

# Family Law

## Marriage

### Definition

**Marriage Act S5** : "*marriage* " means the union of 2 people to the exclusion of all others, voluntarily entered into for life.

#### **'2 people'**

#### **'To the exclusion of all others'**

- You can only marry one person at a time; until you get divorced you can't marry another person ; you can have multiple non marriage relationships e.g. de facto, defacto + marriage

#### **'Voluntarily and entered into'**

- Consent – if there was no consent (fraud, duress, mistake), the marriage in the first place did not occur and thus can be dissolved

#### **'For life'**

- At the time the decision to marry was made, there must be an intention of the permanency of the relationship.

## Ending a marriage

Nullity – The marriage is 'void' and never happened

### MARRIAGE ACT 1961 - SECT 23; SECTION 23 B

#### Grounds on which marriages are void

(1) A marriage that took place on or after 20 June 1977 and before the commencement of section 13 of the *Marriage Amendment Act 1985* is void where:

- (a) either of the parties was, 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 was not a real consent because:
    - (i) it was obtained by duress or fraud;
    - (ii) that party was mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
    - (iii) that party was mentally incapable of understanding the nature and effect of the marriage ceremony; or
  - (e) either of the parties was not of marriageable age;
- and not otherwise.

(2) Marriages of parties within a prohibited relationship are marriages:

- (a) between a person and an ancestor or descendant of the person; or
- (b) between a brother and a sister (whether of the whole blood or the half-blood).

(3) Any relationship specified in [subsection](#) (2) includes a relationship traced through, or to, a person who is or was an adopted child, and, for that purpose, the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, of the child, shall be deemed to be or to have been the natural relationship of child and parent.

(4) Nothing in [subsection](#) (3) makes it lawful for a person to marry a person whom the first-mentioned person could not lawfully have married if that [subsection](#) had not been enacted.

(5) For the purposes of this section:

(a) a person who has at any time been adopted by another person shall be deemed to remain the adopted child of that other person notwithstanding that any order by which the adoption was effected has been annulled, cancelled or discharged or that the adoption has for any other reason ceased to be effective; and

(b) a person who has been adopted on more than one occasion shall be deemed to be the adopted child of each person by whom he or she has been adopted.

(6) For the purposes of this section:

**"adopted "**, in relation to a child, means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.

**"ancestor "**, in relation to a person, means any person from whom the first-mentioned person is descended including a parent of the first-mentioned person.

## Divorce – A valid marriage has now been brought to an end

A divorce order can be applied for if an irretrievable break down of the marriage is shown through the parties living separately and apart continuously for 12 months

### FAMILY LAW ACT 1975 - SECT 48

#### Divorce

(1) An application under this Act for a divorce order in relation to a marriage shall be **based on the ground that the marriage has broken down irretrievably**.

(2) Subject to [subsection](#) (3), in a proceeding instituted by such an application, the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the **parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months** immediately preceding the date of the filing of the application for the divorce order.

(3) A divorce order shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

#### ***‘Lived separately and apart’***

- The separation does not need to be physical, but a question of whether the circumstances of their relationship has changed.
- Consideration features: where they are living, sexual relationship, intention of permanency, representation of their relationship, expressed statement of intention to separate

### FAMILY LAW ACT 1975 - SECT 49

#### Meaning of separation

(1) The parties to a 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**.

(2) The parties to a marriage may be held to have 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**.

#### ***‘Continuous period of not less than 12 months’***

- The divorce order can only be applied for the day after the 12 months after separation – a date must be given.
- S50 allows a period of resumption of only one period of less than 3 months of reconciliation
  - If there is one period of less than 3 months reconciliation, that period isn't included