

# Family Law Exam

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SEMESTER 1, 2017

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# 1. Marriage & Defacto Relationships

## 1.1 MARRIAGE

### Definition of marriage

*Voluntary union for life – man and women and exclusion of all*

- *Hyde v Hyde* (1866)
  - Voluntary union for life...
- *Marriage Act 1962* (Cth) s51 and 88AE (legislative form)
  - Voluntary union
  - For life
  - Man and woman
  - To the exclusion of all others (man and woman)

### Characteristics

*Opposite sex*

- Determining identity of person for law of marriage
- **Re Kevin (2003)**
  - **Held:** gender is determined at the time of the marriage ceremony
  - Undergone substantial sex reassignment medical treatment
- *s 88(e)(a)* – union of same sex marriage in foreign country cannot be recognised here in Australia

*Capacity to marry*

- *s 23, s 23(b)*
  - must have mental capacity to marry (low threshold)
    - **at time of the marriage ceremony**
- *Durham v Durham* (1885)
  - **Held:** as long as know what marriage entails broadly
- *AK v NC*
  - **Held:** just know general understanding that getting married – not the financial capacity of it

*Marriage age – Marriage Act 1961* (Cth), s 10(2), s 11-16, s 23B(1)

- S 11 – must have 18 to marry
  - Can be reduced by two years when **exceptional** circumstances and other party of marriageable age
    - Exception/unusually
      - *Re Z* (1970) **held:** pregnancy and with maturity and had the support of family
      - Relate to particular parties not the group they belong to – specific to persons not community

*Bigamy – Marriage Act 1961* (Cth) s 23B(1), s 94

- Cannot marry if already married
- Doesn't matter if believe partner was dead or dies after the marriage
  - Is a criminal offence – onus BRD

### Prohibited Relationships

- *S 23B(2) MA*
  - Brother or sister – whole blood or half

- Ancestry
- Relationships through adoption – child recognised as a natural child

### **Valid Marriage**

*Formalities – s 40- 42, 44 MA*

- Solemnised by authorised celebrant
  - Minister of religion, register of marriage, person registered as celebrant under the Act
- Notice to the celebrant
  - Birth certificate, death certificate or divorce certificate
- Must make a declaration – *s 42(1) MA*
- Presence of two witnesses over 18
  - Signing of marriage certificate after marriage
  - Certificate provided to parties

*Consent – s 23B(1) MA*

- Consent for adults
- Consent required for minors – *s 13 MA*
  - Need consent of an appropriate adult – parents, custodian, guardian, etc.
    - If been refused – can apply to family Ct or Magistrate (*s 16*)- hold inquiry
      - Considerations: reasonability based on the facts
      - If marry without consent = still valid
      - Except other party/celebrant are sanctioned under criminal code

### **Foreign Marriages**

- *s 88A, s88G*
  - Will recognise the marriage if complies with Australian rules
    - *S 88 MA*

## **1.2. DEFACTO RELATIONSHIPS – *Family Law Act 1975 (Cth)***

**Definition – s 4AA FLA**

- Persons are not legally married
- Persons not related by family
- Relationship as a couple and living together on a *genuine domestic basis*

*Considerations for when in defacto to be satisfied – s 4AA(2) FLA*

- a) duration of **2 years**
- b) nature of common residences – look at why exists
- c) sexual relations – not the deciding factor
- d) financial dependence/inter- dependence – e.g. paying bills, sharing a mortgage, etc.
- e) ownership, use of acquisition of property – e.g. joint title, etc.
- f) degree of mutual commitment to a shared life - e.g. a commitment/engagement ring
  - a. even if two relationships doesn't mean the party isn't committed
- g) registered – declaration

- h) care and support of the children
  - a. Involvement of partner to care for child that is not biologically theirs
- i) Reputation and public aspect of relationship
  - a. Can exist if same sex, or legally married to someone else
    - i. *Jonah v White* **held**: if defacto of just an affair?
    - ii. Based on nature/quality of relationship not just quantity of time – e.g. no public recognition

*Cases to consider*

- ***Moby v Schuler (2010) held***: to exist must not make all findings
  - Doesn't have to be exclusive don't have to live with them on a full time basis
  - Case by case analysis
  - 2 year requirement met
- ***Ricci & Jones (2011) held***: existence of a child alone doesn't create a defacto relationship

**Declarations – s 90RD FLA**

- That a de facto relationship existed
- Made if in doubt there was a de facto relationship
  - State the time period, etc.

**Gateway Requirement – s90SB**

*Length of relationship*

- Period of relationship **2 years OR there is a child OR** parties can make a declaration because both made substantial contributions
- *Dahl v Hemblem* held: two periods can be congregated to make one period

**Geographical Requirements – s 90RG, s 90SK FLA**

- Must be in the same jurisdiction when making declaration for property right/interests

**To Register De Facto**

*Relationships Act 2016 (SA)*

- Passed last year but not yet in effect
- *Relationships Act 2003 (Tas)*
- *Civil Union Act 2012 (ACT)*
- *Relationships Act 2008 (Vic)*
- *Relationships Register Act 2010 (NSW)*
- *Relationships Act 2011 (QLD)*

## 2. Divorce/Nullity/Terminating a Defacto Relationship

### 2.1. DIVORCE

First step: check validity of marriage or assume

Second step: assume no issue with jurisdiction – s 39(3) FLA

Third step: proceedings under Act for divorce order in relation to marriage can be made by either party to the marriage/or jointly – s 44(1A) FLA

### **Grounds – s 48 FLA**

s 48(1) – *Irretrievable breakdown*

- Application for divorce order in relation to a marriage shall be based on the ground that the marriage has been **broke down irretrievably**
  - *Falk and Falk*

s 48(2) – *Calculating the 12 months' separation period*

- Order shall be made, if, and only if, the Ct is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months
  - *Bozinovic and Bozinovic*

s 48(3) – *No likelihood of cohabitation being resumed*

- Order shall not be made if the Ct is satisfied that there is a reasonable likelihood of cohabitation being resumed
  - *Bates v Sawyer*

### **Separation**

s 49 – *meaning of separation*

- 1) Parties to marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties
  - a. Intention needs to be **communicated** – *Marriage of Whiteoak*
    - i. **MUST HAVE BOTH INTENT & COMMUNICATE**
  - b. Parties action on intention
- 2) May be held to be separated and to have lived separately and apart notwithstanding that they have continued to **reside in the same residence** or that either party has rendered some household services to the other

### **Resumption of cohabitation – s 50 FLA**

- 1) After separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption, they again separated and thereafter lived separately and apart up to date of filing application
  - = time living separately, before and after period of cohabitation may be aggregated as one continuous period
    - Period of cohabitation shall not be deemed to be part of the period of living separately/apart
- 2) A period of cohabitation shall be deemed to have continued during any interruption, if in opinion of the Ct, it was not substantial

### **Applying for a divorce order – s 98A(1)**

CHECK

### **Divorce order where children – s 55A FLA**

- 1) Divorce order in relation to a marriage does not take effect unless Ct has, by order, declared that it is satisfied:
  - a. No children of marriage who are not 18; or
  - b. Children of marriage who not reached 18 are specified and that:
    - i. Property arrangements in all circumstances been made for care, welfare and development of children
    - ii. Good reasons order should take effect even though Ct not satisfied that arrangements been made
- 2) If Ct doubts such arrangements are proper in circumstances Ct may adjourn proceedings until report obtained from family consultant regarding arrangements

### **Counselling for Marriages**

- Compulsory counselling for marriages less than 2 years – s 44(1B) FLA

### **When Divorce Order takes effect?**

s 55

- 1) Divorce order under Act takes effect by force of this section:
  - a. At the expiration of a period of 1 month from the making of the order
  - b. From the making of an order under 55A

s 57

If divorce order has been made in relation to a marriage, Ct may, at any time before order takes effect, upon application of the parties to the marriage, rescind the divorce order on the ground that the parties have become reconciled

s 93

No appeal after divorce order takes effect

## **2.2. NULLITY**

s 51 FLA – application for nullity based on that marriage is void

*Two sections due to ‘The Hague Convention on the Celebration and Recognition of the Validity of Marriages of 1978’*

20<sup>th</sup> June 1977 – 7<sup>th</sup> April 1986: s 23 MA

7<sup>th</sup> April – present: s 23B MA

Prior June 20<sup>th</sup>: void according to the law the time the marriage was entered (state law)

### **Grounds – s 23B MA**

- Time of marriage either parties married to another person
- In prohibited relationship
- Procedural irregularity – by s 48 MA
- Lack of consent (duress, fraud, mistaken identity)
- Age

### **Procedural irregularity – s 23B(1)(c) MA**

- s 48(1) MA – preceding provisions to be complied with or else not valid marriage (40 – 47)
  - 41 – marriages to be solemnised by authorised celebrant
  - 42 – notice to be given and declaration made