

## 1. NULLITY

- A declaration by the ct that there was never a marriage between the parties (cf divorce order which **terminates** a valid marriage)
  - **Only ground** on which nullity can be granted is that it was **void** (*s. 51, MA*)
  - Only FCoA has jurisdiction over nullity
  - Allows people to marry w/o getting a divorce first
  - For *FLA*, “marriage” includes a void marriage (*FLAS s. 4(2)*) ∴ Act still applies to financial disputes in nullified marriage
- **Marriage Act, ss. 23, 23B** set out circumstances in which a marriage is void:
  - Either party married to another person (*s. 23B(a)*)
  - No real consent (*s. 23B(d)*)
    - Because of **fraud** (*s. 23B(d)(i)*): narrowly construed as fraud as to the identity of the other party but not as to their attributes (health status, motivations for marriage) or as to the nature of the ceremony
      - One partner entering into marriage for purposes of obtaining citizenship w/o the other’s knowledge ≠ fraud (*Marquis & Marquis [2012] FamCA*)
    - Because of **duress** (*s. 23B(d)(iii)*)
      - Pressure from family members/religious advisors has been held to be insufficient for duress where applicants are mature and/or financially independent

### **Radtko & Pagano [2016] FamCA**

<b>F</b>	<ul style="list-style-type: none"> <li>• Applicant (wife) applying for declaration of nullity</li> <li>• Rel’nship began before A was 18 y.o.; R was 26 at the time</li> <li>• R was in Aus on work visa; he moved into her apartment uninvited</li> <li>• Relationship became abusive; A was working full time and supporting them both</li> <li>• R planned their marriage so he could stay in country, threatened her if she didn’t go through with it</li> <li>• A asserts she felt trapped and didn’t want to go through with marriage</li> </ul>
<b>I</b>	Whether marriage is a nullity b/c void on basis of duress.
<b>D</b>	Yes.
<b>RA</b>	<p>If there are circumstances which taken together lead to the conclusion that because of the oppression a particular person has not exercised a voluntary consent to marriage that consent is vitiated by duress and is not real consent. (<i>Re S (1980) FLC</i>)</p> <p>The crucial question...is whether <u>threats, pressure, or whatever</u> it is, is such as <b>to destroy the reality of consent</b> and overbears the will of the individual. (<i>Hirani v Hirani (1983) UK</i>)</p>
<b>RE</b>	<ul style="list-style-type: none"> <li>• R imposed on A and took advantage of her youth and lack of maturity</li> <li>• Severe emotional, financial, psychological, physical abuse</li> <li>• Duress at the time of the marriage ceremony is critical – must show some overbearing force operating <i>at that time</i>; evidence about the ceremony and events during and immed. Before/after can be important (<i>Teves III and Campomayor (1994) FamCA</i>)           <ul style="list-style-type: none"> <li>• Marriage celebrant spoke w/ applicant and gave evidence that A felt trapped and was in fear for her life</li> </ul> </li> </ul>
<b>ETC</b>	<ul style="list-style-type: none"> <li>• Forced marriage is also a crime ∴ may want to attack a situation like this from various angles</li> </ul>

## 2. DIVORCE

- Applications go to FCCoA
- Most are joint applications; unusual to have litigation around granting a divorce

### REQUIREMENTS:

- **Sole ground** for divorce is that the marriage has broken down irretrievably (*FLA, s. 48(1)*)
- Allows one person to end marriage (*FLA, s. 49(1)*)
- **Must have lived separately for 12 mos** prior to filing application (*FLA, s. 48(2)*)
  - Can be living separately and apart even if living under one roof (*FLA, s. 49(2)*)
  - Can resume cohabitation for one period of up to 3 mos and still count time prior and after towards 12 mo separation (*FLA, s. 50(1)*)

- **Separation** = more than physical separation; can only occur where one or both spouses form the intention to sever the relationship and not resume and act on that intention;
  - compare relationship before and after purported separation, keeping in mind that each relationship is different (consider e.g., dwelling under same roof, sex, mutual society and protection, recognition of the existence of the marriage by both spouses in public and private) (*Pavey (1976)*)
- Should not be granted if ct believes there is a reasonable likelihood that cohabitation will be resumed (*FLA, s. 48(3)*)
- For marriages less than 2 years in duration, parties must undertake counselling (*FLA, s. 44(1B)*)
- Divorce order does not take effect unless ct satisfied that proper arrangements have been made for the care, welfare, and development of any children (*FLA, s.55A*)

## A. DE FACTO RELATIONSHIPS (DFR)

DEFINITION: *FLA, s. 4AA(1)*

- Two people;
- Not legally married to each other;
- Not related by family;
- Are in a relationship as a couple living together on a genuine domestic basis
  - List of indicative factors: *FLA s. 4AA(2) & (3)*
- Can be SS or hetero (*FLA s. 4AA(5)*)
- Being in a marriage/DFR with someone else does not preclude finding of DFR (*FLA s. 4AA(5)(b)*)

### *FLA s 4AA De facto relationships*

#### Meaning of a de facto relationship

- (1) A person is in a de facto relationship with another person if:
- (a) the persons are not legally married to each other; and
  - (b) the persons are not related by family (see subsection (6)); and
  - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

#### Working out if persons have a relationship as a couple

- (2) Those circumstances may include any or all of the following:
- (a) the duration of the relationship;
  - (b) the nature and extent of their common residence;
  - (c) whether a sexual relationship exists;
  - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
  - (e) the ownership, use and acquisition of their property;
  - (f) the degree of mutual commitment to a shared life;
  - (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
  - (h) the care and support of children;
  - (i) the reputation and public aspects of the relationship.
- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.
- (4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
- (5) For the purposes of this Act:
- (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
  - (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

#### When 2 persons are related by family

- (6) For the purposes of subsection (1), 2 persons are related by family if:
- (a) one is the child (including an adopted child) of the other; or
  - (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or

(c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

- **FLA S. 90RD** gives FL cts the power to issue declaration as to existence or non-existence of DFR for purposes of proceedings
  - The existence of a DFR is what establishes the jurisdiction of the ct → ct must ascertain whether DFR exists before it can exercise other powers:
    - **Financial (property and maintenance) matters**
      - ∴ allows access to federal jurisdiction which may offer advantages (like specialised cts, approach that is more sympathetic to homemakers, and national consistency)
      - In order to apply for financial orders under **FLA** must also have:
        - Breakdown of relationship; and
        - DFR existed for min. 2 years **or** there is a child of the relationship **or** substantial contributions and serious injustice would result o/w **or** a registered relationship (**s. 90SB**)
          - Can aggregate 2+ periods during which parties were in DFR (**s. 90SB(a)**)
          - Can include periods before 1/3/09 (introduction of DFR provisions) as long as the relationship ended *after* 1/3/09
    - **nb**: no requirement regarding the duration of DFR for the definition of the relationship itself or in regard to other matters that hinge on DF status
  - **Establishing parentage in (assisted conception) ART context**

**Clarence & Crisp [2016] FamCAFC 157**

<b>F</b>	<ul style="list-style-type: none"> <li>• 2 Female former partners</li> <li>• A appealing against parenting orders made concerning daughter (P)</li> <li>• A is birth mother of P, P conceived w/ an egg supplied by R; conceived 11 July 2011</li> <li>• Parties agreed they <b>commenced</b> DFR in 2004</li> <li>• A claimed it ended on 21 March 2011 ∴ not in DFR at time of conception ∴ R not a parent</li> <li>• TJ found they were in DFR ∴ both A + R are parents → leg've presumption in favour of equal shared parental responsibility</li> </ul>
<b>I</b>	Whether birth mother and respondent (donor mother) were in a DFR at the time of the conception of P
<b>D</b>	NWS the fact they were living apart at the time of conception, there were other relevant factors sufficient to indicate DFR existed.
<b>RA</b>	Touchstone for determining DFR is <b>whether the parties are a couple living together on a genuine domestic basis</b> . DFR can exist even where parties lived together for only limited periods; the focus should be on the nature and quality of the relationship rather than quantification of time spent together ( <b>Jonah &amp; White</b> )
<b>RE</b>	<ul style="list-style-type: none"> <li>• Question is not whether the relationship ended when R left the home but whether it subsisted on the date P was conceived</li> <li>• Although bio parents are usually the legal parents, ART displaces that assumption. ∴ R must prove she was in DFR w/ A in order to be a parent.</li> </ul> <p><u>Relevant factors pointing toward DFR:</u></p> <ul style="list-style-type: none"> <li>• Sexual relationship; text messages (extent and nature of communication); R stayed overnight sometimes even after she moved out; identified selves as 'partners' on donor declarations; continued sexual relationship; cont'd joint socialisation</li> <li>• May have been dissatisfaction and disharmony but that was not an infrequent state of affairs in their relationship</li> </ul>
<b>ETC</b>	These prov'ns were introduced in order to recognise SS co-parenting but have often been used by one ex-partner in an attempt to deny the other ex-partner's parenting rights.

**Jonah & White [2012] FamCAFC 200**

<b>F</b>	<ul style="list-style-type: none"> <li>• Clandestine relationship between 1992-2009; R was married and had separate family w/ wife throughout this time</li> <li>• When relationship broke down, A sought declaration of DFR (<b>s. 90RD</b>) as precursor to applying for <b>FLA</b> financial orders</li> </ul>
<b>I</b>	Whether TJ was correct in finding parties were not in DFR (A argued that TJ didn't give enough credence to the fact that there can be 2 relationships at once, which necessarily reflects on the possibility of meeting the other indicia for DFR)
<b>D</b>	TJ decision upheld – no DFR.

<b>RA</b>	The key to the definition of DFR is a relationship where the parties has so merged their lives that they are, for all practical purposes, living together as a couple on a genuine domestic basis. The proper <b>focus is on the nature and quality of the asserted relationship.</b>
<b>RE</b>	<ul style="list-style-type: none"> <li>Person can maintain 2 simultaneous relationships (<i>s. 4AA(5)</i>) ∴ being in a marriage not dispositive of also being in DFR</li> <li>Maintenance of separate residences not necessarily inconsistent w/ DFR; but where parties have lived together for limited periods of time, other indicia must exist</li> <li>Emotional communion is not sufficient to fall w/in definition of 'living together'</li> </ul> <p><u>Indicia pointing towards DFR:</u></p> <ul style="list-style-type: none"> <li>Went on vacation together; R helped A buy a home; R paid A monthly sums;</li> <li>Significant degree of Mutual commitment to one another, expressed overtly: A loved R and was devoted to him; he provided her w/ significant care and support;</li> <li>A regarded the relationship as exclusive; R also said they were exclusive except for some one night stands and his marriage</li> </ul> <p><u>Indicia pointing away from DFR:</u></p> <ul style="list-style-type: none"> <li>Always maintained separate residences</li> <li>No mixed finances</li> <li>R's HH involved the maintenance of family relationships; no relationship or intended one b/w A and R's kids</li> <li>Clandestine – time was not spent socialising as a couple; no mixing of friends/family</li> <li>R told A of limits of the relationship – expressed that if he had to choose, he would choose wife + kids</li> </ul>
<b>ETC</b>	In this and <i>Clarence &amp; Crisp</i> you see the fact that when TJ makes detailed decision and b/c they have gotten a feel for the case, there is evident reluctance to overturn TJ's decision.

### **Sha & Cham [2017] FamCAFC 161**

<b>F</b>	<ul style="list-style-type: none"> <li>A + R in secretive sexual relationship; A was married to someone else at the time</li> <li>A + R discuss having a baby, sign a financial agreement pursuant to <i>FLA, s. 90UC</i> stating they are in DFR and that A will pay certain amts to R and child for their maintenance</li> <li>Child born; relationship deteriorates; R seeks to enforce the financial agreement</li> </ul>
<b>I</b>	Whether parties were in DFR at the time they entered the <b>financial agreement</b>
<b>D</b>	Yes.
<b>RA</b>	<p>No requirement for the court, in applying <i>s. 4AA</i> to carry out a specific evaluation or weighing up of the factors in favour of and against DFR; it is a global question where the relationship as a whole is considered.</p> <p>Parties can be in DFR despite one of them being married to someone else at the time; DFR can be established despite parties having lived together for only limited periods of time.</p>
<b>RE</b>	<p><u>Factors indicating DFR:</u></p> <ul style="list-style-type: none"> <li><b>Signed the financial agreement, where both parties stated they were in DFR</b></li> <li>Parties had 'common residence' at R's home, albeit for ltd periods of time <ul style="list-style-type: none"> <li>Although they did not own it jointly, A had enjoyment of R's home as he wished &amp; he purchased furniture for the property</li> <li>A's name on electricity bill</li> </ul> </li> <li>Sexual relationship</li> <li>At A's request, R stopped work as a sex worker and from he made periodic and lump sum payments to her</li> <li>A repeatedly assured R that he wanted to have a child and that he would provide both A + child w/ support</li> <li>Commitment to IVF process was further evidence of this commitment</li> <li>Referred to himself as "your husband" and to R as "my wife" in a letter</li> <li>Socialised w/ R's daughter (although not many other public aspects of life together)</li> </ul>

## **B. DEFINING 'PARENT'**

- No overarching definition** of parent in the *FLA*

- Only definition is: **S. 4**: when “parent” is used in Part VII in relation to an adopted child, it means the adoptive parent of the child
- A parent under the **FLA** will share responsibility for the child (in the absence of a court order to the contrary) (**FLA, s. 61C: session 4**)
- Declaration of parentage under **FLA s. 69VA**
  - Operates as conclusive evidence for all the laws of the Cth
  - A lifelong status relationship (i.e., you’re a parent for life)
- Parenting *order* can be made in favour of a parent **or** someone else (**session 4**)

## 1. PARENTAGE IN ASSISTED CONCEPTION

- The child is the child of the woman who gives birth and her consenting partner (if existent) for the purposes of the **FLA**, regardless of genetic link if:
  - Parties are married or in DFR at the time of conception attempt (**s. 60H(a)**)
  - Partner consented to the conception attempt (presumed if **(a)** found, but can be rebutted on BoP) (**s. 60H(5)**)
- The donor **is not a parent**
  - Ongoing issue is with donors to single birth mothers → what is the status of the donor in such a situation where the woman has no partner?
  - Two paths have been taken by the cts:
    - If donor does not fit into definition of parent (i.e., is *not* the birth mother’s partner), they are not a parent
    - If the donor does not fit in **s. 60H** then ct can look more broadly at whether they can still be considered a parent [the expansive approach] (**e.g., Groth & Banks (2013)**) where known sperm donor found to be a parent of child and got parenting orders awarded in his favour)
    - Evinces a gendered understanding of parenthood; means single mothers by choice through ART are v vulnerable to such an enlarging approach
      - Also a presumption in favour of nuclear family form w/ 2 parents

### **60H Children born as a result of artificial conception procedures**

(1) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the ***other intended parent***); and

(b) either:

(i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; **or**

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) **the child is the child of the woman and of the other intended parent;** and

(d) if a person other than the woman and the other intended parent provided genetic material--the child is not the child of that person.

(2) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

(6) In this section:

**"this Act "** includes:

(a) the standard Rules of Court; and

(b) the related Federal Circuit Court Rules.