

**JANE DOE**

Plaintiff

Vs.

**JOHN ROE**

Defendants..

SUPERIOR COURT OF NEW JERSEY  
XXXXXX DIVISION  
XXXXXX COUNTY  
DOCKET NO. XXXXXX

CIVIL ACTION  
**MEMORANDUM OF LAW IN  
SUPPORT OF COMPLAINT FOR  
ANNULMENT**

The Plaintiff, Jane Doe, in support of her Complaint for Annulment, states the following.

### **MEMORANDUM OF LAW**

Under New Jersey law a plaintiff may have her marriage declared a nullity when there has been fraud “of an extreme nature pertaining to one of the essentials of the marriage.” Patel v. Navitlal, 265 N.J.Super. 402, 408, 627 A.2d 683, 686 (1992) citations omitted; see N.J. Stat. Ann. § 2A:34-1(d) (West 2002). Misrepresentation or concealment of a fact regarding the essentials of the marriage can serve as the basis of an annulment. 627 A.2d at 687 citing Tabon v. Sanchez, 213 N.J.Super. 472, 517 A.2d 885 (Ch.Div. 1986). At trial plaintiff proved by clear and convincing evidence that prior to their marriage defendant promised that he would reside in the same state as plaintiff after they married; plaintiff also convincingly testified that she relied on defendant’s representation when marrying him. See 265 N.J.Super. at 408, 408 A.2d at 686 citing Bilowit v. Dolitski, 124 N.J.Super. 101, 304 A.2d 774 (Ch.Div. 1973) for the standard of proof in annulment cases. Thus avoidance of the marriage results from the defendant’s actions prior to the marriage when he misrepresented his intention to live in the same state as the plaintiff, not actions subsequent to marriage; therefor annulment, rather than divorce, is proper in this case. See 4 Am. Jur. 2d Annulment of Marriage § 1.

Although New Jersey has not addressed whether cohabitation is one of the essentials of marriage, it has addressed several other misrepresentations of fact regarding marriage. Not grounds for annulment in New Jersey are the following: misrepresenting one's character, Lindquist v. Lindquist, 130 N.J.Eq. 11 A.2d 325 (E. & A. 1941), misrepresenting one's Indian cast 265 N.J.Super. 402, 627 A.2d 683, failure to disclose out of wedlock children, Tabon v. Sanchez, 517 A.2d 886 (N.J.Super.Ch. 1986), nondisclosure of a prior marriage Gerard v. Distefano, 202 A.2d 220 (N.J.Super.Ch.,1964), concealment of prior commitment to an insane asylum Houlahan v. Horzempa, 135 A.2d 232 (N.J.Super.Ch. 1957), and a husband's misrepresentation that he would adopt his wife's child Brown v. Brown, 112 A.2d 1 (N.J.Super.Ch. 1954).

Because they are considered essential to the marriage contract the following are grounds for annulment in New Jersey: misrepresenting one's desire or lack or desire to have children Williams v. Witt, 98 N.J.Super. 1, 235 A.2d 902 (App.Div. 1967), V.J.S. v. M.J.B., 249 N.J.Super. 318, 592 A.2d 328 (Ch. Div. 1991), misrepresenting one's intention to avoid marital sex Bolmer v. Edsall, 106 Atl 646 (Walker Ch. 1919), entering into marriage for the sole purpose of seeking residence in the US, if the marriage had not been ratified, Faustin v. Lewis, 427 A.2d 1105 (N.J. 1981), a wife's inability to properly perform her wifely duties because her husband misrepresented that he was of the same far-reaching religious belief, 124 N.J.Super. 101, and non-disclosure of a physical or mental condition or behavior that strikes against the central purpose of marriage, such as a heroine condition, Costello v. Porzelt, 282 A.2d 432 (N.J.Super.Ch. 1971).

Examining what courts have considered an essential element of marriage, it is clear that cohabitation is an essential element of marriage in New Jersey. Essential elements of marriage

are those factors that affect the marriage itself (having children, sexual relations) or factors that inhibit the ability to perform marital duties (far-reaching religious beliefs, a heroine addiction). Non essential elements are those that relate to the character of an individual entering the marriage (character, previous physical or mental conditions). Cohabitation clearly relates to the nature of the marriage and therefore is an essential element of marriage.

The court in V.J.S. v. M.J.B., addressed the need for a contextual analysis to define the essentials of marriage.

“What is fraud in respect to the ‘essentials’ of marriage, or, to use the broader term, what is ‘sufficient fraud,’ I think remains today the subject of ascertainment in every case brought before this court in which the complaining spouse alleges that his or her consent to a marriage was induced by the defendant's fraud. *Ysem v. Horter*, 91 N.J.Eq. 189, 198 110 A 31 (Ch. 1920).” What is essential to the relationship of the parties in one marriage may be of considerably less significance in another. Therefore, a determination of whether a fraud goes to the essentials of the marriage must be decided on a case-by-case basis. 24 N.J.Super. at 320, 592 A.2d 329.

In the instant case the plaintiff clearly considered living in the same state as husband and wife an essential element of marriage and communicated that belief to the defendant. Moreover, plaintiff relied on defendant’s misrepresentation that they would reside in the same state when she married him.

Other state law is useful in determining that a misrepresentation about marital cohabitation relates to an essential element of marriage. One California case directly parallels the instant action. Handley v. Handley, 179 Cal.App.2d 742, 3 Cal.Rptr. 910 (Cal. Dist. Ct. App. 1960) held that a wife’s secret intent not to live with her husband after marriage was grounds for an annulment. Similar to the instant action, plaintiffs in both situations would not have married the defendants had they known of the intention not to live together. Jane Doe’s situation is a stronger case than the plaintiff in Handley as the Handleys were married for six years before they

were separated while plaintiff and defendant were married for less than two years before she sought an annulment. Additionally, in Handley the defendant kept an apartment in the same city and state as the plaintiff, whereas in the instant case defendant lived out of state. California has a similar standard to New Jersey when granting an annulment for fraud. “[A] marriage may be only annulled for fraud if the fraud relates to a matter which the state deems vital to the marriage relationship.” Id. at 912, citations omitted. The California test is very similar to the New Jersey essential element test. Compare Id. at 913 (“The test in all cases is whether the false representations or concealment were such as to defeat the essential purpose of the injured spouse inherent in the contracting of a marriage.”) with 265 N.J.Super. at 408 (“The fraud must be of an extreme nature pertaining to one of the essentials of the marriage.”). Because defendant misrepresented his intention to live with plaintiff, under the Handley standard plaintiff is entitled to an annulment of her marriage.

In Brazil v. Brazil, 235 A.D.2d 611, 651 N.Y.S.2d 721 (App.Div. 1997), the New York Supreme Court, Appellate Division held that a defendant-wife had not misrepresented her intention to move to a different state.

Here, plaintiff's principal allegation of fraud in the inducement is his claim that defendant misrepresented to him that she would reside with him primarily in the Capital District after they married and that he did not discover defendant's true intentions until after October 1992. Plaintiff testified at trial, however, that it was his “feeling” that defendant was agreeable to sharing a principal residence in the Capital District with him and not that defendant actually promised this to him. In fact, plaintiff testified that defendant did not confirm or dispute his statements in that regard. The silence attributed to defendant cannot be equated with a promise on her part. 235 A.D. 2d at 613.

Additionally, the court found that the plaintiff in Handley did not prove that he would not have married defendant if she had not made that misrepresentation. Id. Brazil is clearly distinguished from this instance in that, unlike the defendant in Brazil, Roe clearly represented

that he and plaintiff would live in the same state after marriage. Additionally, unlike in Brazil, Jane Doe specifically relied on defendant's misrepresentation and would not have married him if she had known that they would not be living in the same state. Thus under the standard set by the court in Brazil Jane Doe is entitled to an annulment based on defendant's fraud. Moreover, New York defines any fraud as material "where it is proven that the plaintiff relied on premarital representations and, had such representations not been made, he or she would not have consented to the marriage. The fraud must be of a nature that a reasonably prudent person would be deceived." Murray v. Murray, 271 A.D.2d 587, 706 N.Y.S.2d 164 (App.Div. 2000) citing Brazil. Consequently, because she relied on defendant's misrepresentation and a reasonably prudent person would expect to live with their spouse in the same state, under New York law plaintiff would be entitled to an annulment.

Lastly, cohabitation is so clearly an essential element of marriage, that in South Carolina lack of cohabitation is an element of an annulment action. E.D.M. V. T.A.M., 307 S.C. 471, 474, 415 S.E.2d 812, 814 (S.C. 1992) (holding that a husband and wife who lived together and participated in "minimal" sexual activity had consummated a marriage by cohabitation). Similarly in New York a marriage cannot be annulled on the basis of fraud where the parties had cohabited once the spouse became aware of the fraud. O'Connell v. O'Connell, 8 Misc.2d 811, 166 N.Y.S.2d 949 (N.Y. Sup. Ct. 1957) Additionally, in Massachusetts an annulment "may be secured more readily in a case where the parties" have not cohabited. Hanson v. Hanson, 287 Mass. 154, 159, 191 N.E. 673, 675 (Mass. 1934); see Damaskinos v. Damaskinos, 325 Mass. 217, 89 N.E.2d 766 (Mass. 1950) (holding that under New York law that fraud regarding defendant's immigration difficulties were grounds for annulment when the parties had not cohabited). Florida differentiates between fraud and non fraud cases in which there was no intent

to cohabit after marriage, holding that in the absence of fraud a lack of intent to cohabit is not grounds for annulment of the marriage. Stone v. Stone, 159 Fla. 624, 32 So.2d 278 (Fla. 1947).

Cohabitation is an essential element of marriage. It is analogous to other instances where New Jersey courts have found qualities to be an essential element of marriage. Moreover, other states have found that living together as husband and wife is an essential element of marriage. Therefor defendant's misrepresentation that he would live in the same state as plaintiff after they married was a misrepresentation of an essential element of marriage entitling plaintiff to have the marriage declared a nullity by this court.

For the aforementioned reasons plaintiff's Complaint for Annulment should be granted and her marriage to defendant declared a nullity.