

MARRIAGE

Marriage Act 1961 s5(1) – the union of a man and a woman to the exclusion of all others, voluntarily entered into for life – *Hyde v Hyde (1866)*.

Do they have capacity to be married?

- Opposite sex: Gender determined post-operation/at time of marriage – *Kevin & Jennifer*. But cf. *Bellinger*, HOL decision stating gender decided at time of birth.
 - Marriageable Age (marriage otherwise void – **s23(1)(e)**: 18y.o **s11**; OR 16-18y.o in 'exceptional & unusual circumstances' by order of judge (**s12(2)**).
 - Need consent of parents or guardian **s13 & s14** unless impractical to obtain or unlikely to be reasonably given **s15(1)**.
 - Must consider: Maturity, existing de-facto relationship, employment prospects (*Re Z*). Test won't be met by just by pregnancy (*K v Cullen*)
 - Excep + unusual circums. must apply to individual not public in general (*R v SG*).
- Not already married: **s23(1)(a)** – **s23B(1)(a)**. Bigamy **s94**

Not in prohibited relationships: **s23B(2)** includes:

- Sister, brother, half-sibling, ancestor, descendant, adopted sib. Has valid consent been given? Consent vitiated by: **s23B(1)(d)** –
- Duress (i): *Szechter test*: Will of the party overborne by genuine and reasonably held fear caused by threat of immediate danger.
- Fraud (i): Only relating to party's ID or nature of ceremony (*Hosking, Marquis*). Not vitiated by misrep of health or wealth. ▪ Mistaken identity (ii): Only of ID of Party or nature of ceremony. Not mistake as to legal consequence of marriage (*Mehta*) ▪ Mental incapacity (ii): Low threshold (*AK and NC*)

Have they completed requisite formalities?

Marriage will be VALID despite absence of pre-marriage formalities – **s48**.

Auth. Celebrant: **s41** – However, sufficient if: either party believed celebrant to be authorised (**s48(3) & Marriage of Rewal**).

Passive presence of celebrant sufficient (i.e. back of room) (*W v T*)

2 witnesses over 18 present: **s44** particular words spoken: **s46** Foreign marriages: recognised if conducted in accordance with local law attended by chaplain and registered **s88C**- Original marriage certificate taken as prima facie evidence of lawful marriage - **s88G**. Same grounds as invalidity as domestic marriages

DE FACTO RELATIONSHIPS

Do parties meet s4AA of the FLA?

- Not legally married to each other: **s4AA(1)(a)**, one party may be married to someone else however (5)(b). Not related by family: **s4AA(1)(b)** – inc child, adopted siblings, parents or descendants **s4AA(6)**. Can marry ancestor (i.e. uncle). Live together on gen domestic basis: **s4AA(1)(c)** (*Moby v Schulten*):

- Circumstances to consider **s4AA(2)**: (a) duration of relationship (b) nature and extent of common residence (c) sexual relationship (d) financial dependence or arrangements between them (e) ownership of their property (f) commitment to share life (g) care and support of children (h) public announcement of rel.
- **1of4 Gateway reqs. Satisfied? Court can declare DF rel. under s90RD** – only if alleged there was a DF rel. and it has now ended, if satisfied of reqs. in **s90SB**: (a) rel. is > 2 years; or (b) child of DF rel; or (c)(i) party to DF rel made substantial contributions **s90SM(a-c)**; and (ii) failure to make order would result in serious injustice; or (d) rel. was registered under State law.

PARENTAGE

Who is the legal parent? CL- mother of the child = woman who gave birth to the child. Father is the man who acknowledges and accepts the responsibility for the child or who is proven to be father in court. If child born during marriage (**s69P**). or cohabitation-(**s69Q**), or is registered (**s69R**)--presumed to be child of woman and husband. Presumption is rebuttable on BOP. (**s69U**).

ART= woman give gives birth (whether conceived naturally or artificially)- is the mother (even if used both donor sperm and donor egg (*Re Michael & 60H & 60HB*)).

CHILDREN IN FLA

Child = person under 18 (**s4(1) FLA**). Each parent has PR for child until 18 (**s61C**).

Presumption of equal shared PR = (**s60C(1)-(2)**; *Goode v Goode*). Presumption rebuttable grounds to believe child abuse, domestic abuse (**s60DA(2)**; *Doherty*) or not in child's best interests (**s60DA(4)**). Parenting Orders may be *equal time* (**s65DAA(1) MRR v GR**) or *substantial and significant time* (**s65DAA(2)**). Long term issues relating to **care, welfare and d'ment** of the child must be made jointly (**s65DAC**)).

Child's best interests: Child's best interests are paramount consideration in making a parenting order (**s60CA**). **Primary and additional considerations** in deciding best interests (**s60CC**). Primary = meaningful relationship w both parents + protect from harm, abuse, violence, neglect (**s60CC(2)**; *Doherty*). If risk of violence too high, prevails over meaningful r'ship w both parents (Additional = e.g. child's views, effect of change on child, practical difficulty and expense, capacity to provide, domestic violence etc. (**s60CC(3)**). All factors are equally relevant (*Slater v Light*)).

In making **parenting order** (**s64**) - Views of the child must be considered (**s60CD**; *Burton*). ICL can be appointed to ascertain views of child and put them before the court (**s62(G)(2)&68LA(5)-(6)**); *Bennett; P & P*. Family Consultant may also be appointed (**s11A**);