is exclusive (all third parties are ruled out), perpetual (it continues in existence as long as both parties are alive), and ordered by nature to the procreation of children. If one grants this definition, all else that we have to say here follows, <<as night the day>>. If one calls into question any of its **essential elements** or seeks to add others, all else that we have to say here will probably founder.

But let us push on. The marriage we have just defined is a relationship, an <<esse ad>>, if you will, which is brought into being when Titius and Titia consent to it by giving and accepting the exclusive and perpetual right to perform acts which are intrinsically directed toward the begetting of offspring. It has never been brought into being in any other way and, indeed, cannot be brought into being in any other way. Consequently, if one or both of the partners to a marriage were unable to participate in marital acts or were unable to commit himself or herself to participate in those acts only with the other partner as long as both were among the living, their marriage, their conjugal <<esse ad>>, or more explicitly, that relationship which should have resulted from the exchange of the above described right, would be invalid for incapacity to follow through on marriage, which is to say, for incapacity to fulfill the essential obligations of marriage.

Perhaps we may seem to be pointlessly laboring the obvious. Unfortunately we are not. For, while the vast majority of canonists today would accede in theory to what we have just written in the paragraph above, **not a few deny it in fact by attaching to the key word, <<relationship>>, a new meaning which, though never spelled out, emerges quite clearly, all the same** [bold not in original]. .

The approach goes something like this : <<Of late the Church has discovered that marriage does not have just a corporal but also a personal meaning, nay more, an interpersonal meaning. Hence, if Titius and Titia are unable to constitute an interpersonal relationship, their marriage is manifestly null and can be declared such on the grounds of incapacity to fulfill the essential obligations of marriage>>.

Up to this point, no urgent complaint need be lodged. It is, of course, not true that the Church has only recently learned that marriage is an interpersonal relationship, as is evident from the fact that Canon 1082 of the 1918 Code of Canon Law stated that anyone who did not know that marriage was, a <<permanent association of a man and a woman>> could not marry validly and that such ignorance was not to be presumed after puberty. Likewise, it is not true that the Church only recently learned that marriage is something more than a merely corporal matter, as is evident from the fact that Canon 1081 of the same 1918 Code of Canon Law stated that marriage results from an exchange of rights, something that can be done only by persons exercising their highest spiritual faculties. However, setting these two reservations aside as issues of secondary importance, we repeat that no grave damage has been done thus far. Marriage is a relationship (interpersonal of course); and if Titius and Titia are unable to constitute the relationship, they do not marry validly. So far, so good.

But the explanation continues: <<The interpersonal relationship which Titius and Titia must constitute is clearly not had if they cannot grow in it, if they cannot be enriched by it, if they cannot be mutually fulfilled as a result of it. Therefore, when either or both parties to a marriage are afflicted by a psychic disorder (usually an abnormality of the personality) whereby they are unable to grow in their marriage, be enriched by it, and mutually fulfilled as a result of it, again, they do not marry validly>>.

Here we have the most serious of complaints [bold not in original]. For <<relationship>> has moved from meaning an <<esse ad>> to meaning a successful <<esse ad>>. And worse yet, the criteria for the success (which is, of course, quite beside the point when the validity of a marriage is at issue) is so vague (<<growth>>, <<enrichment>>, <<fulfillment>>) that it is unlikely that any marriage could survive the test if those judging a case based on such grounds were disposed to sanction a new effort by Titius and/or Titia to achieve a more satisfactory growth, enrichment, and fulfillment in a new, conjugal, interpersonal relationship.

Are we therefore suggesting that the second kind of incapacity for marriage is without meaning? Certainly not. For there are psychic disorders which can render persons incapable of fulfilling the essential obligations of marriage, namely, those psychic disorders which make it impossible for persons to give and accept the exclusive and perpetual right to conjugal acts whence arises that interpersonal relationship which is marriage. As a matter of fact, three are well-known to have such an effect. They are 1. satyriasis, whereby a male cannot commit himself to an exclusive, interpersonal, conjugal relationship ; 2. nymphomania, whereby a female cannot commit herself to an exclusive, interpersonal, conjugal relationship; and 3. that homosexual condition whereby a male is permanently impeded from engaging in sexual activity with a female or a female is permanently impeded from engaging in sexual activity with a male.

If there be any others, they have not as yet been identified at least for those for whom the word, <<relationship>>means <<relationship>> and not necessarily <<happy Relationship>>. Thus there seems to be little more to be remarked about the second incapacity beyond the simple fact that the jurisprudence of the Sacred Roman Rota concerning satyriasis, nymphomania, and homosexuality is quite well-developed and easily available in the published decisions of the past twenty-five years.[13]

2. Pope Benedict XVI, 2011 Address to the Roman Rota

Every year the Pope gives an address to the Tribunal of the Roman Rota. He is the ultimate legislator and interpreter of canon law. Pope Benedict, in 2011, emphasized that no one can claim the right to a Catholic wedding unless they want to marry as the Catholic Church understands marriage.

The post-conciliar discussion on canon law was centred on the relationship between law and pastoral care. The well-known assertion of the Venerable Servant of God, John

Paul II, whose opinion was that "it is not true that, to be more pastoral, the law should be less juridical" (cf. Address to the Roman Rota, 18 January 1990, n. 4), expresses the radical surmounting of an apparent antithesis.

"The juridical and the pastoral dimensions", Pope Saint John Paul II, said, "are united inseparably in the Church, a pilgrim on this earth. Above all, one aspect of their harmony emerges from their common goal: the salvation of souls" (ibid.)." […] "Today I would like to pause to consider the juridical dimension that is inherent in the pastoral activity of preparation and admission to marriage, to seek to shed light on the connection between this work and the judicial matrimonial process.

The canonical dimension of preparation for marriage may not be an element that is immediately apparent. In fact, on the one hand one observes that in courses for the preparation of marriage canonical issues have a rather modest — if not insignificant — place since there is a tendency to think that the future spouses have little interest in problems reserved for experts.

On the other hand, although the need for the juridical work that precedes marriage and that aim to ascertain that "nothing stands in the way of its valid and licit celebration" (Code of Canon Law, can. 1066), escapes no one, there is a widespread view which holds that the examination of the parties engaged to be married and the publication of marriage banns or other appropriate means for carrying out the necessary inquiries which are to precede marriage (cf. ibid., can. 1067) — including courses for the preparation of marriage — are exclusively formal requirements. In fact it is often maintained that in admitting couples to marriage pastors must have a broad-minded approach, since people's natural right to marry is at stake.

It is right in this regard to reflect on the juridical dimension of marriage itself. It is a subject that I mentioned in the context of a reflection on the truth about marriage, in which I said, among other things: "With regard to the subjective and libertarian relativization of the sexual experience, the Church's tradition clearly affirms the natural juridical character of marriage, that is, the fact that it belongs by nature to the context of justice in interpersonal relations. In this perspective, the law is truly interwoven with life and love as one of the intrinsic obligations of its existence" (Address to the Roman Rota, 27 January 2007). Thus, there is no such thing as one marriage according to life and another according to law: marriage is one thing alone, it constitutes a real legal bond between the man and the woman, a bond which sustains the authentic conjugal dynamic of life and love.

The marriage celebrated by the spouses, with which pastoral care is concerned and which is the focus of canonical doctrine, is a single, natural and salvific reality whose richness certainly gives rise to a variety of approaches yet without losing its essential identity. The juridical aspect is intrinsically linked to the essence of marriage. This is understood in the light of a non-positivistic notion of law, but considered in the perspective of relationality in accordance with justice.

The right to marry, *ius connubii,* must be seen in this perspective. In other words it is not a subjective claim that pastors must fulfil through a merely formal recognition independent of the effective content of the union. **The right to contract marriage presupposes that the person can and intends to celebrate it truly, that is, in the truth of its essence as the Church teaches it. No one can claim the right to a nuptial ceremony** [bold not in origina]. Indeed the *ius connubii* refers to the right to celebrate an authentic marriage.

The *ius connubii* would not, therefore, be denied where it was evident that the fundamental requirements for its exercise were lacking, namely, if the required capacity for marriage were patently lacking or the person intended to choose something which was incompatible with the natural reality of marriage.

I would like to reaffirm in this regard what I wrote after the Synod of Bishops on the Eucharist: "Given the complex cultural context which the Church today encounters in many countries, the Synod also recommended devoting maximum pastoral attention to training couples preparing for marriage and to ascertaining beforehand their convictions regarding the obligations required for the validity of the sacrament of Matrimony. Serious discernment in this matter will help to avoid situations where impulsive decisions or superficial reasons lead two young people to take on responsibilities that they are then incapable of honouring (cf. Propositio, n. 40) The good that the Church and society as a whole expect from marriage and from the family founded upon marriage is so great as to call for full pastoral commitment to this particular area. Marriage and the family are institutions that must be promoted and defended from every possible misrepresentation of their true nature, since whatever is injurious to them is injurious to society itself" (Post-Synodal Apostolic Exhortation, Sacramentum Caritatis, 22 February 2007, n. 29).

Preparation for marriage, in its various phases described by Pope John Paul II in the Apostolic Exhortation Familiaris Consortio (22 November 1981), certainly has aims that transcend the juridical dimension because its horizon is constituted by the integral, human and Christian, good of the married couple and of their future children (cf. n. 66), aimed definitively at the holiness of their life (cf. CIC, can. 1063, 2°).

It should never be forgotten, however, that the immediate objective of this preparation is to promote the free celebration of a true marriage, that is, the constitution of a bond of justice and love between the spouses, **characterized by unity and indissolubility, ordained for the good of the spouses and for the procreation and upbringing of their offspring** [bold not in original], and which among baptized people constitutes one of the sacraments of the New Covenant. This preparation does not address an extrinsic ideological message to the couple, nor, still less, does it impose a cultural model; rather, the engaged couple are put in a position to discover the truth of a natural inclination and a capacity for committing themselves which they bear inscribed in their relational entity as man-woman. From this derives the law, as an essential component of the marital relationship, rooted in a natural potential of the spouses that the consensual gift of self actualizes.

3. Prefect of Signatura on Simulation, Cardinal Raymond Burke

"Recent Jurisprudence of the Supreme Tribunal of the Apostolic Signature regarding So-Called New Grounds of Nullity." Canon Law Conference for Canonists and Civil Attorneys." La Cross, Wisconsin: Shrine of Our Lady of Guadalupe, 10 August 2011.

> I would like to now, in the half hour that remains to address the question of new grounds of nullity introduced by some tribunals and I will just take up three today. One is called, the ground, the Intention against the Good of the Spouses, against the *bonum conjugum*. The second one is called Error of Law and the third one is Invalid Convalidation.
>
> And the background of which I take up the question of three so-called new grounds of nullity is my presentation yesterday regarding the collaboration of the Apostolic Tribunals, Roman Rota and the Supreme Tribunal of the Apostolic Signatura in the care for the correct administration of justice in the Church.
>
> With regard to the grounds of nullity of marriage, the rule which guides absolutely the Apostolic Signatura is the discipline of the Universal Church articulated in the Code of Canon Law for the Latin Church and the Code of canons for the Eastern Churches as those grounds are interpreted in Rotal jurisprudence or maybe a more accurate word are "applied" in Rotal jurisprudence.
>
> It must be clear from the start that the only grounds of nullity of marriage are those established by Universal Church discipline— that is those named in the Code of Canon Law.
>
> The formula of doubt and here I am citing canon 1677 in the third section and referring also to the third section of Art. 135 in Dignitas Connubii, the formula of the doubt not only is to ask whether the nullity of marriage is established in the case, but also must determine on what ground or grounds the validity of the marriage is to be challenged.
>
> The Intention against the Good of the Spouses. On June 16, 2004, the Apostolic Signatura wrote to the moderator of a metropolitan tribunal to request some sentences based on the ground of intention contra *bonum conjugum*. On the following August 16 th , the Judicial Vicar sent three sentences to the Signatura which the Signatura submitted to the study of an expert who offered pertinent observations. On February 2, 2008, the Supreme Tribunal responded to the moderator, enclosing a copy of the observations of the expert.
>
> In its letter, the Signatura indicated that a correct understanding of the ground of intention contra *bonum conjugum* is that of an exclusion by a positive act of the will of the ordering of the marriage to the bonum conjugum. Such an exclusion must be proven by the same means used in proving other kinds of exclusion, that is, and we reviewed these yesterday, the confession of the simulating party corroborated by testimony, the reason why the marriage was nonetheless celebrated, the reason for the simulation, and the circumstances preceding, accompanying and following the marriage which support the presumed exclusion.

The Apostolic Signatura further noted that the correct use of such a ground necessarily requires the specific identification of the *bonum conjugum* as an essential element of marriage. And the Signatura further observed on the one hand the *bonum conjugum* in this context has to be distinguished from the *bonum sacramenti,* indissolubility of marriage, the *bonum fidea*, the unity of marriage, fidelity and the bonum prolis, the good of offspring. On the other hand, the *bonum conjugum* understood as *mutu magitorium* can only refer in this context to the minimum and essential requirements of the same; that the mutual assistance of the spouses.

The exclusion of the *bonum conjugum* as a ground of nullity of marriage would therefore indicate the decision existing at the moment of the celebration of the marriage not to foster in any way the well-being of the spouse. This could be the only meaning which this ground has. It cannot be used as a kind of net in which is placed any kind of difficulty in the marriage that is then construed as being against the good of the spouses.

In its response to the Most Reverend Moderator of another diocesan tribunal, the Signatura continued its observation by adding, in other words, a distinction between the central element and other supplementary elements must be made. The essence of the *bonum conjugum* is the intention to promote the good of the spouse and the *exclusio bonum conjugum* is a positive intention to exclude the good of the spouse. The fact is that it would appear to be very rare that someone enters marriage with the intention not to promote in any way the good of the spouse. End of citation.

What should be evident is that there is not an established Rotal jurisprudence regarding this so-called new ground of nullity which represents a development at lower tribunals without respect for the rule of Rotal jurisprudence.

The expert consulted regarding the sentences from the Metropolitan tribunal offers the following helpful observations:

First, the *bonum conjugum* understood as one of the ends towards which the consortium *totius vitae,* the community of the whole of life is ordered and now explicitly mentioned in the 1983 Code, that's in Canon 1055 in the first section, has been considered up to now in the jurisprudence of the Roman Rota almost exclusively in the context of the incapacity to assume the essential obligations of marriage. Here obviously referring to Canon 1095 number three.

As a result of the consideration of the *bonum conjugum* in the framework of simulation of consent at the lower tribunals, the Roman Rota has now begun to examine the matter and it will obviously as causes are appealed in second or third instance to the Roman Rota.

Regarding the contents of the *bonum conjugum,* there continues to be debate among the authors. The expert observes:

"It goes without saying, that not all elements pertaining to the *bonum conjugum* can be considered as essential with respect to the consortium *totius vitae*. And consequently, the exclusion of the non-essential elements does not bring about the nullity of the marriage." In other words, while now the *bonum conjugum* is considered an essential element of the

consortium *totius vitae*, there is no accepted description of the contents of the *bonum conjugum* both regarding its essential and non-essential elements. For example, the *bonum conjugum* is not offended by burning the toast regularly [laughter] nor this kind of situation.

"Regarding the contents of the *bonum conjugum*," the expert notes, and this is an important observation, "that the majority of authors are in agreement, that along the lines of the ends of marriage, it certainly includes *mutu magitorium* and *remanium concupiscentia*." And that's Canon 1013 section one of the 1917 code which in their generality indicate all the aspects, above all interpersonal, that render the life of the spouses better and happier. That being the case, the expert concludes: "It goes without saying, that when the cause is admitted it is necessary to specify the formulae of the doubt well and the grounds of nullity to be used must follow the causes and facts that allegedly led to the nullity of marriage." The use of a very generic grounds of nullity may, perhaps, facilitate declarations of nullity, and I suspect this is the reason, why this ground of nullity is appealed to some.

The second observation is important, but do not help at all to discover the truth about the validity or not of the marriage. And, that's the key point.

He notes that such an exclusion as an autonomous grounds of nullity requires not only the specification and clarification of the essential juridic contents of this *bonum*, but also the proof of its exclusion as required for all causes of partial simulation. We reviewed those before.

In the causes studied, the argumentation of the sentence also introduces a discussion of the error treated in Canon 1099 which I will treat in just a moment. I simply here refer to a text that the allocution of the Blessed Pope John Paul II in the great Jubilee Year, 2000. His allocution to the Roman Rota:

No one can deny that the current mentality of the society in which we live has difficulty in accepting the indissolubility of the marital bond and the very concept of marriage as the "foedus, quo vir et mulier inter se *totius vitae* consortium constituunt. " This is canon 1055, section 1, whose essential properties are "unity and indissolubility which in a Christian marriage by reason of the sacrament, obtain a peculiar firmness." But this real difficulty does not amount "*sic et simpliciter*" to a concrete rejection of Christian marriage or its essential properties. Still less does it justify the presumption, as it is unfortunately formulated at times by some tribunals, that the primary intention of the contracting parties, in a secularized society, pervaded by strong divorce currents, is to desire a dissoluble marriage so much that the existence of true consent must instead be proven.

In other words, that, now it would be presumed that any consent contained an exclusion of indissolubility that you'd have to prove the contrary. This, by the way, also has to do with natural law. Nature teaches just the opposite.

And I recall a situation of a couple that I was preparing for marriage in the late 1980's and I discovered that the young man who was not Catholic, that his parents were divorced and also three of his siblings and so I felt it necessary during the marriage preparation to address this matter with him with regard to his own intentions and his response to me was

this: He said, "I understand that marriage is for life and because of the sad experience that I've had with my parents and the sad experience I see my siblings have had, I want a marriage that's permanent, that's indissoluble." The fact that even one would be intensely left in his own personal life experiencing the divorcist mentality does not in any way justify the presumption that that person also therefore in entering marriage intends to exclude indissolubility.

In order to affirm the exclusion of an essential properly, or the denial of an essential end of marriage, canonical tradition in Rotal jurisprudence have always required that this exclusion or denial occur through a positive act of the will that goes beyond a habitual generic will, an interpretive wish, a mistaken opinion about the goodness of divorce in some cases or a simple intention not to respect the obligations one has really assumed.

In conformity with the doctrine constantly professed by the Church, therefore, we must conclude that opinions opposed to the principle of indissolubility or attitudes contrary to it, but without the formal refusal to celebrate a sacramental marriage, do not exceed the limits of simple error concerning the indissolubility of marriage, which according to canonical tradition in current legislation, does not vitiate marital consent. And again, the reference is to canon 1095.

Nevertheless, the Pope continues: in virtue of the principle that nothing can replace marital consent; here the reference is to canon 1057, an error concerning indissolubility, by way of exception, can have an invalidating effect on consent if it positively determines the will of the contracting party to decide against the indissolubility of marriage. And we'll take this up in greater detail in a minute.

This can only occur when the erroneous judgement about the indissolubility of the bond has a determining influence on the will's decision, because it is prompted by an inner conviction deeply rooted in the contractant's mind and is decisively and stubbornly held by him. [14]

4. Saint John Paul II on psychic anomaly, Address to Roman Rota 1988

Saint John Paul II gave authoritative instruction about psychic anomalies that would make consent to marriage impossible. He commented on the analysis that occurs during the nullity investigation. Tribunals are required to have an expert witness psychologist review the record of a nullity case and provide their expert opinion to assist the judge. Saint John Paul II recognized that nearly everyone has experienced some kind of traumatizing and inhibiting elements during their childhood and adolescence, but it would be a mistake to conclude that such experiences made it impossible for the person to freely consent to marriage.

It follows, therefore, that while for the psychologist or psychiatrist every form of psychic illness can appear contrary to normality, for the canonist, who is inspired by the

aforementioned integrated vision of the person, the concept of normality, that is to say, of the normal human condition in this world, also includes moderate forms of psychological difficulty. Consequently it includes the call to live in accordance with the Spirit even in the midst of tribulation and at the cost of renunciation and sacrifice. Where such an integral vision of the human being is lacking, normality on the theoretical level can easily become a myth and on the practical level, one ends up denying to the majority of people the possibility of giving valid consent.

The second point on which I intend to dwell is related to the first. It concerns the conclusions to be drawn in jurisprudence, when psychiatric evidence indicates the presence of some psychopathology in the spouses.

Bearing in mind that **only the most severe forms of psychopathology impair substantially the freedom of the individual** and that psychological concepts do not always correspond with canonical, it is of fundamental importance that, on the one hand, the identification of the more serious forms and their distinction from the slight, be carried out by means of a method that is scientifically sure; and on the other hand it is important that the categories that belong to psychiatry or psychology are not automatically transferred to the field of canon law without making the necessary adjustments which take account of the specific competence of each science.

In this regard it must not be forgotten that difficulties and divergences exist within the sciences of psychiatry and psychology as regards the definition of psycho-pathology. There certainly exist descriptions and classifications which receive a higher level of agreement, so that scientific discussion is possible. However, it is precisely in relation to these classifications and descriptions of the principal psychic disturbances that a serious danger can arise in the dialogue between expert and canonist.

It frequently happens that the psychological and psychiatric analyses carried out on the contracting parties, instead of considering “the nature and degree of psychic processes which impinge upon matrimonial consent and the ability of the person to assume the essential obligations of marriage” (February 23, 1987, supra p. 192, no. 2) are limited to a description of the behavior of the contracting parties in the different stages of their life. From that the abnormal symptoms are collected and classified according to a diagnostic label. It must be said candidly that such an exercise, while it has its value, is totally incapable of supplying the clarification which the ecclesiastical judge expects of the expert. The judge should, therefore, request the expert to go further and extend the analysis to an evaluation of the underlying causes and dynamic processes without stopping with the symptoms which spring from them. Only such a complete analysis of the subject, of the individual’s psychic capacities, and freedom to strive for values that are in them selves self-fulfilling can be translated into canonical categories by the judge.

All possible explanations for the failure of a marriage for which a declaration of nullity is sought will have to be considered and not just the hypothesis of it being due to psychopathology. If nothing more is done than a descriptive analysis of the different ways

of behaving, without seeking their dynamic explanation and without attempting a comprehensive evaluation of the elements which make up the personality of the subject, the analysis of the experts leads to one single predetermined conclusion. In fact it is not difficult to see within the contracting parties infantile and irreconcilable aspects, which in such a situation become inevitably the proof of their abnormality. It may, in fact, be a case of people who are substantially normal but who have difficultties which could be overcome, were it not for their refusal to struggle and make sacrifices.

The error becomes all the more easy if one considers that often the expert presupposes that a person's past not only helps to understand the present but inevitably determines it in such a manner as to eliminate all possibility of free choice. Here again the conclusion is predetermined and the consequences are serious when it is considered how easy it is to find in everyone's infancy and adolescence traumatizing and inhibiting elements.

There is another and not infrequent source of misunderstanding in the evaluation of psychopathological symptoms. It arises not from an exaggeration of the extent of the illness but, on the contrary, from an unjustified exaggeration of the concept of capacity to contract marriage. As I noted last year (supra p. 192, no. 6), the misunderstanding can arise from the fact that the expert declares that a party is incapable of contracting marriage, while referring not to the minimum capacity sufficient for valid consent, but rather to the ideal of full maturity in relation to happy married life.

5. Roman Rota Sentence about psychic anomaly, 12 December 1996

When anyone is seeking to understand the meaning of psychic incapacity to consent to marriage, the sentences of the Tribunal of the Roman Rota serve as an authoritative source on the application of the law. The Roman Rota is responsible to promote the unity of jurisprudence and, through its own sentences, to be of assistance to lower tribunals (cf. Pastor bonus, Art.126). Sections from a Roman Rota sentence are published on the internet.

10. Under the canon a first main requirement that a marriage be declared null due to "psychic incapacity" for consent is the gravity of the underlying anomaly from which the incapacity derives. The correspondence of this requirement with natural law is obvious. It is because marriage is so particularly in consonance with human nature that a human right to marry exists (c. 1058). It follows — also as a matter of natural law — that only some grave defect in a person's natural psychic faculties can induce the loss of this right. To suggest that this right could be forfeited because of some mild or moderate defect in one's psychic faculties (such as about everyone at times undergoes) would violate both common sense and the tenets of Christian anthropology.

That only a condition which is gravely anomalous can provoke consensual incapacity is expressly stated by c. 1095 2º regarding a possible defect of discretion of judgment. If any doubt initially existed that the requirement of gravity also applies to the "causes of a

psychic nature," mentioned in no. 3 of the canon, this was definitively dispelled by the authoritative interpretation of the canon given by Pope John Paul II in his Addresses to the Roman Rota in 1987 and 1988: "An argument for real incapacity can be entertained *only in the presence of a serious form* of anomaly which, however one chooses to define it, must substantially undermine the capacity of understanding and/or of willing of the contracting party" (AAS 79 (1987) 1457);" ... "*only the more serious forms* of psychopathology are capable of undermining the substantial freedom of the person" (AAS 80 (1988) 1182)"

11. The second main requirement for a declaration of nullity due to consensual incapacity is explicitly stated in both nos. 2 and 3 of the canon: i.e. that **the incapacity** (whether in the estimative or in the executive order) **should relate to the *essential* rights/obligations of marriage, and not just to its incidental duties, rights, or expectations** [bold not in original].

Therefore, it is not enough to prove that the person consenting suffered from some form of grave psychic anomaly, nor even to demonstrate that the anomaly in question affected some matrimonial right or duty with an incapacitating effect. One must further and absolutely show the essentiality — regarding the institution of marriage — of the right or obligation in question. **An anomaly, however grave, that affects a person regarding the understanding, choice or assumption of *un*essential rights or obligations of matrimony, is inadequate to provoke consensual incapacity:** [bold not in original]. This is constantly held in Rotal jurisprudence.

12. There is then united agreement in Rotal jurisprudence that an incapacity regarding a marital right or obligation invalidates consent, only if the right or obligation in question merits the juridic status of essential. It would be premature to say that equal agreement exists about which obligations of marriage are in fact to be considered juridically essential. This latter question is still a matter of ongoing reflection in rotal jurisprudence, in furtherance of the directive given by Pope John Paul II shortly after the entrance into vigor of the new Code:

13. Since these essential or constitutional rights and obligations have their juridic roots in the object of matrimonial consent, it would seem that investigation of this aspect of c. 1095 must go hand in hand with the analysis made of c. 1057, § 2, which itself describes matrimonial consent in terms that are quite new in canonical parlance: "an act of the will by which a man and a woman, through an irrevocable covenant, mutually give and accept each other in order to establish a marriage." The exact juridic content — the nature, extent and limits — of what is implied in the "sese mutuo tradunt et accipiunt", demands careful study, and poses no small problems.

14. The "sese mutuo tradere et accipere", ordered to the constitution of marriage, certainly entails a mutual, free and binding commitment of the persons of the spouses: a bond or covenant uniting them and, for the purposes of canon law, giving rise to rights and obligations that are juridically measureable. It is however questionable whether one can require an integration of the persons of the spouses, as an essential juridic element of the

> "sese mutuo tradere et accipere/" An "integration of per-sons" — more properly expressed as an "integration of personalities" — is a psychological concept, at the same time as, applied to the conjugal union, it no doubt expresses a spiritual ideal. However it resists any juridic measurement, and does not appear to qualify as a working concept for elaborating a judicial decision. Judges can decide questions in their own field, only if it is possible to weigh the concrete issues before them in juridic terms and to apply juridic measurements to them. Psychological, anthropological or spiritual parameters do not in themselves provide any basis for judicial practice, unless they can be appraised in proper juridic terms which give a notion of legal rights or obligations sufficiently precise and determined that a court of law, in fulfilment of its mission, can pronounce on them. (Sentence of the Tribunal of the Roman Rota. Dec. 12, 1996. Rome. www.cormacburke.or.ke/node/431.)

6. Roman Rota, Psychic Anomaly, Discretion of Judgment, 17 April 1997

Sentences from the Roman Rota include three sections: Facts, Law, and Argument. In this case, the Facts show that first instance tribunal decided that nullity had been proven based on grounds of grave lack of discretion of judgment on each one's part (c. 1095 2º). In the Law section, the Roman Rota sentence contrasts the incorrect suggestions from lower tribunals with the correct application of canon law about the lack of discretion that would stand in the way of valid marital celebration:

> … 3. *Discretion and prudence*. Invalidating lack of discretion must relate not to the person chosen as spouse, but (as the canon specifically states) to the essential rights and duties of the institution of matrimony itself. Nevertheless it is at times still suggested that discretion of judgment, in the juridic sense in which it is used in c. 1095, 2°, demands "a certain fundamental prudence", shown in "adequate knowledge of the subjects and of the object of matrimonial consent" (cf. the sentence under appeal that is before us today: Acts, p. 203). This leads to the idea that a "wrong" or "imprudent" choice of partner invalidates consent, as proving a grave lack of discretion. One could logically speak of a "wrong choice" only if the marriage breaks down; but then the breakdown becomes the proof of the "wrongness" of choice, which in turn offers the proof of grave and invalidating lack of discretion. Thus the breakdown of a marriage become the key element in the proof of its nullity. Jurisprudence rejects the suppositions that lead to this circular reasoning.
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> 4. In the vast majority of cases Dr. Samuel Johnson's observation continues to be true: "It is not from reason and prudence that people marry, but from inclination" (*Boswell: Life of Dr. Johnson*, vol. I, p. 368). Ecclesiastical courts are not called on to judge the wisdom of a concrete marital choice, nor can they take an apparently "unwise" choice of a particular partner as proof of consensual incapacity under c. 1095, 2º. The canon specifically relates the invalidating lack of discretion not to the [judgment about] the concrete partner chosen, nor to the "desideranda" for the particular marriage being entered, but to the essentials of the marital institution as such; it is in relation to these essentials, not

to one's partner, that discretion must be adequate. Invalidity is not provoked by a mistaken judgment about the sort of person one's proposed partner is (except where the false judgment has been caused by deceit, within the terms of c. 1098), no more than it is by a false judgment about the sort of person one is oneself. The canon requires a minimum of discretionary judgment, not a high degree of psychological perception (cf. decision coram the undersigned Ponens of Nov. 25, 1993: vol 85, p. 705)

[From III. the Argument]… 18. *Re the parties' understanding of marriage.* **The judges make the issue of a "wrong" or "poor" marital choice central to their conclusion regarding the petitioner's invalid consent. This, as we have remarked in our theoretical considerations, confuses a possible lack of prudence in the choice of one's partner with the juridic concept of an invalidating defect of discretion of judgment** [bold not in original]. The respondent's advocate showed a sounder grasp of jurisprudential principles, but the judges disagreed with him: "The Advocate's third argument is that Daria's poor choice of a marriage partner does not invalidate her consent. This assessment is misleading, in the Court's view, because in reality the "poor choice" is often times the result of inadequate discretion, which was verified in this case" (211). (See full sentence at http://www.cormacburke.or.ke/node/432)

Separation

7. Canon 1152, 1153, promulgated year 1983

Can. 1152 §1. Although it is earnestly recommended that a spouse, moved by Christian charity and concerned for the good of the family, not refuse forgiveness to an adulterous partner and not disrupt conjugal life, nevertheless, if the spouse did not condone the fault of the other expressly or tacitly, the spouse has the right to sever conjugal living unless the spouse consented to the adultery, gave cause for it, or also committed adultery.

§2. Tacit condonation exists if the innocent spouse has had marital relations voluntarily with the other spouse after having become certain of the adultery. It is presumed, moreover, if the spouse observed conjugal living for six months and did not make recourse to the ecclesiastical or civil authority.

§3. If the innocent spouse has severed conjugal living voluntarily, the spouse is to introduce a cause for separation within six months to the competent ecclesiastical authority which, after having investigated all the circumstances, is to consider carefully whether the innocent spouse can be moved to forgive the fault and not to prolong the separation permanently.

Can. 1153 §1. If either of the spouses causes grave mental or physical danger to the other spouse or to the offspring or otherwise renders common life too difficult, that spouse gives the other a legitimate cause for leaving, either by decree of the local ordinary or even on his or her own authority if there is danger in delay.

§2. In all cases, when the cause for the separation ceases, conjugal living must be restored unless ecclesiastical authority has established otherwise.

8. Canon law from year 1917, canon number 1131 on Separation of Spouses

Can. 1131. § 1. Si alter coniux sectae acatholicae nomen dederit; si prolem acatholice educaverit; si vitam criminosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero coniuge totidem legitimae causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora.

§ 2. In omnibus his casibus, causa separationis cessante, vitae consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumve tempus, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore. (Link to intratext.com page)

9. Advocate/Procurator Tribunal of the Signatura, English canon 1131, year 1944

In 1944, an American Advocate and Procurator of the Tribunal of the Apostolic Signatura and of the Sacred Roman Rota, authored the "Canonical Procedure in Matrimonial Cases, Volume II, Informal Procedure." Msgr. William J. Doheny, C.S.C., J.U.D, provided a list of grounds for separation (besides adultery) covered in the 1917 Code of Canon Law.

> (Doheny, page 631 and 634) Canon 1131 §1 enumerates the following causes as among those which constitute sufficient grounds for a temporary separation:
>
> A. Affiliation with a non-Catholic sect by a consort who was once a Catholic.
>
> B. Non-Catholic education of the children effected by one consort.
>
> C. The leading of a criminal and disgraceful life by one consort.
>
> D. Serious danger to the soul or body of one consort caused by the other.
>
> E. Cruelty which renders conjugal life unbearable.
>
> F. Causes and reasons similar to the foregoing.
>
> … E) Unbearable Cruelty Which Renders Conjugal Life Insupportable … The Latin term *saevitia* means excessive or unbearable cruelty, harshness, extreme severity, fierceness, and barbarity. What is called cruelty, by way of travesty, in modern divorce courts could not be viewed as *saevitia,* in the sense of canon 1131 §1. Hence, the so-called incompatibility of temperament, divergence of views, and the like would not be considered sufficient to invoke separation.
>
> … (Doheny, page 635-636) F) Causes and Reasons Similar to the Foregoing: It is to be observed that **the reasons authorizing separation are not *taxative propositae*** in Canon 1131 §1. Innumerable other reasons may be encountered in practical cases. **For instance, desertion has been adjudged by the S. R. Rota as a cause sufficiently grave to authorize separation** [bold not in original] for an indefinite period of time.(32) Separation could be invoked as a necessary precaution to save one's fortune, provided it was duly proved that such a separation was the sole means by which a family or personal fortune could be adequately safeguarded.(33) Other causes might warrant temporary separations, provided it was duly proved that separation was the only possible expedient. Such causes might be an extremely avaricious and niggardly character which made life unbearable; an excessively extravagant tendency to squander money to the detriment of the fortune of the other consort;[15]
>
> … (Doheny, page 659, Chapter XXVII Digest of Cases of Separation Adjudged by the Tribunal of the Sacred Roman Rota, Section III, Case of Separation for an indefinite period of time granted to wife because of desertion of husband.) Malicious desertion is given by authors as a just cause for separation. The reason for this is *quia recidit vel in odium capitale vel acerbiores animi affections.* **In a case of desertion, permission for separation is not to be granted at once. The deserting consort should be entreated to return** [bold not in original]**.** For this, all possible means should be employed. If the party fails or refuses to resume conjugal cohabitation within a reasonable or stipulated period of time, the judge may then grant separation to the innocent consort. *Ex quibus colligi potest, non tam faqtum*

desertionis esse causam legitimam ad divortium pronuntiandum, quain potius pertinacem detrectationem conjugal, consortium instaurandi post iudicis invitationem. [(Translation of previous Latin sentence provided by Mary's Advocates, excerpt from *coram* Perathoner, 17 March 1913, section 5) From these words it can be adduced, not so much that the fact of abandonment is a legitimate cause for pronouncing separation, but rather that the obstinate refusal to establish the conjugal partnership after the invitation of a judge is a legitimate cause for pronouncing separation.[16]]

10. Other Canonically Lawful Reasons for Decree of Separation, Gibbons, 1947

(Gibbons, page 64) In addition to the causes specifically mentioned in the law, the Sacred Roman Rota has recognized among others the following as justifying causes for a temporary separation: the mental abnormality of one of the parties if it be conjoined with implacable hatred (note 75); malicious desertion, done without justification but at the same time with the intention of not returning (note 76); the persistent and constant practice of onanism and other irreligious and immoral acts on the part of one of the parties (note 77)."[17]

75 S. R. Rota, Separationis quoad thorum et cohabitationem, 20 aprilii 1912, coram RP.D. Michaeli Lega, Decano, Dec. XVI, nn. 11-12—S. R. Rotae Decisiones seu Sententiae, IV (1917), 199-201.

76 S. R. Rota, Separationis, 17 mart. 1913, coram R.P.D. Antonio Perathoner, Ponente, Dec. XIX, nn. 17-18—-S. R. Rotae Decisiones sets Sententiae, V (1919), 225.

77 S. R. Rota, Separationis, 4 febr. 1925, coram R.P.D. Iosepho Florczak, Ponente, Dec. VI, nn. 6-10--S. R. Rotae Decisiones seu Sententiae, XVII (1935), 39-47.

11. Exegetical Commentary Canon 1153 §1, grave danger, Ivars

Javier Escriva Ivars, graduated with both a Doctor of Law, Canon Law and Ecclesiastical Law, Cum Laude. He is a professor at the University of Valencia, assistant professor at University of Navarra, and director of the Institute of Family Sciences at the University of Navarra since 2009 (source, LinkedIn). He provided commentary about the canon law on separation of spouses for the internationally distributed "Exegetical Commentary on the Code of Canon Law" from University of Navarra. When the English translation was first published, his Eminence Julian Cardinal Herranz, President of the Pontifical Council for Legislative Texts, said it "will be an indisputable resource for English-speaking canonists, pastors, and students of the law." In discussing morally legitimate reasons for separation of spouses, Escriva Ivars provides necessary critarian:

3. Grave danger in common conjugal life (c. 1153 § 1) According to c. 1153 § 1, there is a legitimate cause for separation when a spouse makes common life too difficult. Making the common life unduly difficult is a generic expression that indicates a series of varied

circumstances that can make conjugal cohabitation very difficult or impossible. With this expression, the legislator makes way for all those manifestations of cruelty-verbal or physical abuse, harshness, and lack of consideration towards another-that produce a common life that is practically impossible.

Physical cruelty includes violent conduct and physical aggression against one's spouse or one's material assets, cruel or merciless treatment through beating, etc. Moral cruelty involves offensive conduct, in word, act, or omission, against the dignity, honor, and feelings of the person, through slander, insults, disregard. For separation due to physical or moral cruelty to be lawful, the following conditions are necessary:

- it must be grave, such that it makes common life dangerous for the spouse or children;

- it must be repeated, because if it were merely occasional, it would not create the fear for future common life, which justifies the separation;

- and separation must constitute the only means of avoiding the danger involved in common life. (page 1585)[18]

12. Roman Rota, Frequent Quarrels, year 1936 & 1938, Gibbons Citations

(Gibbon, page 62-64) Frequent quarrels, in themselves, are not regarded by the Holy See as a "just cause" even for a temporary separation, as is 'Clearly seen from a decision of the Rota in the year 1928 (notes 72). In this case the alleged cause in modern parlance would have been termed "incompatibility of temperament," and would no doubt have supported a "divorce" decree in almost any modern civil tribunal. The married life of the elderly couple had been marked by frequent quarrels and almost continual unhappiness. It was the contention of the petitioner that "implacable hatred" (*odium capitale*) existed on the part of the wife. The decision, while recognizing that the wife bad used opprobrious language towards her husband, declared that the use of such language did not prove the existence of "implacable hatred," but only proved her anger towards him because of his conduct. The Sacred Rota declared that the frequent quarrels were due to avarice rather than "implacable hatred," and refused to grant a temporary separation inasmuch as a "just cause" was not present.

The Sacred Roman Rota expressed the same teaching in another case decided in the year 1930 (note 73). In this decision the Sacred Roman Rota, recognizing that cohabitation was not of the essence of marriage, pointed out that separation from bed, board and cohabitation, even if temporary, is a grave matter. Such separation by its nature is public, contrary to the marriage obligations, and filled with dangers to the consorts, especially the danger of incontinence. The Sacred Roman Rota in this decision gave a norm for determining whether or not an alleged cause for a separation is legitimate. The cause, the Rota said, must be proportionate to the evils that result from the separation, i.e., the cause must contain an element of danger either to the soul or the body of the other party, and this

danger must be so serious that there is an end of the obligation imposed by the law which binds the consorts to observe the community of conjugal life.

This norm of judging the legitimacy of the alleged cause is in harmony with the teachings of most of the authors who wrote before the enactment of the Code of Canon Law (note 74). These authors agreed that all causes for a temporary separation must include the element of danger to the spiritual or bodily welfare of the other party if they are to be regarded as sufficient causes for a temporary separation.

Note 72: S. R. Rota, Separationis, 30 jun. 1928, coram R.P.D. josepho Florazak Decano, Dec. XIX, n. 2: " Affirmari tamen potest, omnium istarum cauÂsarum, ex quibus ius ad divortium obtinendurn oriri potest, unurn esse debere effectum, gravis nempe damni sive animae sive corporis periculum. Non sufficit timor cuiuscumque periculi, necessarium est ut malum quod timetur sit grave ac tale quale ad metum viri constantis requiritur. Ex his sequitur, non satis esse minas, nisi qui minatur solitus sit eas exsequi, prae oculis praeiertim habit¡ sive minitantis sive metuentis sexu, iiidole, ingenio, necnon minandi modo. Quod si de odio agatur, requiritur odium capitale ac placabile: et leves iniuriae, verba probrosa aut ipsa characterum inter sponsos incompatibilitas, quae molestam cohabitationem faciant, non possunt haberi uti causae sufficientes ad eosdern dissociandos." S. R. Rotae Decisiones seu Sententiae, XX (1936), 268-269.

Note 73: S. R. Rota, Separationis, 6 aug. 1930, coram R.P.D. Andrea Jullien, Ponente, Dec. XLVII, n. 2: " Ventm, quamvis cohabitatio non sit de matrimonii essentia, separatio tamen tori, mensae et habitationis, etiam temporaria, est res gravis, utpote publica, obligationi naturaii contraria, ac periculis plena pro coniugibus, specietenus de continentia servanda ; quaÂpropter separationis causa, ut sit legitima, debet esse proportionata, id est continere pericirlum sive animae sive corporis ita grave, ut cedat obligati¡ ilia, qua coniuges servare vitae coniugalis communionem iure tenentur."Ñ S. R. Rotae Decisiones seu Sententiae, XXII (1938), 524.

Note 74 Wernz , *Ius Decretalium* (3. ed., 6 vols. in 10, Prati, 1913-1915), IV, n. 713; Schmalzgrueber, *Ius Ecclesiasticum Universum*, Lib. IV, tit. XIX, nn. 141-145; Gasparri, *De Matrimonio* (3 ed., 2 vols., Parisiis, 1904), II, n. 761. (This is the sole instance in which this particular edition is cited by the writer.)

75 S. R. Rota, Separationis quoad thorum et cohabitationem, 20 aprilii 1912, coram RP.D. Michaeli Lega, Decano, Dec. XVI, nn. 11-12-S. R. *Rotae Decisiones seu Sententiae*, IV (1917), 199-201.

(Gibbons, page 62-64)

13. Question of nullity not basis for separation, Roman Rota Judge, 1935

A person’s domicile generally is understood to mean the person’s home. But in canon law distinctions are made between *voluntary* or *real* domicile, and *lawful* domicile. In both the codes promulgated in 1917 and 1983, there are laws that delimit the domicile for minors, spouses, and

religious. One's *voluntary* or *real* domicile is the place where one (on his or her own authority) chooses to establish residence. The *voluntary* or *real* domicile might not be canonically legal. For example, if a priest in a religious order could move to another city to get a secular job and rent an apartment. Then, he would have a *real* or *voluntary* domicile at the apartment. However, he would not have a canonically *lawful* domicile at the apartment, because canon law establishes that his domicile is with his brother-priests (c. 103).

Similarly, in the 1983 Code of Canon Law, canon 104 limits spouses' *lawful* options for establishing domicile: "Spouses are to have a common domicile or quasi-domicile; by reason of legitimate separation or some other just cause, both can have their own domicile or quasi-domicile."

In the code from year 1917 (*CIC*/1917), the limits were defined from only the wife's perspective, though in the new code, the limits apply to both spouses. In the 1920's, a wife could not just move to another city with no just cause and start living with relatives and claim her new domicile is the relatives' address. Even if she had a just cause, such as her husband was a known adulterer; she could not claim her *lawful* domicile was with the relatives. She would have a moral right to be separated and to establish her own *real* or *voluntary* domicile with the relatives, but she could not establish a *lawful* canonically recognized domicile on her own authority. If she wanted her new domicile to be canonically recognized, she would need to get an ecclesiastic decree of separation.

About twenty years after the 1917 Code of Canon law was promulgated, the Sacred Congregation for the Discipline of the Sacraments issued the instruction *Provida Mater, Instructio Servanda A Tribunalibus Dioecesanis In Pertractandis Causis De Nullitate Matrimoniorum* (15 August 1936).[19] This instruction, "organized the material by gathering together the canons, the jurisprudence and the praxis of the Roman Curia."[20] After *Provida Mater* was promulgated, Rev. Marion Gibbons published his doctoral dissertation on "Domicile of the Wife Unlawfully Separated from her Husband." He cited *Provida Mater* and an auditor (judge) of the Roman Rota, when noting the following:

> (Gibbons, page 77-78) The Code today speaks of a *legitimate* separation, (116) of a *legitimate* accusation, (117) of a *legitimate* departure (118) and of *legitimate* causes. These phrases seem to imply something more than the simple consideration of licitness in an act of separation or departure. The Instruction (120) of the Sacred Congregation of the Sacraments offers the strongest indications to the same effect. Therein, **at least when there is question of an alleged nullity of the marriage, private authority is not recognized as an adequate basis for establishing a legitimate separation** [bold not in original]. Sartori, as noted by Torre, (121) considered an ecclesiastical juridical sentence or decree a requisite for the constitution of a legitimate separation. And Sartori, an auditor of the Sacred Roman Rota, had expressed this opinion before the issuance of the Instruction "*Provida Mater*" of the Sacred Congregation of the Sacraments. Regatillo is of the opinion that a private

separation can have only a *moral*, effect, and terms the innocent party's departure licit, but void of *juridical* effect. (122)

115 *De Matrimonii Sacramento*, Lib. X, disp. XII, nn. 12, 25,

116 Cf. canon 93, §§1, 2.

117 Cf. canon 1129, §2.

118 Cf. canon 1130.

119 Cf. canon 1131, §1.

120 S. C. de Sacramentis, instr. "*Provida Mater,*" Art. 6, §1 --*AAS*, XXVIII (1936), 314.

121 "Sartori apud Enchridion canonicum (a. 1935 pag. 24 ad can. 93) addit sequentem rationem 'quia non est legitime (idest per iudicem ecclesiasticum) a viro separata, etsi legitime discesserit proptia tantum auctoriate.' " —Cf. Torre, *Instructio servanda a tribunalibus dioecesanis in per tractandis causis de nullitate matrimoniorum a Sacra Congregatione de Disciplina Sacramentorum edita* (Neapoli: M. D'Auria, 1937), p. 12.

122 Ius Sacromentarium, II, n. 588.

14. Canon Law Annotated, c. 1153, Blameless Unhappy Situations, Hervada

Canon 1153

§1 A spouse who occasions grave danger of soul or body to the other or to the children, or otherwise makes the common life unduly difficult, provides the other spouse with a lawful reason to leave, either by a decree of the local Ordinary or, if there is danger in delay, even on his or her own authority.

§2. In all cases, when the reason for separation ceases, the common conjugal life is to be restored unless otherwise provided by ecclesiastical authority.

(Hervada, page 897) 1153 -- This canon contains the reasons for temporary separation, that is separation which lasts as long as the reason for it endures. Canon 1131 of the CIC/17 specified these reasons; in contrast, the present law establishes generic types.

It has bean widely discussed in recent years whether it is sufficient that the reasons for separation constitute a danger, or whether it is necessary that this danger should be of culpable origin, as prescribed in common doctrine. A distinction should be made between separation, which suspends conjugal rights and obligations, and the fact that the spouses no longer live together. Indeed, blameless danger is sufficient for there to be no obligation to cohabit; more so, there can be an obligation to not cohabit; e.g., in cases of very contagious grave illnesses, aggressive insanity, etc. Nevertheless, the fact that the spouses do not live together is not equal to *de iure* separation, i.e., a suspension of conjugal rights and obligations.

Blameless, unhappy situations not only fail to constitute reason for suspension of the right and obligation to common life in its sense of solidarity and of sharing, but they also represent cases in which one of the ends of marriage, mutual assistance, must manifest

itself in all its width and depth. It is not is the hands of the spouse nor in the power of human judges to suspend an obligation of natural law which has been imposed not only for favorable times, but also for the difficult and painful circumstances of life, when help is most needed from the person who is of the same flesh as the one suffering the misfortune ('[...] to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health [...]' Rite of Marriage 25).

In order for the separation to be juridically effective and thus suspend conjugal rights and obligations as well as the objective of mutual assistance, the situations opposed to conjugal life must be culpable, because only guilt breaks the obligation of the other party and one's own right.[21]

15. *Libreria Editrice Vaticana*, Cases of Separation of Spouses, Diego-Lora 1984

In 1984, the Prefect of the Supreme Tribunal of the Signatura was Aurelio Cardinal Sabattani, and the Vatican Publishing House published a 680-page book, "*Dilexit iustitiam : Studia in Honorem Aurelii Card. Sabattani,*" which translated is "He loved justice: Studies in Honor of Cardinal Aurelius Coram Sabattani." The book included a section, "*Las Causas de Separación de Cónyuges Según el Nuevo Código,"* which translated is "The Cases of Separation of Spouses in the New Code of Canon Law."[22]

English translation of the original Spanish shows that the Overview emphasizes the Church's role in facilitating reconciliation:

In the scheme of the new Code of Canon Law, the reasons for the separation of the spouses are regulated in Chapter III of the Title I, which is dedicated to matrimonial processes, in Part III of Book VII, De Processibus. (Processes). Part III delineates De quibusdam processibus specialibus.

Before beginning into the study of the diverse reasons for the separation of the spouses, their nature, and their peculiar norms of activity, decision, and recourses, we intend to pause on three concrete precepts. Taking into consideration these precepts with certain amplitude could deviate us from our present objective.

The first and second of these precepts tend to obtain the same practical result: that the reason (cause) for the separation of the spouses and its peculiar effects, as well as the effects which are merely civil must originate from the Decree of the diocesan Bishop or from the judicial sentence; if these procedures are followed, they must also produce their efficacy in the civil sphere. The Church is situated in a field which is under the sovereignty of the states, which are frequently ignorant if not hostile to any other juridical system that does not proceed from their own sovereignty. This is explained by the precepts of Can. 1692§§ 2 y 3. And therefore, the Church renounces any jurisdiction over juridical matrimonial matters when these do not affect the sacred matrimonial bond (cfr. also 1672).

However, **Can. 1692 §2 seems to require the previous permission of the Bishop of the diocese of the residence of the spouses – *perpensis peculiaribus adiunctis* – so that the spouses can approach the civil forum** [bold not in original]. In relation to its antecedent, in the project of Book VII, the following was said: "I appreciate that this license '*ad casum'* in the event that the final revision of the scheme is upheld, is only a bureaucratic step, without any practical efficaciousness and its suppression would be more prudent. This problem would be different if there would exist a service in the pastoral organization of the diocese for the faithful who find themselves in this conflictive matrimonial situation which would operate with efficaciousness."

On the contrary, we estimate, by contrast, that if this service of assistance does not exist, it must be created if the ecclesiastical judges and ministers in charge of pastoral ministry at the diocesan level are incapable or have great difficulties in attending these problems, which emerge between the spouses. Precisely, such a desire to offer a pastoral solution to the differences and conjugal conflicts makes it necessary to impose upon the Judge a specific obligation, not proceeding from a juridical nature, but pastoral; this, according to Can. 1695, [bold not in original] which is the third of the precepts that we have mentioned. Similarly, Cann. 1152 and 1155 indicate and recommend to the innocent spouse affected by the separation to renounce to the *actio separationis*, and even in the precepts his/her conduct is praised if it is a conduct of reconciliation and reestablishment of the conjugal life. In these hypotheses, there are not enough canons, such as 1713, which tend to avoid a trial. It is about enabling an efficacious pastoral stance of the Church prior to the beginning of the process.

The Specialties section shows how the new code specifies that separation of spouses cases are handled in either of two venues (administrative by the Bishop, or judicial by a tribunal). English translation of Spanish instruction summarizes the administrative process:

[From Part 3. Specialties of These Causes Of Separation of Spouses, c) Procedural Transactions (page 388-400)] To summarize, this process—since specific norms are lacking—could consist in the petition for separation which is presented by one of the spouses, directed to the diocesan Bishop, specifying the legitimate cause of separation that excuses the conjugal life (cfr. can. 1151), which must conform to one or more of the hypotheses that are respectively contemplated in can 1152 and 1153. Together with the petition, the spouse who presents it must accompany the alleged proof of the legitimate cause or causes of separation. As long as it contains such a proof, this petition can be handled through the documentary process; the proofs that do not fulfill these qualities must be, at least, invoked before the Bishop, and if he judges them to be correct, he may put it into practice.

Next, the competent ecclesiastical authority will cite the spouses with the finality of implementing the pastoral means of agreement and conciliation, in order for the conjugal life to be reestablished peacefully, according to the prescript of can. 1695. If this wished

for outcome is not achieved, we must proceed to a new citation of the spouses, and of the Promoter of Justice, in order to formulate the arguments, to propose them, and to put into practice—within the shortest possible time—the suitable proofs that lend credibility and legitimacy to the alleged causes, or the reasons to support the opposition of the same. If some of those who are cited would solicit the judicial venue, the diocesan Bishop must decree the closing of the process that has been initiated so that the petitioner can approach the judicial process.

… The procedure, however, must be endowed with the freedom of organization inherent to each case that is followed by the competent authority. However, in order to receive determined proofs, such as those provided by the prudence advises that the proofs must be regulated through whatsoever possible means to that which the Codex has established for them. But this convenient prudence cannot restrict, however, the organizational freedom of the process of the ecclesiastical authority that pronounces the decree.

Lastly, if the process continues, the diocesan Bishop, or the special representative, will decide on the conjugal separation by a decree. **This decree must be well founded** and it will identify the legitimate motive or motives for the separation according to can. 1152 and 1153 respectively; it **will also include, at the same time, these opportune measures that require the due sustenance and education of the children** [bold not in original] (cfr. can. 1154).

The Code does not mention, on the other hand, whether it is possible to approve a conventional separation by a decree of the diocesan Bishop. It has been noted that this conventional separation, "homologated" by the competent authority, has become more widely accepted in the canonical field before the many favorable aspects that it encases in comparison with the contentious separation." From our perspective, we leaned toward this theme beforehand demanding that the legitimate cause of separation be mediated, and that the agreement by Decree of the Ordinary of the competent judicial ecclesiastical authority be endorsed; such a decree would serve to homologate the agreement of the spouses, sanctioning in this way that the established pacts in the agreement would be conformed to both natural and canonical law, and at the same time they would be respectful of the public ecclesiastical order.

Before the new Code, we take into consideration the freedom contained in the existent process for the diocesan Bishop to dictate the decree for the separation of the spouses; thus, we do not see any obstacle in order for the Bishop to dictate his decree, after the spouses have reached an agreement, if it can be proved that the motive for the separation is legitimate according to can. 1152 or 1153, and its truth is simultaneously demonstrated; and at the same time, just measures are provided for the effects of the sustenance and the education of the children (can. 1154). In addition, the validity of this decree requires for the ecclesiastical authority to have exhausted the intention of conciliation of can. 1695; furthermore, it also requires the intervention of the Promoter of Justice before the

pronouncement of the decree according to can. 1696. These would be the conditions, moreover, of any particular law that might exist in a determined place (cfr. Can. 1692 §1).

16. Exegetical Commentary Canon 104, Dean Navarra Canon Law School

Professor Father Amadeo de Fuenmayor was one of the experts in canon law who provided explanations on canon law in an internationally recognized commentary. Canon 104 states, "Spouses are to have a common domicile or quasi-domicile; by reason of legitimate separation or some other just cause, both can have their own domicile or quasi-domicile." The earlier version of canon law from the year 1917 stated the woman is obligated to have the domicile of her husband unless there was a legitimate separation or other just cause.

The University of Navarra's website has a notice about Professor Father Amadeo de Fuenmayor's death in 2005. He was the "dean of the Faculty of Canon Law (1967-1987)." […] "Since 1986 was prelate of honor to His Holiness and consultant to the Pontifical Council for the Interpretation of Legislative Texts." He was an expert in matrimonial law and offered this instruction about canon 104 in the "Exegetical Commentary" wherein he even describes some other iterations in canon 104 during the drafting and editing stages (*coetus* and *Schema)*.

COMMENTARY Amadeo de Fuenmayor

1. The biggest innovation introduced into the regulations regarding domicile is found in c. 104, which has replaced the prescriptions of c. 93 CIC/1917 regarding the domicile of a married woman. The revision has been profound and is a consequence of the *principle of equality* that the legislator incorporates into c. 1135: "each spouse has an equal obligation and right to whatever pertains to the partnership of conjugal life."

Canon 93 of the CIC/1917 treated the domicile of a wife not lawfully separated from her husband as a necessary domicile imposed by law, together with the necessary domicile of an insane person or of a minor. The three of them were the object of a special guardianship for which there were necessarily preserved, respectively, the domicile of the husband and the curator of the person to whose authority the minor was subject.

The assimilation of the three cases led to recognizing (c. 93 § 2 *CIC*/1917) the possibility of acquiring proper quasi-domicile: a minor after infancy; and a wife not lawfully separated from her husband. Likewise a wife was afforded the possibility of acquiring domicile if she were lawfully separated. But the discipline regarding this issue was so rigid that, even in the case of her being maliciously abandoned by her husband, a wife could not acquire her own domicile except after having obtained a perpetual or indefinite separation from an ecclesiastical judge (note 1).

2. The new regulation of the domicile of a married woman is a consequence of the criterion adopted by the legislator about marital authority and the duty of cohabitation of the husband and wife.

By not sanctioning marital authority—to assure the principle of equality—the old norms, which took for granted that authority (cc. 1112 and 1129 § 2 *CIC*/1917) disappear from the Code; or they were suitably recast (c. 90 § 1 *CIC*/1917 regarding place of origin; and c. 98 § 4 *CIC*/1917 regarding the wife's changing to the rite of the husband).

Regarding the duty of cohabitation, the legislator has pondered its great importance and obtained its protection with different norms. Thus, it is reflected in c. 104, which establishes common domicile or quasi-domicile as a duty of both parties, even though it is added that each one of them can have his or her own domicile or quasi-domicile, in case of a lawful separation or other just reason.

3. The process that has led to the text of c. 104 is very interesting because it reveals the criteria that have inspired reformation of a married woman's domicile; the various formulations that were tried in order to incorporate in this canonical principle of equality between husband and wife; and the efforts to protect common domicile in the new situation created by not sanctioning marital authority.

Early on, starting from the community of life that must exist between husband and wife and that must be regulated by mutual consent, the resolving of the question by resorting to the expedient of presumptions was considered. It is presumed that the wife has the domicile of her husband. This domicile is considered not to be legal or necessary domicile, but voluntary and freely chosen by the wife. Such presumption is *iuris tantum*, for which she can have her own domicile or quasi-domicile. Thus, it was agreed in the session of 1974 of the *coetus De personis physicis et iuridicis* (note 2). *And this was the criterion adopted in the Schema* of 1977 (note 3).

In the session of the *coetus* held on October 17, 1979 numerous observations were received regarding the *Schema* of 1977 and were examined, agreeing that not just the wife was discussed; in suppressing the presumption of domicile of the husband; and in stating that both the wife and husband can have their own separate domiciles, they added “for just reason,” to protect conjugal community. After a full discussion it was agreed to affirm the existence of *common domicile*, without alluding to a method to determine it, but by saying that husband and wife must have a common domicile or quasi-domicile. With this change, the text of the *Schema* of 1980 is arrived at (note 4), which would pass into the Code as c. 104.

The question of the domicile of a married woman had also been the object of study in the heart of the *coetus De quaestionibus specialibus Libri II,* in their sessions of May 5/6, 1967 (note 5). Of particular interest are the discussions that were had concerning the pastoral importance that the husband and wife's observance of the duty of cohabitation has; and, for that purpose, the existence in fact of a conjugal or familiar domicile, that is, a common domicile, compatible with the possibility of each one's simultaneously acquiring a separate domicile or quasi-domicile.

Throughout the study, the necessity for the couple's mutual consent to select a domicile was examined and the exigency of this requirement was avoided, though it was stated that

familial stability depended in large part on the common election of the domicile. Likewise excluded was the opportunity of allowing the criteria that rule in many civil legal systems that, in order to resolve a disagreement between husband and wife, they can resort to a judge at the behest of one or both to establish domicile.

4. With this background the scope of c. 104 can be stated, which has revised the regulations of the *CIC/*1917.

Domicile of a married woman is gone as a legal domicile depending on the domicile of the husband. In its place, the new canon limits itself to declaring the "duty of husband and wife of having a common domicile or quasi-domicile," that is to say, a domicile for the wife and for the husband, in equality.

This common domicile has its limits: "By reason of lawful separation or for some other just reason, each may have his or her own domicile or quasi-domicile."

In the case of lawful separation, community of life and conjugal cohabitation cease (c. 1151ff), because of which the couple can have their own separate domicile or quasi-domicile.

If there is "another just reason" (temporary emigration, professional reasons, illness, etc.), each can have their own domicile or quasi-domicile, without excluding their maintaining the common domicile or quasi-domicile.

The legislator shows in numerous places of the Code his great preoccupation for avoiding the separation of husband and wife and to achieve the reestablishment of common life [bold not in original]**.** Normalcy is to be reestablished through the return to cohabitation. And it is also desired to avoid the serious risk that separation could be the road leading to divorce. One of the reasons allowed today by most civil laws to grant a divorce is separation; not only judicial, but also separation in fact.

5. Canon 104 only speaks of the duty that the couple has to maintain a common domicile or quasi-domicile, without indicating the routes to reestablish cohabitation in case of a break. These routes are in the canons that regulate pastoral action with which the Church cares for the faithful in their marital crises. A brief reference to them will be sufficient.

Canon 1695 provides that before accepting a case of separation [bold not in original] and as long as there is hope for success, the judge must employ pastoral means so that the couple reconcile and be induced to reestablish conjugal community, if it has been in fact interrupted. In c. 1676 an analogous requirement is placed on the ecclesiastical judge before accepting a case of annulment (note 6).

Canon 1692 §§ 2 and 3 contemplate several cases in which, with the prior authorization of the diocesan bishop of the place of the couple's residency, they can put the case for separation in the civil forum. This requirement presents the bishop the opportunity to assure that pastoral means are employed by him or by his delegates, so that the couple reconcile and reestablish common life.

In three instances in several other canons (1152 § 3, 1153 § 2, and 1155), the legislator insists on reconciliation and the reestablishment of conjugal life, in order to render effective the right and duty that husband and wife have, pursuant to c. 1151, to maintain cohabitation unless excused for a lawful reason.

Note 1. Cf. CPI, July 14, 1922, in AAS 14 (1922), p. 526.

Note 2. Cf. *Comm*. 6 (1974), p. 96.

Note 3. Cf. *Schema*. 1977, c. 9, p. 25.

Note 4. Cf. *Schema*. 1980, c. 103, p. 20.

Note 5. Cf. *Comm*. 21 (1989), pp. 43-48.

Note 6. Cf. C. DE DIEGO-LORA, "Medidas pastorales en las causas de separacion conyugal," in us Canonicum 25 (1985), pp. 209ff.

17. Exegetical Commentary Canon 1153, Malicious Abandonment, Ivars

(Ivars, page 1585-1586) Malicious abandonment: The concept of malicious abandonment as a sufficient cause for separation is not expressly provided by current legislation. Its autonomous treatment and character regarding the other concepts of separation is the result of a work of jurisprudence and doctrine with the intent of specifically protecting compliance with every conjugal and family duty, and penalizing their omission.

Malicious abandonment is differentiated from other causes of separation in that, while causes expressly defined in the CIC contemplate positive conduct - "occasions grave danger of soul or body to the other or to the children, or otherwise makes the common life unduly difficult" - malicious abandonment contemplates noncompliance with every conjugal duty. The party abandoning his or her spouse violates his or her matrimonial duties, that is, he or she fails to comply with the principle *foedus nuptiale servandum est*, because the spouse's attitude consists precisely of a dissolution, in the sphere of social reality, of the conjugal consortium.

Malicious abandonment constitutes a cause for temporary separation, based on a principle distinct from those that are the basis in other causes of temporary separation: violation of the principle *foedus nuptiale servandum est*. While the criterion for admissibility of a factual situation as a cause of separation is none other than that of implying a clear and unequivocal violation of one of the five principles informing married life (see commentary on c. 1151, 2), and cc. 1152 and 1153 are deduced from an analysis thereof, malicious abandonment is defined as the break-up of the conjugal consortium on the plane of social reality.

With the concept of malicious abandonment, one is not seeking separation, because in fact it already exists; nor is there danger to the spirit or body of the other spouse, which can be involved in cohabitation, in that there is no longer cohabitation. With invocation of the concept of malicious abandonment, **there is an attempt to declare guilty the spouse who**

has maliciously been absent [bold not in original] and to obtain the legal declaration of separation for the one who has been abandoned.

Because of its importance as a cause for separation, which requires fault on the part of the absent spouse, jurisprudence indicates the following requirements for malicious abandonment:

a) Abandonment or separation of fact. There must be de facto abandonment or separation. Abandonment is understood to exist if the spouse leaves the conjugal domicile or prevents the other spouse from entering it.

b) Intent to disavow the fulfillment of conjugal duties. The departure from the conjugal domicile must take place with the desire to abandon compliance with conjugal rights or obligations. A temporary absence to fulfill a lawful and reasonable objective does not constitute malicious abandonment.

In short, the concept of malicious abandonment is the procedure to convert a *de facto* separation unjustly created by one of the spouses into a *de jure* separation. (page 1585-1586. Instituto Martin de Azpilcueta. Exegetical Commentary Code of Canon Law.)

18. Canon 1692 §§ 1-3

Can. 1692 §1. Unless other provision is legitimately made in particular places, a decree of the diocesan bishop or a judicial sentence can decide the personal separation of baptized spouses according to the norm of the following canons.

§2. Where an ecclesiastical decision has no civil effects or if a civil sentence is not contrary to divine law, the bishop of the diocese of the residence of the spouses, after having weighed the special circumstances, can grant permission to approach the civil forum.

§3. If a case concerns only the **merely civil effects of marriage** [bold not in original], the judge, after having observed the prescript of §2, is to try to defer the case to the civil forum from the start.

19. Oral Contentious Judicial Process for Separation Cases, Brown 2008

[page 247–249] A canonical determination regarding separation can be made either by a decree of the competent diocesan Bishop or through a judicial sentence. If there is a question regarding the competence of a tribunal to which the case has been referred, it is to be resolved in accordance with the provisions of canon 1673 pertaining to marriage nullity cases (note 39). Thus, unless the case is reserved to the Apostolic See for some reason, cases regarding the legal separation of spouses can be decided by the tribunal of the place where the marriage was celebrated, the tribunal of the place where the respondent has a domicile or quasi-domicile, the tribunal of the place where the plaintiff has a domicile provided both parties live in the territory of the same Bishops' Conference and the Judicial

Vicar of the respondent's domicile consents after being consulted, or the tribunal of the place where most of the proofs are to be collected if the Judicial Vicar of the respondent's place of domicile consents after asking the respondent if he or she has any objection (note 40).

Cases for the separation of spouses are to be determined according to the oral contentious process, unless either party or the promoter of justice requests that the ordinary contentious process be used. Therefore the matter can be heard by a single judge (c. 1657) according to the norm of canon 1424 (that is, the judge may utilize two assessors as advisors, who can be either clerics or laypersons, if he so chooses). The petitioner must submit a petition that complies with canon 1504 (identifying the judge before whom the case is brought, what is being requested and from whom, the legal basis of the petitioner's claim and at least in general the facts and proofs in support thereof; it must be signed by the plaintiff or her or his procurator indicating the day, month and year and the address of the plaintiff or procurator; and it must indicate the respondent's domicile or quasi-domicile). Furthermore, the petition must summarize the facts involved and identify any proofs that cannot be submitted with the petition itself in a way that will permit them to be gathered immediately by the judge (note 41). Furthermore, any relevant documents (or at least authentic copies) must be attached to the petition (note 42).

Canon 1695 requires the judge to use pastoral means to attempt to bring about a reconciliation of the parties and persuade them to restore conjugal living before the case is accepted whenever there is hope a favorable result, Similarly, canon 1659 §1 impliedly requires the judge to attempt mediation according to the norm of canon 1456 before notifying the respondent of the petition and calling forth a response (note 43). Thus, the judge is to exhort the parties to seek an equitable solution to their differences by discussing the matter with them, even employing reputable persons to mediate between the parties (note 44). If such efforts seem pointless or are attempted but prove fruitless, the judge is then to notify the respondent of the petition allowing for a written reply within fifteen days, which has the effect of a judicial summons in accordance with canon 1512. The canons are careful to preserve the respondent's right of defense, and require the judge to set a time limit for the petitioner to reply to any exception raised by the respondent within the allowed time for responding to the petition (note 45). After the time limit for the pleadings has expired the judge is to examine the acts and determine the point in issue, and then summon the parties and any others whose attendance may be required to be present for a hearing within thirty days, identifying for the parties the point in issue (note 46). The parties are to be notified in the summons that they may submit a short written statement in support of their positions at least three days before the hearing (note 47) and at the hearing the judge is to consider first all of the matters referred to in canons 1459-1464 (exceptions based on defects that might render the judgment invalid, requests for delay, objections to the competence of the tribunal or the judge, assertions that the matter is a *res judicata*, other

peremptory exceptions, counterclaims and questions regarding the allocation of judicial expenses or the grant of free legal aid).

The acts of the case are to be assembled during the hearing (without prejudice to the judge's right to call upon other tribunals for assistance in instructing the case or communicating the acts as noted in canon 1418) (note 48), and the parties may be allowed to assist in the examination of the other party or witnesses or any experts (note 49). A record of the pleadings, acts and testimony to the extent they bear on the substance of the matter is to be kept by a notary and signed by the persons testifying (note 50), and proofs not previously submitted or requested may only be admitted in accordance with canon 1452 (although the judge does have considerable leeway in admitting new proofs in accordance with both canon 1452 and canon 1600, specifically mentioned in canon 1665) (note 51). Nevertheless, if all of the proofs cannot be collected during the hearing, the matter is to be delayed and a further hearing scheduled (canon 1666, which is clearly designed to safeguard the right of the parties to have adequate notice of proofs and an opportunity to respond to all relevant matters brought before the tribunal). After the proofs have been collected the judge is to conduct an oral discussion of the case and proceed to make a decision privately, the dispositive portions of which are to be immediately announced in the presence of the parties (note 52). Judgment can be deferred for up to five "useful" days in particularly difficult matters, but the full text of the judgment, including the reasons for it, is to be notified to the parties as soon as possible, normally within fifteen days (note 53).

note 39 Canon 1694.
note 40 Canon 1673.
note 41 Canon 1658.
note 42 1bid.
note 43 Canon 1659.
note 44 Canon 1446 §2.
note 45 Canon 1660.
note 46 Canon 1661 §1.
note 47 Canon 1661 §2.
note 48 Canon 1663 §1.
note 49 Canons 1663 §2, 1561, 1670.
note 50 Canon 1664.
note 51 Canon 1665.
note 52 Canon 1668 §1.
note 53 Canon 1668 §§2 & 3.

20. Catechism 2382-2386 offenses against marriage, Canon 1060

Catechism 2382: 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. 174 Between the baptized, "a ratified and consummated marriage cannot be dissolved by any human power or for any reason other than death."

2383 The separation of spouses while maintaining the marriage bond can be legitimate in certain cases provided for by canon law. [cf. CIC, cann. 1151-1155.] If civil divorce remains the only possible way of ensuring certain legal rights, the care of the children, or the protection of inheritance, it can be tolerated and does not constitute a moral offense.

2384 Divorce is a grave offense against the natural law. It claims to break the contract, to which the spouses freely consented, to live with each other till death. Divorce does injury to the covenant of salvation, of which sacramental marriage is the sign. Contracting a new union, even if it is recognized by civil law, adds to the gravity of the rupture: the remarried spouse is then in a situation of public and permanent adultery:

If a husband, separated from his wife, approaches another woman, he is an adulterer because he makes that woman commit adultery, and the woman who lives with him is an adulteress, because she has drawn another's husband to herself.

2385 Divorce is immoral also because it introduces disorder into the family and into society. This disorder brings grave harm to the deserted spouse, to children traumatized by the separation of their parents and often torn between them, and because of its contagious effect which makes it truly a plague on society.

2386 It can happen that one of the spouses is the innocent victim of a divorce decreed by civil law; this spouse therefore has not contravened the moral law.

There is a considerable difference between a spouse who has sincerely tried to be faithful to the sacrament of marriage and is unjustly abandoned, and one who through his own grave fault destroys a canonically valid marriage.

Canon 1060

Marriage possesses the favor of law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven.

21. Council of Baltimore year 1885, Decree No. 126

When the United States was still pseudo-mission territory, the U.S. Bishops drafted some particular laws for the faithful in their territories. Included among them was Act Number 126 stating that those who petitioned the civil forum for separation [or divorce] without the official Church permission incurred grave guilt.

Number 126. Praeterea, quo magia magisque dignitati matrimonii consulatur, quod magnum in Ecclcesia. Sacramentum est, a quo innamora bona profluunt pro animarum salute, pro pace familiarum, pro ipsius civilis reipublicae incolumitate ac prosperitate; iis omnibus, qui matrimonio conjuncti sunt, praecipimus, ne inconsulta auctoritate ecclesiastica, tribunalia civilia adeant ad obtinendam separationem a thoro et mensa. Quod

> si quis attentaverit, sciat se gravem reatum incurrere et pro Episcopi judicio puniendum esse (page 64).[23]
>
> [English Translation] We lay down the precept to all those, who are married, that they not enter civil tribunals for obtaining separation from bed and table, without consulting ecclesiastical authority. But if anyone should have attempted it, let him know that he incurs grave guilt and is to be punished through the judgment of the bishop (page 430).[24]

On October 22, 1977, Pope Paul VI abrogated one decree from Third Plenary Council of Baltimore: the automatic excommunication imposed on Catholics who marry after divorce (number 124). The National Conference of Catholic Bishops petitioned the Holy See to remove the excommunication attached to divorced and remarried Catholics in May of 1977. According to news stories from Dec. 1977, Pope Paul Vl's lifting of the automatic excommunication imposed on Catholics who remarry after divorce does not change the fact that those Catholics living in irregular marriage situations are denied the sacraments of Penance and Holy Communion. The abrogation of one decree from the Third Plenary Council of Baltimore would not abrogate all the others.

To determine if Act Number 126 of the Council of Baltimore is still in force, one needs to first, assess whether or not that act was an act of legislative power. And if it were, then one would need to determine the effect of the 1917 Code of Canon Law on that act. Canon 6 of the 1917 Code established principles by which one could determine whether a particular norm from the Council of Baltimore had been abrogated. One would need to determine the effect of the Second Vatican Council on that act, then the 1983 Code of Canon Law and its effect on that particular act.

Divorce

22. Prefect, Advocate Signatura, permission required for civil action, year 1944

(Doheny. page 650) Before beginning a suit in the civil courts for separation, Catholics must consult, beforehand, the proper ecclesiastical authorities, even though they previously received from the Church a decree or sentence authorizing separation. This is obligatory, under pain of ecclesiastical sanctions, in virtue of Decree, n. 126 of the III Plenary Council of Baltimore, which states in part: "… *Auctoritate Ecclesiastica*, tribunalia civilia adeant ad obtinendam separationem a thoro et mensa. Quod si quis attentaverit, sciat se gravem reatum incurrere et pro Episcopi iudicio puniendum esse." [(Mary's Advocates' note) year 1884]

As the Decree indicates, the penalty is *ferendae sententiae* and is to be determined by the Bishop in proportion to the gravity of the delinquency. In most States some sort of decree of separation or divorce would be necessary to insure recognition of the civil effects of the separation and to safeguard property rights of the separated parties.

23. Exegetical Commentary Canon 1151, Right/Duty to Commonality of Life, Ivars

(Ivars, page 1571) 2. Right-duty to commonality of life:

Matrimony is naturally provided for married life. The valid celebration of matrimony entails the duty (at least intersubjectively (4) to establish and develop married life, because married life is the object of the mutual rights and obligations of the spouses. Canon 1151 sanctions this by stating, "Spouses have the obligation and the right to maintain their common conjugal life." The right-duty of common life is the external manifestation of common conjugal life and constitutes the environment for the receiving and education of children. Nevertheless, c. 1151 authorizes spouses to suspend cohabitation if "a lawful reason excuses them."

The right-duty of physical cohabitation stated in c. 1151 should not be confused with the right to common conjugal life. The right to common conjugal life is the juridical situation of solidarity and of shared assets, social condition, etc., between the spouses. The right-duty to cohabitation adds to the common conjugal life the specific fact of common life, since cohabitation is a natural consequence of the ius in corpus and common conjugal life. In this sense, cohabitation is the immediate operative principle for satisfactory fulfillment or exercise of the right-duty to the conjugal act and to common conjugal life. The right-duty to establish and maintain marital cohabitation is not the right-duty to common conjugal life, but a consequence of it. Undoubtedly, conjugal common life can exist with a very limited matrimonial life, as in the case of immigrants, exiled persons, incarcerated persons, and persons hospitalized due to serious mental illness. These

situations are not the norm in marriage, but they graphically show that matrimony; common conjugal life as a juridical. status, and married life cannot be confused.

The duty and the right to establish and maintain conjugal cohabitation are subject to the vicissitudes of real life. However, as indicated in c. 1151, any separation must be owing to a lawful cause. Thus, matrimony always implies a relationship of cohabitation, but not necessarily a situation of cohabitation.

Once matrimony takes place, a complex combination of interwoven interests is established between the spouses (individual, family, social, economic, spiritual, emotional, religious, etc.), and these interests develop, coincide, and unfold from the immediate cohabitation of the spouses. According to Hervada, (note 5) this living together is informed by a series of informing principles that constitute the general guidelines for spousal behavior. These principles are different from the conjugal rights and obligations, to which they give direction and meaning.

There are five of these informing principles:

1) Spouses must guard their fidelity. Conjugal fidelity is not only the fruit of a conjugal right-duty, but includes the demand to be "one flesh."

2) Spouses must tend to their mutual material or corporal perfection. **This rule implies that spouses must help each other in the maintenance and improvement of the material aspects of their personal life. It also refers to the fact that matrimonial life must not involve a detriment to the corporal or material good of the other spouse** [bold not in original].

3) Spouses must tend to their mutual spiritual perfection. This implies that spouses must help each other in the maintenance and improvement of their emotional, moral and religious life. One spouse must not cause the other any detriment to his or her spiritual well being.

4) Spouses must live together. This is the duty of physical cohabitation, namely a shared table, bed, and dwelling.

5) Spouses must tend to the material and spiritual good of their children. This rule implies that spouses must tend to favor their dual well being in connection with their offspring. Moreover, one must not cause any harm to their material or spiritual well being, immorally or culpably. (from Instituto Martin de Azpilcueta. Exegetical Commentary Code of Canon Law, page 1571-1572)

Note 5: Cf. J. HERVADA, commentary on c. 1151, in CIC Pamplona.

Note 4: the difference between institutional and intersubjective duties, cf J. HERVADA, "Obligaciones esenciales del matrimonio," in Ins Canonical 31 (1991), pp. 63ff.

24. Canonical Procedure in Separation of Spouses (re. Children) King, 1952

Reverend James Patrick King, J.C.L., priest of the diocese of Brooklyn, submitted in 1952 his doctoral dissertation on "The Canonical Procedure in Separation Cases, a Historical Synopsis and a Commentary." In his forward, he stated he was presenting his study relative to cessation of cohabitation. Chapter III is "The procedure in Cases of Separation from the Council of Trent (1545-1663) to the Code of Canon law (1918)." During that time, adultery was still considered the only grounds for permanent separation of spouses, and he discusses other causes for separation.

> (page 49-54)] The role of plaintiff in a case of separation was limited to the innocent consort alone. For no reason was a third party allowed to plead such a suit, unless he acted for the aggrieved consort with a special mandate from the latter. As a result, the parties alone had this right antecedent to the suit, and the pleading of an actual case was the right of the injured spouse alone. (note 27)
>
> The adultery postulated for the bringing of a suit of separation was still what it had been in the Decretal Law. Authors of this period discussed the formal aspect more clearly, and in their descriptions of this crime always postulated an act as fully consummated, perpetrated without the consent of the other spouse, not condoned nor compensated by the same. Actually, there were no legal enactments on this matter. (note 28)
>
> From a general review of the decisions and replies of the Roman Congregations as well as the doctrine of the authors of this period, it is evident that separation cases were regarded as matters of gravity and the need for most conclusive proofs is manifest. Furthermore, judges were admonished to proceed cautiously especially because of the danger of incontinence for separated consorts, and because of the danger to the public good arising from the consequent impossibility of offspring from the broken conjugal life. (note 29) Proofs had to be full and conclusive. They needed at least to furnish a basis for a most violent suspicion. Naturally such a thing as adultery was difficult to prove and the law duly took cognizance of this fact. A mere probable suspicion on the one hand was insufficient; a well-founded suspicion on the other hand, with its basis duly established was admissible. This proof could take the form of presumption which, although only demonstrative and not conclusive in the nevertheless, when taken collectively established the necessary moral certitude in the mind of the judge. This moral certitude was sufficient for him to pass a sentence of separation. (note 30)
>
> Since eyewitnesses were practically impossible in such cases, they were not expected. However, hearsay witnesses were to be barred: they had to be *"de auditu proprio alicuius actus copulae propinquae"* [page 51] at least, and above all suspicion. (note 31) Not only was the testimony of relatives and intimates deemed altogether suitable for evidence, but if the case warranted it even the deposition of medical men or of several matrons appointed by the judge *ex officio* to *examine* the woman. These latter experts were especially useful in cases wherein extreme cruelty was alleged to ascertain the existence of physical abuse. Cruelty was perhaps the most frequent cause after adultery for seeking a separation. Here again strict proof and witnesses were demanded before a separation would be granted for as

the Sacred Roman Rota declared: "… *rari sint coniuges inter quos aliquae dissensiones non oriantur."* (note 32)

Wernz pointed out a very useful recommendation which he based on Sec. 236 of the *Austrian Instruction.* He remarked that, since in cases of separation there is often animosity between the spouses and therefore a danger to soul and body, the judge may, because of the possibility of harm, permit a temporary separation from the very beginning of the suit by way of a provisional decree. (note 33)

With regard to the matter of alimony and of the custody of children, the law manifested little change from that of the Decretals. The authors considered these points in more detail and, as would be expected, gave their opinions on the matter in a more up to date fashion. **The judge was normally to give the children over to the care of the innocent party and they were to be reared at the expense of the guilty partner** [bold not in original]. However, it was left to the discretion of the judge to make any different provisions in the individual case. In a case wherein a guilty partner despite his or her unfaithfulness proved more suitable in the mind of the judge for undertaking the care of the children, the judge could issue his decree accordingly. (note 34)

Despite the guilt of the Catholic party in a case of a mixed marriage, the general rule here was to be changed. In such a case the faith of the children was to be favored through the commitment of them to the custody of the Catholic party. The great risk of putting the children in the danger of being reared in infidelity was considered to be avoided by this means. (note 35)

Alimony or the support of the injured spouse and payment the expenses for the support of the children were provided for the law of the Decretals. The same continued to be the regular norm, although the judge could provide otherwise in particular cases.(note 36) Authors of the period pointed out that the civil authority at the time was accustomed to adjudicate these temporal effects of marriage. However, it was not a question here of a civil divorce or separation, but merely of a declaration of the material property settlement; permission for a civil separation or divorce, a very important matter, was then as now an entirely different element, which will be discussed in a later chapter. (note 37)

An important problem of the post-Tridentine period was one which continues to this day, namely, when and under what conditions was the aggrieved party of a separation suit obliged to return to the erring spouse? In the matter of perpetual separation the solution was very simple. Since adultery was the only cause recognized as sufficient to effect such a separation, the necessity of returning was never present. By his or her breach of marital fidelity, the erring spouse lost all rights to cohabitation, and the innocent party could not be forced even to effect a reconciliation. Naturally judges were advised to attempt this end by persuasion; but, with adultery as a basis for the separation, it remained the pleasure of the injured party to permit or not to permit a reunion, and a new judicial sentence was not necessary if the aggrieved partner wished to allow a return of the guilty one to the common life. The latter could be recalled, and since he or she was the original cause of the

separation, there was an obligation to return and the errant party could even be forced by a judicial sentence to obey the summons of the innocent consort. (note 38)

If one of the spouses lapsed into apostasy, heresy or schism, there was a case which approximated the effects of adultery, but nevertheless, it did not as such constitute a cause for perpetual separation. In such a case the authors distinguished two elements in treating the matter of reconciliation. Needless to say, as long as the erring spouse remained in the state of apostasy, heresy or schism, the faithful spouse did not need to allow a return to marital life. The question became a little more involved when the party guilty of these sins re-embraced the faith. In such a case the authors looked to the state of the innocent party, viz., whether he or she had entered religion or had remained in the world. By entering religion, the party effected a change of state and no reconciliation was prescribed; if the party's state had not been changed, a further distinction was made in line with the method of procedure that led to the separation. If the separation occurred *propria auctoritate* [(Mary's Advocates translation) own authority] on the part of the injured consort, the latter was bound to return upon the conversion of the other. However, if the separation was granted by ecclesiastical authority, then no reconciliation was necessary unless it was ordered by a judge, and it could be ordered only if there was present a sufficient guarantee of the guilty party's real sincere return to the faith. (note 39)

In general the other causes for separation which permitted only a temporary disruption of the marital union could be listed under two main headings. They were dangers to the soul and dangers to the body. There was no exhaustive list stated in the law. It was merely illustrative and left the determination of particular causes in individual cases to the prudent judgment of the ecclesiastical authority. (note 40)

Note 27: S. C. de Prop. Fide, instr. a. 1883, *n. III—Collectanea,* II, n. 1587; *Austrian Instruction,* sec. *215—Collectio Lacensis,* V, col. 1311; Schmalzgrueber, Lib. IV, tit. XVIII, n. 13; Wernz, *Ius Decretalium,* IV, n. 743, III; Gasparri, *op. cit.,* II, n. 1364.

Note 28: Sanchez, Lib. X, disp. V, nn. 2, 3, 13, 19, 20, 23; Schmalzgrueber, Lib. IV, tit. XVIX, nn. 98, 99, 103, 106, 107, 108, 133; Cosci, *De Separatione Tori. Coniugalis* (Florentiae, 1855), Lib. II, cap. XVI, nn. 6, 12, 17, 23, 25; Wernz, *lus Decretalium,* IV, n. 707; Gasparri, *De Matrimonio,* 3. ed., H, n. 1365

Note 29: *Saerae Romanae Rotae Decisiones Recentiores* (ed. Pr. Farinacius, Petrus Rubeus et Ioannes Baptista Compagnus, pro annis 1518-1684, 25 vols., Romae, 1618-1703), Pars XVI (1669), dec. XCIX, n. 3 (hereafter cited as *S. R. Rotae Decisiones Recentiores);* S. C. C. *Firmana,* 16 mail 1789: "Res porro est de separatione thori, in qua ad vitandum incontinentiae periculum, publicumque deficientis prolis damnum, saute procedendum monent"—Thesaurus *Resolutionum S. C. C.,* LVIII, 99.

Note 30: Turn, quia concurrunt plures actus probati per testes qui simul iunci valde adminiculantur, et maximam adulterii praesumptionem inducant, nempe . . . secretae allocutiones de nocte, salutationes et signs. amoris (etc.) . . . ex quibus omnibus simul iunctis adeo fortis et intensa resultat adulterii presumtio, ut de eo moraliter dubitari

nequeat"—S. *R. R. Decisiones Recentiores,* XII (1658), CCCXXXVII; XVI (1669), XCIX, n. 3; VI (1625), CCCXXIV, n. 2; S. C. C., *Imolen., 11 mart. 1786--Thesaurus Resolutionum S. C. C.,* LV, 41-43; Sanchez, Lib. X, disp. XI, n. 39; Cosci, *De Separation Tori ConjUGALIS,* Lib. II, cap. XVI, nn. 20, 21; Gasparri, *De Matrimonio,* 3. ed., II, n. 1365.

Note 31: *S. R. R. Decisiones Recentiores,* XVI (1669), XCIX, n. 1; VI (1625), CCCXXIV, n. 3; VI (1633), CCXXXIX, n. 18; Schmalzgrueber, Lib. IV, tit. XIX, *n.* 115; Cosci, *op. cit.,* Lib. I, cap. XIV, nn. 1, 5, 6.

Note 32: *S. R. R. Decisiones Recentiores,* VI (1632), CLV; IX, torn. II (1645), CCCXXII; XVI (1669), XCIX, n. 4.

Note 33: *Ius Decretalium,* IV, n. 744, ftn. 72.

Note 34: Sanchez, Lib. X, disp. XIX, n. 3; disp. XX, n. 2; Pirhing, *Ius Canonicum,* Lib. IV, tit. XIX, n. 63; Reiffenstuel, Lib. IV, tit. XIX, nn. 103, 104 ; Schmalzgrueber, Lib. IV, tit. XIX, n. 181; Feije, *De Impedimentis,* p. 467; Bangen, *Instructio Practica de Sponsalibus et Matrimonio* (4 vols. in 1, Monasterii, 1858), p. 148; Gasparri, *De Matrimonio,* 3. ed., II, n. 1373.

Note 35 Benedictus XIV, const. *Probe,* 15 dec. *1751—Fontes, n.* 418; S. C. C., 12 aug. *1865—ASS,* II (1866), 136, n. IX; S. C. C., *Basileen., 31* iul. *1869—Fontes,* n. 4215; *Austrian Instruction,* Sec. *236—Collectio Lacensis,* V, col. 1313.

Note 36: S. C. C., *10c. cit.;* Sanchez, Lib. X, disp. XX, n. 1.

Note 37: T *Austrian Instruction,* Sec. *244—Collectio Lacensis,* V, col. 1314; Santi, *Praelectiones luris Canonici,* Lib. IV, tit. XIX, n. 16; Wernz, *lus Decretalium,* IV, n. 714.

Note 38: S. C. C., *Taurinen.,* 16 mart. *1726—Thesaurus Resolutionum S. C. C.,* III, p. 291; S. C. C., *Firmana,* 16 mail 1789—op. *cit.,* LVIII, p. 99; SchmalzIrueber, Lib. IV, tit. XIX, nn. 118-123.

Note 39: Barbosa, *Collectanea Doctorum tam Veterum quam Recentiorem in Ius Pontificium Universum (5* vols., Lugduni, 1656), Lib. IV, tit. XIX, c. VI, n. 5; Plrhing, *lus Canonicum,* Lib. IV, tit. XIX, nn. 30, 31; Gasparri, *De Matrimonio* 3. ed., II, n. 1371.

Note 40: Conc. Trident., sess. XXIV, *de matrimonio,* Canon 8; Wenrz, *Ius Deretalium,* IV, n. 713.

25. World Congress of Families 2009, Stephen Baskerville

Stephen Baskerville is an associate professor of government at Patrick Henry College and research fellow at the Howard Center for Family, Religion, and Society. In 2007, his book "Taken Into Custody: The War Against Fathers, Marriage, and the Family" was published. He has written about the injustices of no-fault divorce in many periodicals, including Catholic publication "Crisis," and Christian publication," Touchstone" that has Dr. Anthony Esolen on their editorial staff. On August 11, 2009, Baskerville spoke at the World Congress of Families held in Amsterdam:

G.K. Chesterton once suggested that the family was the main check on state power and that weakening it would destroy freedom. Chesterton was writing about divorce, and a critical difference between today's debates over the family and the way it has been approached in the past is the now-neglected issue of divorce. The central indicator whenever issues of family or marriage arose, until very recently – and still today the most direct cause of family breakdown – has been divorce.

Today we see the vindication of Chesterton's prophecy: As divorce (with other factors) destroys the family, so it also destroys freedom. In the name of divorce (and various divorce-related pretexts) we are now seeing the massive destruction of freedom. This is most advanced (ironically) in the most freedom-loving country on earthy – the United States – but it is spreading throughout the Western world: mass arrests are now taking place in the United States, mass incarcerations without trial, forced confessions, the forced separation of children from their parents, children used as informers against their parents, wholesale expropriations of the property of law-abiding citizens, and many more violations of the most basic liberties that we in the Western world have assumed for centuries. I have documented this repression in my book, Taken Into Custody (and I can show you the documentation if anyone is interested).

We have reached the point where "divorce" today has become a euphemism for an unprecedented government invasion of private life, as innocent Americans find their families taken over and themselves criminalized. In the name of divorce, legally unimpeachable citizens – citizens (parents) convicted of no crime, citizens (parents) charged with no legal infraction, criminal or civil, citizens (parents) sitting in their own homes minding their own business – are summoned to court and subject to repressive measures never before seen in the United States. No one denies that these measures are now routine in America; each is simply rationalized by a euphemism from the jargon of family law:

- Parents are ordered out of their homes ("divorce").
- Parents are told they may not see their children, on pain of arrest and incarceration ("child custody").
- Children are summarily removed from their parents, with no evidence of wrongdoing ("child abuse").
- Parents find their property, including their homes, are summarily confiscated ("division of property").
- Parents are summarily ordered to pay huge sums to officials they have not hired for services they have neither received nor sought, on pain of incarceration ("reasonable attorneys' fees").
- Parents are handcuffed and forcibly removed from their homes, and separated from their children, without being formally charged with or tried for any crime ("domestic violence").

- Parents are summarily ordered to pay staggering sums to which they never agreed, assigned “debts” they did nothing to incur, and their wages are confiscated, all on pain of incarceration (“child support”).
- Parents are jailed without trial (“deadbeat dads,” “domestic abusers”).
- Parents (in some cases) are beaten.
- Parents are ordered not to speak to the media about these abuses, on pain of incarceration (“family privacy”).

I repeat, all these measures are now routine in the United States, and no one denies they are taking place. What may be most astonishing is the absence of any opposition or outcry or media attention. [25]

26. Consulters Drafting Canon Law, canon 1692 §3

Before the Code of Canon Law was promulgated in 1983, expert consulters analyzed draft versions of the code. Texts and minutes from the consulters’ meetings were published by the Apostilic See's publisher, "*Typis Polyglottis Vaticanis*." The consulters who were working on the canons about cases of separation of spouses voted against a proposal to give a tribunal judge authority to issue permission to a spouse to petition in the civil forum for separation or divorce. A suggestion was made that the tribunal judge(s) could have the authority, to on their own, consider the precautions mentioned in 1692 §2, and grant a party permission to petition in the civil forum. But the suggestion was not adopted. Instead, the tribunal judge(s) has to follow the prescript (law) in §2 that says only the bishop can give permission. This is documented in the minutes of “Work of the Consultors in Reviewing the Schema” The Study Group “On Procedures” Session VI, (Held on the 26-31 days of March 1979), Gathering on the 31st day of March 1979, Title II Concerning the Cases of the Separation of Spouses:

Other consultors proposed that it should say “servatis cautelis de quibus in § 2,” (note 144) in place of “servato praescripto § 2,” (note 145) so that the intervention of the Ordinary of the residence of the spouses is not required. It was voted whether this proposition was pleasing: Yes: 3; No: 5

note 144: after having observed the precautions mentioned in §2

note 144: means after having observed the prescript of §2[26]

27. Separation cannot be specifically considered a merely civil effect, Gibbons, 1947

(Gibbons, page 65-66) The legitimate authority with respect to matrimonial cases between baptized persons is properly and exclusively the Church (note 78). The contract of marriage between baptized persons is governed not only by the divine law but also by the canon law, but with relation to the civil effects of the marriage contract the competency of the civil power is recognized by the Church (79).

Even the temporary interruption as well as the perpetual cessation of the conjugal life by way of a separation of the parties, though not affecting the bond of marriage, can in no way be specifically considered a merely civil effect over which the State has any native authority (bold not in original)**.** The Church may authorize the civil power to grant a sentence of temporal or of perpetual separation (note 80), but it suffices to note here that the civil power, if acting without ecclesiastical approval, may not legitimately sanction a separation of baptized persons. The matter of the granting of a separation between baptized persons belongs primarily to the Church as interpreting the divine law or as giving effect to her canonical prescriptions.

As has been seen in the foregoing Article, the Church does not authorize the institution of a separation, either temporary or perpetual, except for certain "just causes." Likewise the immediate legitimate authorizing agency is designated in the law of the Church (note 81). A scorning of the requisite agency, or also any action taken by an agency when the action lies beyond the scope of the agency's power necessarily marks any resulting separation as unlawful for lack of an adequate competence in the authority which sanctioned the separation. (Gibbons, page 65-66)

78. Canon 1960 [CIC/1917}.

79. Canon 1016

80. Cf. Art. 34 of the Concordat with Italy in the year 1929: " Quanto alle cause di separazione personale, la Santa Sede consente che siano giudicate dall' autorita giudiziaria civile."—*AAS*, XXI (1929), 291; cf. also the Concordat with Austria under date of June 5, 1933, where in the Zusatzprotokoll, Art. VII, 2, reads : "Der Heilige Stuhl willigt ein, dass das Verfahren bez der Trennung der Ehe von Tisch und Bett den staatlichen Gerichten zusteht."—*AAS*, XXVI (1934), 277.

81 Canons 1130; 1131, §1.

Prevalent Practice

28. Apostolic Signatura, The Denial of the Right of Legitimate Defense 1987

Definitive Sentence of the College, 17 January 1987. Prot. no. 15301/83 CG. Published in Per 77 (1988) 329-359.

B. The Denial of the Right of Legitimate Defence

13. According to the norm of c. 1680, which contains the canonical system of the nullity of juridic acts, the nullity of the sentence due to a denial of the right of legitimate defence can be of natural law or positive law. Here, however, it concerns derived nullity in both cases, inasmuch as it arises from the nullity of the process on which the sentence depends as its proper cause.

By natural law, a process is null when the judicial exchange (contradictorium) has been denied a party, since this essentially constitutes a trial. "One cannot conceive of a trial or judicial debate without a judicial exchange, that is, the opportunity given to both parties to defend oneself against the assertions and allegations of the other party" (Lega-Bartoccetti, op.cit., vol. II, 1950, 900).

It must be kept in mind that this nullity does not arise from a lack of judicial exchange, but from a denial of judicial exchange. "Since we are treating the theme of judicial defence, let no one deny that the parties can renounce the right of defence.... The nullity posited by the law is therefore relative, not absolute" (ibid., 909)—it is remediable (ibid.) as is confirmed in c. 1894,10, where **the lack of a legitimate citation is included among the causes of the remediable nullity of the sentence** [bold not in original]**.**

Furthermore, not every denial of legitimate defence amounts to the nullity of the trial and the sentence, but only those which affect the substance of the trial. "We observe that certain causes of nullity established in positive law also derive from natural law, like if a legitimate defence was denied in the process." "For the most part, if the essential aspects of the right of defence were in fact not observed in a process, there has probably been a perversion of procedural laws such that the process cannot but suffer from nullity" (F. Roberti, De processibus, vol. II, 1926, nos. 494-523). Consequently, the nullity of a sentence was admitted in a decision of the Sacred Roman Rota coram Mori of 16 June 1910, no. 2, 210, where the following is read: "When these defects are substantial, though, inasmuch as they remove the right of defence, which is given to a person by the law of nature, they render the process absolutely null"; similarly, in a decision coram Mannucci of 27 February 1930, no. 4, 120.

The necessary proofs and the legitimate defences pertain to the substance of the instruction of the process. The process is null: a) if the judge has not admitted the necessary proofs.... b); if the judge has denied legitimate defence by not communicating to the respondent the proofs brought forward by the petitioner, by not admitting contrary proofs as

mentioned above—especially if new proofs have been admitted after the conclusion of the cause, but an appropriate time for learning about the proofs and for self-defence has not been given to the respondent (c. 1861). If only one proof or other has remained hidden, the sentence will be null to the extent or not that it is based on that proof; c) if the time limit for presenting proofs or defences is overly restrictive or shortened without the consent of the party; d) if proofs have been invalidly acquired; e) If the sentence hinges on proofs not present in the acts" (A. Hanssen, article cited in Ap 12 [1939] 200-201, in agreement with H. Jone, Commentarium in C.I.C., vol. III, 1955, 98).

The right of defence consists of the concrete and practical grant not only of an abstract right or of the mere possibility to defend oneself, but also of the exercise of the right, that is, of the possibility of actually exercising one's right of defence.

A grant of the right without the concrete possibility to exercise the right, at least in actuality, is the same as a denial of the right itself. Hence, if a party is in fact denied the exercise of the right of self-defence in a trial, it must be maintained that the sentence issued in such a trial suffers from the nullity established by the law of nature itself.

14. By positive law, the right of defence is exercised in a trial by means of a judicial exchange between the parties.

A judicial exchange between the parties does not actually occur if one party speaks in the trial and the other, while theoretically being admitted to contend in the trial, is in fact impeded from being able to contend. In order for there to be a judicial exchange, a dialogue is required; a monologue is not sufficient.

It is certain that the citation is absolutely necessary in order to establish or give way to a judicial exchange. This is insufficient for establishing a judicial exchange, however, if the party is not then given the concrete or practical possibility of exercising the judicial exchange—just as it is insufficient to open the door of judicial exchange if a party is then impeded from being able to enter through the door and enter into or exercise the judicial exchange. The citation is indeed the beginning of the judicial exchange, but it does not exhaust or fulfill the entirety of a judicial exchange.

Concretely, the right of defence or judicial exchange principally consists of the following:

a - the opportunity to introduce proofs in the trial;

b - the opportunity to learn about the proofs advanced by the opposing party;

c - the opportunity to present one's own deductions, allegations and defences;

d - the opportunity to respond, at least once, to the deductions, allegations and defences of the opposing party;

Hence, if the concrete possibility of pursuing all of these opportunities is denied, the judicial exchange is actually lacking, and therefore the process is null, since it lacks that which essentially constitutes the process (c. 1680), that is, the judicial exchange—even though the individual omissions of those acts do not amount to the nullity of the process since they are not required under pain of nullity.

15. In particular it can be asked whether an omission of an exchange or of a communication of defences between the parties that is not accepted or not sanated can amount to the nullity of the process.

In this regard, it is helpful to note that the allegations, defences and observations which private and public parties submit to the judge in writing are nothing other than the elements prepared in a scientific and logical manner, also with the aid of argumentation, deductions and presumptions, with which parties principally exercise their right of defence, and with which the judicial exchange between the parties attains its highest degree.

The advocates' Brief regarding the Law and the Facts, like the Observations of the defender of the bond and the votum of the promoter of justice, are not a mere recounting of the proofs which emerge from the acts, but they are a construction or elaboration which shed due light on the force of the proofs brought forward, by relying on the elements of the instruction of the cause.

For this reason the law rightly prescribes that defences and allegations are exchanged or communicated between the parties.

For this purpose, therefore, Lega concludes: a copy of a written defence must also be distributed "to the opposing party, who will in turn exchange his defence with the other party. This practice of exchanging written defences between parties, which includes also the promoter of justice and the defender of the bond, is not of little seriousness since it directly influences the legitimate discussion of the cause and pertains to a necessary element of the trial, that is, the discussion of the controversy according to the prescript of c. 1552, §1. For, a party who may make an exception that he had not received a copy of the opposing defence and that he did not defend himself with respect to it would constitute a serious obstacle to deciding the cause" (op.cit., vol. II, 315, nos. 6-7); if the cause has already been decided, this would constitute a serious obstacle to the validity of the decision itself, that is, the sentence, because of a denial of the party's right to self-defence. (English Translation, page 49-55).[27]

29. Lack of Legitimate Citation, Canon Law and *Dignitas Connubii*

Canon Law

Can. 1459 §1. Defects which can render the sentence null can be introduced as exceptions at any stage or grade of the trial; the judge can likewise declare them ex officio.

§2. In addition to the cases mentioned in §1, dilatory exceptions, especially those which regard the persons and the manner of the trial, must be proposed before the joinder of the issue unless they emerged after the issue was already joined; they must be decided as soon as possible.

Can. 1504 The *libellus*, which introduces litigation, must: ... 2º indicate the right upon which the petitioner bases the case and, at least generally, the facts and proofs which will prove the allegations.

Dignitas Connubii (DC)

Art. 116 §1 A *libellus* by which a cause is introduced must: ... 3º indicate at least in a general way the facts and proofs on which the petitioner is relying in order to demonstrate what is being asserted; (cf. can. 1504).

Art. 120 – § 1. The *praeses* can and must, if the case requires, institute a preliminary investigation regarding the question of the tribunal's competence and of the petitioner's legitimate standing in the trial.

§ 2. In regard to the merits of the cause he can only institute an investigation in order to admit or reject the libellus, if the *libellus* should seem to lack any basis whatsoever; he can do this only in order to see whether it could happen that some basis could appear from the process.

Art. 127 – § 1. The *praeses* or *ponens* is to see that the decree of citation to the trial is communicated immediately to the respondent party and at the same time made known to the petitioning party and the defender of the bond (cf. cann. 1508, § 1; 1677, § 1).

§ 2. It is advisable that the *praeses* or *ponens*, together with these communications, propose to the parties the formulation of the doubt or doubts based on the *libellus* so that they may respond.

§ 3. The introductory *libellus* is to be attached to the citation, unless the *praeses* or *ponens* for grave reasons decrees, with a decree indicating reasons, that the *libellus* is not to be communicated to the respondent party before that party has given his judicial deposition. In this case, however, it is required that the respondent party be notified of the object of the cause and the ground(s) proposed by the petitioner (cf. can. 1508, § 2).

§ 4. Together with the decree of citation the names of the judges and defender of the bond are to be communicated to the respondent party.

DC Art. 128. If the citation does not contain those things which are necessary in accordance with art. 127, § 3 or if it was not legitimately communicated to the respondent party, the acts of the process are null, without prejudice to the prescriptions of Art. 60; 126, §3; 131 and with the prescriptions of art. 270, nn. 4, 7 remaining in force (cf. can. 1511).

30. Respondent's right to read Psychologist Report and Testimony, Burke 2012

Below are excerpts from "*Dignitas Connubii,* Instruction to be Observed by Diocesan and Interdiocesan Tribunals in Handling Causes of the Nullity of Marriage" promulgated by the Pontifical Council for Legislative Texts in 2005. The instruction specifies the questions that the tribunal judges must ask their expert witness psychologist:

Art. 209 – § 1. In causes of incapacity, according to the understanding of can. 1095, the judge is not to omit asking the expert whether one or both parties suffered from a particular habitual or transitory anomaly at the time of the wedding; what was its seriousness; and when, from what cause and in what circumstances it originated and manifested itself.

§ 2. Specifically:

1º in causes of *defectus usus rationis*, he is to ask whether the anomaly seriously disturbed the use of reason at the time of the celebration of the marriage; and with what intensity and by what symptoms it manifested itself;

2º in causes of *defectus discretionis iudicii*, he is to ask what was the effect of the anomaly on the critical and elective faculty for making serious decisions, particularly in freely choosing a state in life;

3º finally, in causes of incapacity to assume the essential obligations of marriage, he is to ask what was the nature and gravity of the psychic cause on account of which the party would labour not only under a serious difficulty but even the impossibility of sustaining the actions inherent in the obligations of marriage.

§ 3. The expert in his opinion is to respond to the individual points defined in the decree of the judge according to the precepts of his own art and science; he is to take care lest he exceed the limits of his task by giving forth judgements which pertain to the judge (cf. cann. 1577, § 1; 1574).

Regarding the right of the parties to read the report of the expert witness psychologist and the transcript of his judicial examination (testimony), former Roman Rota Judge, Msgr. Cormac Burke wrote a thorough section in his 2012 article, "Excerpts from Justice and Transparency in Matrimonial Decisions," for *Angelicum*. This publication is the multi-lingual canon law and theology journal of the Pontifical University of St. Thomas Aquinas, in Rome. Msgr. Burke criticized the practice of a tribunal for keeping secret from the respondent the report and testimony of the expert witness psychologist during the publication of the acts. This is the phase of the process wherein both parties have the right to read the whole case record.

The law emphasizes the importance of showing the parties everything in the case record (called the acts of the cause): *Dignitas Connibii* Art. 241 "It is entirely forbidden that information given to the judge by the parties or their advocates or even other persons remain outside the acts of the cause (can. 1604, § 1);" and Canon 1604 §1, "It is absolutely forbidden for information given to the judge by the parties, advocates, or even other persons to remain outside the acts of the case."

(Burke, Section "*Sealing* of part of the Acts") Immediately after being notified by the Judicial Vicar of the decision XY spoke on the phone with his Advocate who gave him further information. "According to my Procurator/Advocate, it looks like a great deal of weight in coming to an affirmative decision was based on the psychological expert's evaluation of my wife. However, based on her Advocate's request, both her psychological records as well as the expert's report, were sealed so that I was not able to view them [at the moment of publication of the Acts]. Thus, I'm left with the question of how do I defend against an affirmative decision that was apparently largely based on information that was off limits to me?"

The respondent found himself placed in a situation where he was understandably perplexed. What I propose to examine is whether the situation in which he was placed is just and according the norms of church law. My opinion, which I will advance already, is that it is not [bold not in original].

Nevertheless, the "sealing" of part of the evidence - almost always the psychiatric or psychological expert's report on which the Sentence will most probably be based - seems quite widespread in cases of consensual incapacity (the grounds on which 95% or more of the petitions of nullity heard in the English-speaking world are based). The manner in which it is habitually practiced must be called into question, being based on a - to my mind, inequitable - application of a provision contained in c. 1598 which gives norms governing the publication to the parties of the Acts. The canon states:

"§1 When the evidence has been assembled, the judge must, under pain of nullity, by a decree permit the parties and their advocates to inspect at the tribunal office those acts which are not yet known to them. Indeed, if the advocates so request, a copy of the acts can be given to them. In cases which *concern the public good*, however, the judge can decide that, in order to avoid *very serious dangers*, some part or parts of the acts are not to be shown to anyone; he must take care, however, that *the right of defense always remains intact*" [emphasis added]. "§2 To complete the evidence, the parties can propose other items of proof to the judge. When these have been assembled the judge can, if he deems it appropriate, again issue a decree as in §1".

A number of points should be noted:

a) The last phrase in paragraph §1 must remain paramount in the mind of the judge in any application of the canon. The reason is that, in accordance with c. 1620, 7°, any violation of the "ius defensionis" can lead to the irremediable nullity of the eventual sentence (and every canonist who has followed rotal jurisprudence will know that violation of the right of defense is by far the most common cause of a sentence being declared irremediably null).

b) This point is also a guide in studying the scope of the phrase, "in cases which concern the public good" (it is only in such cases that a judge can "seal" or deny access to some part or parts of the acts). Marriage and the validity of a marriage are certainly matters which concern the public good, for it is very much to the public good that the institution of marriage - marriage in its human reality, as created by God - be defended and that its dignity be recognized and upheld. It is of course equally to the common good that only true and valid marriages be upheld. The maintenance of a null marriage (i.e. a union that was a non-marriage from the outset) would be contrary to the common good. That is why the Church's tribunals hear marriage cases, so that if the whole of the evidence properly weighed induces moral certainty in the judges that a marriage was null (no valid consent having been given), such a 'non-marriage' should be publicly declared null. Conversely, if the whole of the evidence does not induce that certainty, the plea of nullity should be denied. Either way not only is the dignity of marriage favored, but also the common good.

For it is fundamental for the common good that a non-marriage should not be held as a real marriage, and that a real marriage should not be subjected to the violation of justice represented by an unwarranted declaration of nullity.

So, the Church has always considered matrimonial cases to involve the *bonum publicum*. This is also the reason why the hearing of such cases is governed by special procedural norms (cf. cc. 1671-1707). The public good is indeed prejudiced if, in a matter so important to society as matrimony, these norms are not faithfully observed.

But - then we come to the point. What grave danger to the public good is averted by the frequent practice of denying one of the parties access to all the evidence? The danger of increased resentment between the spouses? Unfortunately such resentment is usually there already, at least on the side of one of them. Is it a matter of public concern, of the public good, to contain such resentment? One could argue so, although some would maintain that it is rather a question of private good. However, one could only questionably argue that a possible increase in this resentment poses a **grave** danger to the public good. The most one could admit is that it poses a *minor* danger to whatever good one wishes, public or private.

Even if one did not fully agree with the above reasoning. it seems to me that whatever force it may have should be weighed by any disinterested judge when he considers refusing a party access to the full Acts under c. 1598. Moreover, if he does in fact "seal" part of the Acts, surely he should put on record what precisely was the grave danger to the public good that he regarded as justifying this drastic measure. Any reluctance to do so would seem to call into question his disinterestedness as a judge.

I would insist on this: that the judge must be clear in his mind, and specific on record, about the grave danger to the public good that he fears will result from disclosure of part of the Acts to one of the parties. The provision of c. 1598 that we are discussing is evidently meant for exceptional cases. It would be an abuse if its application were to become a general rule. The seriousness of this procedural measure becomes more obvious when one also considers that it cannot be justly taken without weighing any possible grave danger to the public good against the real injury done to the good - to the reasonable interest - of the party so deprived of the opportunity of knowing and contesting evidence on which the eventual judgment may hinge. After all, that too poses a danger to the due process of law, and hence a danger to the public good.

We could add a further consideration. Transparency in matters that affect the public is constantly being called for today. It is debatable whether or not the demand for transparency in civil trial is always a good thing; one can take one side or another. But in a matter as important for both parties concerned as a matrimonial case, transparency, to each of the parties, certainly corresponds to the splendor of justice. Justice simply does not shine through a veiled process tilted in favor of a one-sided decision.

c) The canon lays down an elementary rule of procedural law: that each of the parties should be fully acquainted with *all* of the evidence that the other has brought forward in support of his or her position, the purpose being to enable them, if they can and wish, to

produce further evidence in rebuttal of the case advanced by the other side (cf. par. §2 of the canon). It can help if we take a look at canon 1678: "§1 The defender of the bond, the advocates of the parties and, if engaged in the process, the promotor of justice, have the right: 1° to be present at the examination of the parties, the witnesses and the experts, without prejudice to can. 1559; 2° to see the judicial acts, even if they are not yet published, and to inspect documents produced by the parties." / §2 The parties themselves cannot be present at the sessions mentioned in §1, n. 1." One might consider §2 of this canon as a limitation on the rights, or at least the desires, of the parties. But such a limitation is clearly in the interests of the objective instruction of the case. The presence of each party at the examination of the other or at that of witnesses, might have the effect on the one hand of worsening the probably already strained relationship between the parties themselves, and on the other of acting as a unwarranted constraint or inhibitory factor on the evidence of the witnesses, including the experts. That said, the fact that *all* the evidence will be seen by both parties does act as a *warranted* constraint on both witnesses and experts, favoring objectivity, balance and serenity in a process.

The right of defense

d) In my opinion (but of course I am speaking with hindsight) c. 1598 could have been more carefully formulated for, as presently worded, it does lend itself in practice to a violation of the "*ius defensionis*". Time and again the Rota has decreed the irremediable nullity of a sentence on the grounds that the refusal to let the respondent examine the Acts violated his or her right of defense. Bearing in mind the innovative nature of canon 1598 (it had no equivalent in the previous Code), it is interesting to note that its importance and proper application were the subject of one of Pope John Paul II's early addresses to the Roman Rota after the promulgation of the new Code: that of 1989 [4]. We will quote from it at some length.

He emphasized that "the new Code of Canon Law attributes great importance to the right of defense", for indeed "one cannot conceive of a just judgment without the concrete possibility granted to each party in the case to be heard *and to be able to know and contradict the requests, proofs, and deductions adopted by the opposing party* or ex officio" (emphasis added). "The right of defense of each party in the trial, that is, not only of the respondent but also of the plaintiff, should obviously be exercised according to the just dispositions of positive law. It is not the function of positive law to deprive one of the exercise of the right of defense, but to regulate it so that it does not degenerate into abuse or obstructionism, and at the same time to guarantee the practical possibility of exercising it. The faithful observance of the positive law in this regard constitutes a grave obligation for those engaged in the administration of justice in the Church."

Pope John Paul continued: "The right of defense demands of its very nature the concrete possibility of knowing the proofs adduced both by the opposing party and ex officio. Canon 1598, §1 therefore lays down that when the evidence has been assembled, the judge must, under pain of nullity, permit the parties and their advocates to inspect at the

tribunal office those acts which are not yet known to them". And he emphasizes "This is a right *of the parties* and their advocates". Then he deals with the exception mentioned in the canon: "in cases that concern the public good, the judge can decide that, so as to avoid very serious dangers, some of the Acts are not to be shown to anyone; he must take care, however, that the right of defense always remains completely intact"; and immediately comments, "With regard to the aforementioned possible exception, it must be observed that it would be a distortion of the norm of law and also a grave error of interpretation if the exception were to become the general rule. One must therefore abide faithfully by the limits indicated in the canon."

Unfortunately it seems that the exception has in fact tended to become the rule. Insofar as this has occurred it may be due to pseudo-pastoral criterion prevailing over a responsible juridical sense.[28]

31. Respondent's right, Petitioner Brief & Defender Observations. *Dignitas Connubii*

Art. 240 – § 1. When the conclusion in the cause has taken place, the judge is to set a suitable period of time for the preparation of the summary of the acts, if needed, and for exhibiting defenses and observations in writing (cf. can. 1601).

§ 2. The regulations of the tribunal are to be observed in regard to the preparation of the summary and the writing of the defenses and observations, the number of copies, and other things of this nature (cf. can. 1602).

Art. 241 – It is entirely forbidden that information given to the judge by the parties or their advocates or even other persons remain outside the acts of the cause (can. 1604, § 1).

Art. 242 – § 1. When the defenses and observations have been mutually exchanged, each party is permitted to exhibit responses within a short time period set by the judge (can. 1603, § 1).

§ 2. This right is to be given to the parties only once, unless it seems to the judge that for a grave cause it is to be granted again; then, however, a concession granted to one party is considered to have been granted to the other as well (can. 1603, § 2).

Art. 243 – § 1. It is always the right of the defender of the bond to be heard last (cf. can. 1603, § 3).

§ 2. If the defender of the bond offers no response within the brief time limit set by the judge, he is presumed to have nothing to be added to his observations, and it is permitted to go forward.

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