

Family Law Short Notes

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The Basics: Marriage, nullity, divorce, de facto, parenting

1. Is it a valid marriage?
 - a. 2 adults who have given individual consent; heterosexual; monogamous; not an ancestor or descendent (*MA* section 23B)
 - b. Requirement of notice (*MA* section 42) and the presence of a witness (section 44)
 - c. Solemnized in the presence of an authorised celebrant (*MA*, section 41)
 - i. Each makes the proclamation that they take the other 'to be my lawful wedded wife/husband (section 5(3))
 - ii. Celebrant must say that 'marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life (section 46(1))
 1. The point at which sex is determined for the law of marriage is at the time of marriage, not that of birth (*Re Kevin*)
 - d. Or a minister of a religion (section 45)
 - e. If same-sex solemnized abroad, not recognised as a marriage in Australia (section 88EA)
2. Nullity? (I.e., a declaration that the marriage was never valid)
 - a. Only grounds that a decree of nullity can be granted is that the marriage is void (*FLA* section 51)
 - i. *MA* sections 23 and 23B set out limited circumstances in which a marriage is void:
 - (a) either of the parties is, at the time of the marriage, lawfully married to some other person;
 - (b) the parties are within a prohibited relationship;
 - (c) by reason of section 48 the marriage is not a valid marriage;
 - (d) the consent of either of the parties is not a real consent because:
 - (i) it was obtained by duress or fraud; or
 - Fraud – difficult to make out. Needs to be fraud as to the identity of the other person or as to the nature of the ceremony
 - Duress – family pressure, but the applicant needs to be young.
 - *Kreet & Sampir*
 - (ii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony; or
 - (e) either of the parties is not of marriageable age.