

No. 2016-3

---

---

**In the  
Supreme Court of Illyria**

---

OLIVIA

*Petitioner*

*v.*

SEBASTIAN

*Respondent*

---

**On Writ of Certiorari to the  
Illyrian Court of Appeals**

---

**BRIEF IN SUPPORT OF  
RESPONDENT SEBASTIAN**

---

DAN K. WEBB  
*Counsel of Record*  
MATTHEW R. CARTER  
ELIZABETH E. GRDEN  
WINSTON & STRAWN LLP  
35 West Wacker Drive  
Chicago, IL 60601  
(312) 558-5600  
dwebb@winston.com  
mcarter@winston.com  
egrden@winston.com

*Counsel for Respondent Sebastian*

---

---

## QUESTIONS PRESENTED

1. Whether an alleged mistake of fact by one party to a marriage is grounds for annulment where the other party did nothing to “procure” the marriage under Illyrian law.

2. Alternatively, assuming that the marriage was “procured” by fraud (it was *not*), whether the claim for annulment here was waived by post-fact acceptance.

**TABLE OF CONTENTS**

	<b>Page</b>
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW.....	3
ARGUMENT.....	4
I. ‘No Legacy is so Rich as Honesty’ – Countess Olivia’s Consent to Marry Was Not Procured by Fraud.....	4
A. Sebastian Did Not “Procure” His Marriage with Countess Olivia and Never Acted Fraudulently.....	4
B. Countess Olivia’s After-the-Fact Reason For Ending Her Marriage Is Not Grounds for Annulment.....	8
II. ‘The Lady Doth Protest’ Too Late – Countess Olivia Waived Her Annulment Claim. ....	8
A. Countess Olivia Has No Right to an Annulment. ....	8
CONCLUSION .....	11

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>STATE CASES</b>	
<i>Abell v. First Nat. Bank in Shawneetown,</i> 153 Ill. App. 3d 946 (1st Dist. 1987) .....	5
<i>Beckley v. Beckley,</i> 115 Ill. App. 27 (1905) .....	7
<i>Bielby v. Bielby,</i> 333 Ill. 478 (Ill. 1929) .....	5, 8
<i>Eisenberg v. Goldstein,</i> 29 Ill. 2d 617 (Ill. 1963) .....	9
<i>Georges v. Georges,</i> 12 Ill. App. 2d 471 (1st Dist. 1956) .....	7
<i>In re Marriage of Igene,</i> 2015 IL App (1st) 140344 .....	5
<i>In re Marriage of Nord,</i> 402 Ill. App. 3d 288 (4th Dist. 2010).....	3
<i>People v. Emmel,</i> 292 Ill. 477 (Ill. 1920) .....	4, 6
<i>Rushton v. O'Malley,</i> 89 Ill. App. 3d 103 (4th Dist. 1980).....	4
<i>Stiska v. City of Chicago,</i> 405 Ill. 374 (1950).....	4

*Wolfe v. Wolfe*,  
76 Ill. 2d 92 (Ill. 1979) ..... 5

**FEDERAL STATUTES**

Illyria Stat. § 16-904(d) ..... 4

Illyria Stat. § 46-403..... 4

**STATE STATUTES**

750 Ill. Comp. Stat. Ann. 5/301 ..... 4

**OTHER AUTHORITIES**

*Black's Law Dictionary* (4th Ed. 1968) ..... 6

*Dr. Samuel Johnson's Dictionary of the  
English Language*..... 6

## STATEMENT OF THE CASE

Twins, “both born in an hour,” (II.i.28),<sup>1</sup> were overtaken by a storm far from any shore, their ship wrecked and their lives threatened. One, Sebastian, was saved, but “some hour before” rescue “from the breach of the sea” believed his sister, Viola, drowned. (II.i.28.) So desolate that he begged his savior Antonio to “kill him whom you have recovered” (II.i.28), Sebastian saw his own survival as a “malignancy of fate.” (II.i.28.)

After Antonio nursed him back to health, the grieving Sebastian set out into Illyria, a land completely unknown to him. Almost immediately, the bewildered traveler was faced with his first good fortune in weeks—a beautiful woman demanding that he “go with [her] to [her] house.” (IV.i.90.) Not only that, but this woman—the Countess Olivia—begged him to “plight [her] the full assurance of [his] faith” (IV.iii.98) by marrying her.

This change of fortune was truly astounding: “this is the air, that is the glorious sun/this pearl she gave me, I do feel’t and see’t.” (IV.i.97.) And while it was also confusing, Sebastian’s feelings were real—he fell in love with Countess Olivia at first sight and could not deny her marriage.

While Antonio nursed Sebastian back to life, and unbeknownst to Sebastian, his beloved sister Viola *did*

---

<sup>1</sup> In accordance with Ill. Supreme Court conventions, record cites follow the format (Act.Scene.Page). Page numbers are drawn from the official transcript provided to all parties (D.I. 1) (*Twelfth Night Script.pdf*).

survive the wreckage at sea. She too was living in Illyria. But she did so disguised as a man known as “Cesario.” Under her assumed identity, Viola first served, and then fell in love, with Orsino, the Duke of Illyria. But, as nothing came easy for the shipwrecked twins, Viola—disguised as Cesario—was tasked by Duke Orsino to convince Countess Olivia to marry him (and before she married Sebastian). (I.iv.14.)

When Countess Olivia and “Cesario” first met, while Sebastian was still recovering, the Countess was beset with grief just like the twins, having recently lost a sibling. (I.v.23.) Though “Cesario” appeared as “not yet old enough for a man, nor young enough for a boy” (I.v.27), the Countess was taken with “him” and pursued “him.”

Later, after crossing paths with the bewildered Sebastian—a male copy of Viola—Countess Olivia found his countenance towards her altered but did not stop to question it. (IV.i.89–90.) Instead, she eagerly leapt into marriage, arranging for a priest and vowing to love him. (IV.i.90.) And, even after the marriage, when Countess Olivia discovered that “Cesario” was actually Viola, a copy of Sebastian, the Countess rejoiced, finding it “most wonderful!” (V.i.109.)

Considering these facts, Sebastian is shocked that Countess Olivia now seeks an annulment of their valid marriage. But the law will *not* allow that for two reasons: *first*, the marriage was not procured by fraud because Sebastian had no intent to deceive and simply fell in love with Countess Olivia at first sight; and, *second*, because even if this Court finds that Sebastian procured the marriage by fraud (he did not), Countess Olivia waived any claim to annulment by her post-

knowledge acceptance of Sebastian as her legal husband.

Recognizing these legal principles, both the trial and appellate courts correctly held that the marriage of Sebastian and Countess Olivia is valid.

### STANDARD OF REVIEW

Illinois, like Illyria, is beset by various ills—where Illyria struggles with feuds, fights, accusations, nasty tricks, and debauchery, Illinois contends with much of the same: rabid dysfunction in state government, rampant crime in certain areas, drunken brawls in the streets, and nobility that sees itself above the law. Recognizing the similar issues these “ills” produce, it is no wonder courts in *Illyria* find courts in *Illinois* highly persuasive.

So, a lower court’s decision with respect to an annulment is not disturbed unless it is against the manifest weight of the evidence. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 294 (4th Dist. 2010). And that only happens “if the opposite conclusion is clearly evident or if the decision is unreasonable, arbitrary, or not based on the evidence.” *Id.*

The trial and appellate courts here properly found that “Olivia’s wishes, not any fraud by Sebastian, prompted their marriage.” The evidence *supports* this conclusion and this Court should affirm.

## ARGUMENT

### I. ‘NO LEGACY IS SO RICH AS HONESTY’ – COUNTESS OLIVIA’S CONSENT TO MARRY WAS NOT PROCURED BY FRAUD.

Countess Olivia unilaterally mistook Sebastian for his sister-in-disguise, Viola, and insisted on an immediate and secret marriage. There is no basis for annulment in this record.

#### A. Sebastian Did Not “Procure” His Marriage with Countess Olivia and Never Acted Fraudulently.

In Illyria, a “marriage contract[] may be annulled . . . where such marriage was procured by fraud.” Illyria Stat. § 16-904(d). Any marriage “the consent to which of either party has been procured by . . . fraud” is voidable. Illyria Stat. § 46-403; *see also* 750 Ill. Comp. Stat. Ann. 5/301 (A marriage may be annulled if “a party was induced to enter into a marriage . . . by fraud involving the essentials of marriage.”).

Statutes are given their plain and ordinary meaning so that the legislature’s intent is properly ascertained. *Stiska v. City of Chicago*, 405 Ill. 374, 380 (1950). And, if a term is undefined, courts often use a dictionary to ascertain its plain and ordinary meaning. *E.g., Rushton v. O’Malley*, 89 Ill. App. 3d 103, 104–105 (4th Dist. 1980).

The evidence leaves only one conclusion: Sebastian’s conduct is not within the plain and ordinary meaning of the Illyrian annulment statute. He “procured” nothing, and had no fraudulent intent to induce a marriage. *See People v. Emmel*, 292 Ill. 477, 485–86 (1920) (“To ‘procure’ implies action on the part of the

plaintiff in error to bring about, by some means or effort on his part, [the desired action].”)

Case law fully supports these statutory basics. “An action for annulment is based on proof by clear and convincing evidence of a false representation or concealment tantamount to a representation, on which the injured party justifiably relied.” *Wolfe v. Wolfe*, 76 Ill. 2d 92, 96–97 (Ill. 1979). Here, Sebastian made no false representations, did not conceal his identity, and could not have procured his marriage to Countess Olivia. *In re Marriage of Igene*, 2015 IL App (1st) 140344, ¶¶ 20–21 (reversing an annulment where a husband omitted having been previously married several times because the husband made no affirmative misstatements and thus “[t]here were no representations made by [the husband] on which [the wife] could rely”).

To the contrary, Sebastian was true in his love for the Countess, living by the old and trusted axiom: “to thine own self be true, and it must follow, as the night the day, thou canst not then be false to any man[.]” *Hamlet*, I.iii.564–566. Indeed, Sebastian said his own name at his wedding. These facts are not indicative of a plot, but instead the actions of a man who fairly believed he was entering a marriage with an equally-enamored woman.

Countess Olivia mistook Sebastian because she wanted a love requited. And that is what Sebastian gave her. (IV.iii.98) (Sebastian, to Olivia: “I’ll follow . . . and go with you. And having sworn truth, ever will be true.”). Without intent to defraud, annulment is improper. *See, e.g., Bielby v. Bielby*, 333 Ill. 478, 485 (1929) (applying common law principles to annulment cases); *see also Abell v. First Nat’l Bank in*

*Shawneetown*, 153 Ill. App. 3d 946, 948–49 (1st Dist. 1987) (“[T]he concept of fraud includes wrongful intent, *i.e.*, conduct ‘calculated to deceive.’”). Here, Sebastian had no intent to defraud.

Moreover, silence in the face of confusion cannot “procure” a marriage. See, *e.g.*, *Black’s Law Dictionary* at 1373 (4th ed. 1968) (to “procure is to “cause a thing to be done; to instigate; to contrive, bring about, effect or cause.”); *A Dictionary of the English Language*, Johnson, Samuel (1755) (“To Take. v.a. preterite took, part. pass. taken, sometimes took; taka, Islandish; ey tek, I take; ey took, I took. . . . To get; to procure. Striking stones they took fire out of them. 2 Mac. x. 3.”); see also *Emmel*, 292 Ill. at 485–86. If anyone “procured” anything, it was Countess Olivia. And she procured what was, at least initially, a happy marriage by demanding: “[he] should not choose but go. Do not deny . . . would thou’dst be ruled by me!” (IV.i.90.)

The record supports Sebastian’s honest belief in love at first sight. Countess Olivia and Sebastian took almost identical paths to the altar. The Countess mourned “a brother’s dead love, which she would keep fresh and lasting in her sad remembrance,” (I.i.2) and rebuffed suitors due to her grief. Sebastian felt the same pain (though mistaken) over the loss of his sister. And each was pulled from that state by love.

Any confusion Sebastian felt at his “flood of fortune,” or that it “may be some error,” was easily overtaken. Countess Olivia held such power and persuasion that their sudden love was true to any eye. (“Or else the lady’s mad; yet if ‘twere so, She could not sway her house, command her followers, Take and give back affairs and their dispatch, with such a smooth, discreet, and stable bearing.”) (IV.3.97.)

Countess Olivia's actions confirm this too: she could not distinguish between Sebastian and "Cesario."<sup>2</sup> This is key because "the law makes no provision for the relief of a blind credulity, however . . . produced." *Beckley v. Beckley*, 115 Ill. App. 27 (3d Dist. 1904) (internal citation omitted) (affirming the trial court's refusal to grant an annulment where a woman held herself out as a virtuous church worker but the husband later came to believe she was a prostitute).

Countess Olivia's suggestion that Sebastian had ulterior motives is unsupported and belies her own marriage interests. Indeed, the Countess's own kin, Sir Toby, swore that "she'll not match above her degree, neither in estate, years, nor wit." (I.iii.11.) Moreover, Sebastian's immigration and financial situation do *not* set forth a basis for annulment, even if they were as precarious as Countess Olivia describes (though they are not). See *Georges v. Georges*, 12 Ill. App. 2d 471 (1st Dist. 1956) (evidence did not justify annulment of marriage on the ground of fraud where the husband, an alien, married the wife solely to provide him a basis to stay in the United States).

---

<sup>2</sup> Countess Olivia has argued that Sebastian should have known of her mistake, because she called him "Cesario" in front of a group of unruly men, and again during the wedding ceremony. But Countess Olivia allegedly overlooked facts too—that Sebastian used his own name at the wedding, for example. And these mistakes, in the face of love, mean little—after all, two people in love may have wondered, "What's in a name? That which we call a rose by any other name would smell as sweet." *Romeo and Juliet*, II.ii.47–48.

**B. Countess Olivia’s After-the-Fact Reason For Ending Her Marriage Is Not Grounds for Annulment.**

The Countess’s alternative claim that Viola fraudulently induced her marriage to Sebastian is baseless. “[F]raud significant enough to vitiate a marriage must go to the essence of the marriage.” *Bielby*, 333 Ill. at 483–84. “It is well understood that error, and even disingenuous representations [regarding] the qualities of one of the contracting parties as to . . . condition, rank, fortune, manners and character [are] insufficient [for annulment].” (emphasis added).

Viola, disguised as “Cesario,” did not fraudulently procure the marriage of Countess Olivia and Sebastian. Viola believed Sebastian died at sea. And even after Countess Olivia and Sebastian’s marriage, when Viola met Sebastian in Illyria, she mistook him and exclaimed, “Such a Sebastian was my brother, too; so went he suited to his wat’ry tomb.” (V.i.109.) Thus, Viola could not deceive Countess Olivia about Sebastian because even she did not know he was he until after the marriage.

**II. ‘THE LADY DOTH PROTEST’ TOO LATE – COUNTESS OLIVIA WAIVED HER ANNULMENT CLAIM.**

This case does not involve a marriage procured by fraud, but waiver defeats any claim for annulment anyway. Olivia learned that she married Sebastian, accepted him as her husband, and, in that conduct, waived any claim to an annulment.

**A. Countess Olivia Has No Right to an Annulment.**

Learning of her alleged mistake regarding Sebastian’s identity, Countess Olivia did not immediately

disaffirm or abandon her marriage. This waives annulment:

A person ... misled by fraud of misrepresentation is required, [upon learning] the truth, to disaffirm or abandon the transaction with all reasonable diligence . . . If, after discovering the untruth of the representations, [the person acts] as though [the transaction] were still . . . binding, [the person] waives all benefit of relief from the misrepresentations.

*Eisenberg v. Goldstein*, 29 Ill. 2d 617, 622 (1963) (internal citations omitted).

Countess Olivia took concrete actions and made unequivocal statements “binding” herself to her marriage with Sebastian.

Immediately after learning of her mistake, the Countess suggested that Duke Orsino, a spurned suitor, marry Viola. Countess Olivia specifically did that to make Viola a sister and Duke Orsino a brother: “My lord, so please you, these things further thought on, To think me as well a *sister* as a wife[.]” (V.i.113) (emphasis added). Taking it further, Countess Olivia went on to offer to pay for “sister” Viola’s wedding: “One day shall crown th’alliance on’t, so please you, Here at my house and at my proper cost.” (V.i.113.) And when Viola accepted the proposal, Olivia cried out in joy: “Ah, sister, you are she!” (V.i.113.)

Countess Olivia believed marriage—between her and Sebastian and Duke Orsino and Viola—the best possible outcome for all. The evidence thus shows that even after learning of her “alleged” mistake, Countess Olivia nevertheless celebrated her status as Sebastian’s wife (and, in turn, Duke Orsino and Viola’s sister).

Newlywed Countess Olivia, in her blissful state (and in contrast to her grief-stricken disposition throughout the rest of the record), showered generosity on Sebastian and Viola even after learning the truth she now claims hidden. These are not the actions of an individual disavowing marriage with *any* diligence, let alone the diligence necessary to maintain a claim for annulment. Instead, they are clear affirmations of her love for, and marriage to, Sebastian. There is no basis to rewrite the record now and allow annulment.

**CONCLUSION**

For the foregoing reasons, the Court should affirm the Illyrian trial and appellate courts.

Respectfully submitted,

DAN K. WEBB  
*Counsel of Record*  
MATTHEW R. CARTER  
ELIZABETH E. GRDEN  
WINSTON & STRAWN LLP  
35 West Wacker Drive  
Chicago, IL 60601  
(312) 558-5600  
dwebb@winston.com  
mcarter@winston.com  
egrden@winston.com

DECEMBER 4, 2017