

LAW 4163 – Parent, Child & the State – 2016 Sem 2 – Nat Court

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6 LEGAL REQUIREMENTS FOR GETTING MARRIED (excluding overseas marriage)

- If one of these requirements are not fulfilled, that is a ground of nullity
- One/both of the parties may **bring proceedings** in the **Family Court (FC)** to have marriage **annulled (s 44(1A) FLA)**
- **If marriage is void, a decree of nullity is granted and it is as though the marriage never took place (s 51 FLA, *Rewal*)**

1. Man and woman

- The marriage must be a union of a man and a woman (s 5 MA, codifying *Hyde* in 2004)
- While there is no definition under FLA, s 43(a) requires that FC consider the need to preserve the institution of marriage as between a man and woman

Transsexual (born as one, sex change c.f. ambiguous at birth)

- In Australia, **gender** is determined **at time of marriage**, rather than birth (*Re Kevin 2003*)
- **Post-operative** transsexuals (treatment fully complete) are men or women in accordance with their sexual reassignment or 'brain sex' (how you perceive yourself) (*Re Kevin*)
 - o *Re Kevin 2001*
 - Test case-applied for declaration of validity of marriage: s 113 FLA – born a girl but since birth identified with being a boy. Wore boy clothes to school, work, had hormone treatment (beard, voice broke, breasts + ovaries removed), gender reassignment, changed birth certificate and driver's licence. Had female partner (knew) + 2 kids through IVF. Happy.
 - **Chisholm J: Corbett** no longer good law in modern Australia. Men and woman have different meanings now.
 - 6 grounds on which Corbett no longer good law:
 - 1. Perceived himself to be male (even as child dressed up as boy)
 - 2. Perceived by those who knew him as always having male characteristics
 - 3. Whether you've had operation: (irreversible surgery & hormone treatment)
 - 4. Appearance and behavior: (at time marriage, known & accepted as a man)
 - 5. Accepted as man for social, family, legal, work purposes (name, admission IVF clinic)
 - 6. No fraud: wife knew all & wanted marriage
- **If not full gender-reassignment:**
 - o While Full court in *Re Kevin* left open the question of whether an individual is a man/woman after incomplete gender-reassignment, given Chisholm's claim that people should be categorised according to 'brain sex' (how you see & conduct yourself) and societal progression since 2001, the 'contemporary meaning' of M&W should apply
 - o As **Norrie** (stopped half way), now registered as 'no sex', wants to get married, court may deal with question.
- **In UK: *Bellinger* (2003)** upheld *Corbett*, holding that sex is fixed at birth & surgical intervention should be ignored. However this is only hypothetical now as in March 2014 UK accepted gay marriage.

Hermaphrodite (born with hermaphrodite and sex unidentifiable)

- If neither a man nor a woman, but a 'combination of both', marriage is invalid (**C and D, Bell J**)
 - o **C and D (Bell J)**: Born male & female characteristics, parents related, 7/8 kids had disabilities, brought up as male. 13-20 developed breasts, menstruated, urinated standing, had breasts removed. *Dated female (thought he was a man), married 11 years (no sex), applied annulment (thought man)*
 - o *Bell J framed it as mistaken as to identity (she thought she was marrying a man)*

Intersex (although physically born is boy/girl, identify as neither)

- Can have 'no sex' registered on birth certificate (**Norrie**)
- Wants to get married
 - o If marries male, may be invalid (born man – man&man)
 - o If married female, underwent partial gender-reassignment (arguably same sex)

Same-sex marriage

- Despite the fact that 17 countries now allow same-sex marriage (NZ 2013; UK 2014), in 2014 & 72% of Aussies support it, **s 5(1) MA definition** inserted (codifying **Hyde**) to make it clear Australia does not recognize same-sex marriage.
- Does not recognize same-sex marriages made legally in countries that allow it (**s 88EA MA**)

Cth v ACT [2013] HCA (Unanimous)

- ACT 'Marriage Equality' Act (purported to allow same-sex marriage for residents of ACT) struck down as **inconsistent** with definition in Marriage Act (gave an exhaustive statement of the law of marriage in Australia)
- Held Cth has power to change definition of marriage to include same-sex.

2. Age

- Per **s 23B(1)(e) MA**, the marriage is void if parties are not of marriageable age = 18 (s 11 MA)
- However, a 16/17 year-old may apply under to judge/magistrate to lower the age and J/M *may* allow this if the circumstances are 'so' exceptional and unusual as to justify the making of the order' (**s 12(1) MA**)
- Should **not** be applied strictly. The word 'so' means 'sufficiently' not 'very/strictly' (**Ex Parte Willis**)
 - o **Willis**: (allowed)
 - Girl (17 ¾ & very pregnant) and partner (22) wanted to get married before she gave birth, both parents gave permission (booked venue, paid deposit)
 - o **Re B**: (Nullity)
 - Although 15yo's marriage was valid in Lebanon (full consent), not valid in Australia as she is an Australian citizen
 - o **However**, being pregnant is not enough as no laws for illegitimacy anymore
- If such an order is made, [] is only of marriageable age re other person specified in the order (**s 12(3)**), and it ceases if marriage doesn't take place within 3 months (**s 12(5)**).

3. Consent

- Marriage is void if no real consent (*s 23B(1)(d) MA*)
- [Person seeking to have marriage annulled] must prove **absence of consent** (*Otway*)

No real consent IF:

- it was obtained by duress or fraud;
- party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
- party is mentally incapable of understanding the nature and effect of the marriage ceremony

(i) Married obtained by fraud

- Fraud is limited in scope (*Hosking*)
 - o Fraud must be to the identity of the person or the nature of the ceremony (*Hosking*)
 - o **NOT fraud if relates to motives of the other party**
 - MARRIAGE OF CONVENIENCE – to stay in country, social security, tax (*Hosking, Marquis, Otway*)
 - Court rejected claims that had applicant been aware of partner's intention only to marry in order to come to Australia, would not have married them: *Suria*
 - Similar to *Deniz* but 22, married pen-pal from Phillipines, had met in Manilla twice, lasted 3 days
 - *Marquis*: Aus man married foreigner, spousal visa rejected, he visited her for 5 years, then lived in Aus for 5 years, separated.
 - o **Contrast *Deniz* decision BUT rejected in *Otway* 1987 and *Hosking***
 - Marriage annulled on the basis of deception but decision informed by fact that being *divorced* would be stigmatizing ('used goods') and that she was **15**
 - Facts: H had no intention of performing marriage obligations (Turkish tourist married 15y/o Aus-Lebanese only to stay in the country – she claimed nullity (attempted suicide, if waited 12m, would be stigmatized for life + difficult to remarry))

(ii) Marriage obtained by duress

- No consent if party was coerced to enter into marriage
- **Coercion must be at the time of the marriage ceremony c.f. based on previous events** (*Teves*)
 - o *Teves*:
 - Wife argued coerced into marriage as husband physically and sexually abused and intimidated her
 - The last incident complained of was 10 days before the wedding and court held that duress has to be *at the time of the ceremony* and this was NOT at the time of marriage ceremony
 - o C.f. *Robert and Golden*:
 - woman gave man ultimatum that would terminate pregnancy if they didn't get married. Duress held to be at time of the wedding and marriage annulled
- **Must be so overbearing that it destroyed/eroded consent**
 - o [X] will claim that [Y] was just **weaker willed** at ceremony, but no erosion of consent

- ***Zoumaris and Paradiso (2008): NO NULLITY, she was just weaker willed***
 - 40s, woman (2 kids, lonely, depressed) met man (4 kids) on net. Man told her he dying from cancer, full time care of 2 kids, on sickness benefits. W felt sorry for him, paid for children, household bills, his meds. He went to hospital for food poisoning + she asked nurse how his cancer was.
 - Man's *mum* pressured her to *marry him* as he's going to die & kids need mum.
 - At wedding he admitted that he wasn't dying, but had Hep C & was jailed for trafficking & using drugs.
 - W left him on day of wedding. Sought nullity, claiming **mum coerced her** (made her feel guilty, kids had no mum) + **man coerced her** (lied about sickness + financial struggles)

(iii) Mistake? (as to identity of the other party or as to the nature of the ceremony performed)

- Mistake as to identity of other party

- Mistake as to **identity (C and D per Bell J)**
 - Believed she was marrying a man (unaware hermaphrodite) – consent not 'real' (also, not man/woman)
- Mistake is NOT as to somebody's characteristics (***Zoumaris***)
 - ***Zoumaris***: Lied to + misrepresented about his *character, reasons for marriage & cancer but*:
 - Woman married the person who was physically at the wedding
 - Went through ceremony and consented to the marriage
 - It is irrelevant that she was mistaken re the fact he was dying (he had hep C, jailed but wasn't dying and didn't need someone to look after kids)

- Mistake as to nature of the ceremony

- Did not know that what she was doing was getting married (***Najjarin***)
 - ***Najjarin***: thought a party (Also marriage wasn't performed by an authorized person)
 - ***Rewal***: thought party (was a Hindu wedding)
- ***AK v NC (2004)***:
 - **Case for mental capacity**, but also here she understood the nature of the marriage
 - Even though wife was 80 years old and extremely demented, nullity not granted as she knew that she was getting married again to her ex-husband (appears to be a very strict test)

(iv) Mental incapacity

- No consent if party was mentally incapable of getting married
 - Must be at the time of marriage (***Brown***)
 - Person must not have known that they were getting married (***AK v NC, Chisholm J***)
- Example:
 - ***AK v NC 2004***: Even though wife was 80 years old and extreme dementia (medical evidence), nullity not granted as she knew that she was getting married again to her ex-husband (appears to be a very strict test).