FAMILY LAW HYPOTHETICAL NOTES

CONTENTS

THE LEGAL REGULATION OF FAMILY RELATIONSHIPS

MARRIAGE – 23, 23B

Is the marriage valid or void? Check if it is void:

"*Marriage*" means the union of 2 people to the exclusion of all other, voluntarily entered into for life (*MA, s 5(1)*).

NULLITY

X may seek a decree of nullity only if the marriage is void (*FLA s 51*), otherwise, they would have to seek a divorce order. A decree of nullity is a declaration by the court that there never was a marriage between the parties.

X may establish that the marriage is void if:

S 23 and S 23B:

a) X or Y is, at the time of the marriage, lawfully married to some other person

- × It does not matter if their religion or culture recognizes polygamy as a legitimate practice.

b) X and Y are in a prohibited relationship

- ***S 23(2)*** *or* ***S 23B(2)*** *states what is a prohibited relationship:*
  - *a. Marriages between a person and an ancestor/descendant of the person; or*
  - b. *Between 2 siblings (whether of the whole blood or half-blood).*

c) It is not a valid marriage because of s 48

d) The consent of either X/Y is <u>not real consent</u> because:

i. It was obtained by duress or fraud; or

<u>FRAUD</u>

The **<u>test for fraud</u>** is difficult to meet because it has been very narrowly construed: '*fraud as to the identity of the other party* (but not as to their attributes such as health status or motivation for the marriage) *or as to the nature of the ceremony*' (*In the marriage of Hosking*).

- If X married the person he/she thought he/she was marrying and the party went through a valid marriage, the fact that Y may have deceived X by ____ in order to benefit financially from him/her, does not establish the necessary ground for nullity (*Crooks J, Rick v King*).
- <u>To obtain citizenship</u>: *In the marriage of Deniz*, it was held to be void, but recently, in 2012, it was held not to be void (*Marquis v Marquis*) – but see if duress can be made out.

<u>DURESS</u>

To establish a case of **<u>duress</u>**, X does not have to prove fear or terror to establish a sense of mental oppression. As <u>Watson J</u> stated in *In the marriage of S (1980) (pictures of the marriage day were used as evidence to depict her sadness)*, if all the circumstances read together lead up to a conclusion that X did not exercise a voluntary consent because he/she was oppressed, then that consent is taken to be vitiated by duress and is no real consent. And it does not matter how the oppression arose, only the effect of it on his/her mind is the relevant operative factor. Also, the motivations of the oppressor(s) are not relevant either.

Also, to establish duress, X has the onus of proving duress at the time of the marriage ceremony, i.e., when she was giving consent on that day, her will was overborne, and this can be induced by events prior to it. Evidence about the ceremony, and events occurring during and immediately before or after it are extremely critical (*Lindenmayer J in Teves (1994)*).

RADTKE V PAGANO

- **Applicant:** <u>Age</u>: not 18 yet; <u>her state of mind</u>: was terrified, had to ask friend to stay over to protect herself
- **Respondent:** <u>Age</u>: 26; <u>Status</u>: Working holiday visa expiring soon in Nov 2013; <u>Marriage</u> in Aug 2013; <u>Conduct</u>: Imposed himself moving in with her, violent tendencies, controlling, physically and verbally abusive (especially on marriage day), confront her with knife, was financially dependent on her, marriage idea was his.
- **Forster J**: <u>Evidence by the celebrant</u> who knew what was going on with the applicant and respondent conceded to allegations made by applicant – was very good evidence. Respondent took <u>advantage of her youth & lack of maturity</u>. The relationship between the applicant & the respondent at relevant times <u>prior</u> to the marriage ceremony & <u>at the time</u> of the ceremony was characterised by conduct of the respondent that <u>was coercive</u>, <u>controlling</u>, <u>threatening</u> & <u>abusive</u> all for his own purposes presumably to assist any application for him to remain in Australia.

- × However, pressure of family or religious advisers has been held to be insufficient to establish that *'her will was overborne'* when applicants are mature (*Hallas v Kefalos*, even with a major depressive illness).
- ✓ Younger applicants, particularly those without economic independence are more successful (*Nagri v Chapal* – in his 20s & financially dependent on the uncle who forced him); also, *Radtke.*
- ✓ If coercion is apparent, then duress can be established (*Kreet v Sampir* – girl was taken to India deceptively, and there, her passport was confiscated & she was forced to marry). 'Coercion' is defined in s 270.1A in the *Criminal Code Act 1995* (Cth) to include (a) force; (b) duress; (c) detention; (d) psychological oppression; (e) abuse of power; (f) taking advantage of a person's vulnerability.

ii. **X is mistaken as to the identity of Y or as to the nature of the ceremony performed**; or

iii. **X/Y is mentally incapable of understanding the nature and effect of the marriage ceremony**; or

e) Either X/Y is not of marriageable age.

- **18** is the marriageable age however, there is a discretion if X is between 16 and 18; Y is 18 or above; and there exist exceptional circumstances.

Conclusion: X can/cannot be granted a decree of nullity. Even though X/Y has been granted a decree of nullity, the *FLA* will still apply as '*marriage*' includes a '*void marriage*' under *ss 71 and 4(2).*

- If X or Y are in a **polygamous marriage** that was celebrated **overseas**, it will be deemed to be a marriage (*FLA, s 6*). It may also still qualify as a **de facto relationship** under the *FLA section 4AA*.

If X wants to claim, "*insert financial (property & maintenance) matter*" or to establish parentage in "*insert assisted conception context,*" there are two legal threshold issues that X must address.

A. IS THERE A DE FACTO RELATIONSHIP?

As per *s 4AA(1)* (*FLA*), X has 3 elements to establish to satisfy the definition of a de facto relationship:

a) That X is not legally married to Y
b) That X and Y are not related by family
c) And that X and Y are a '*couple living together on a genuine domestic basis*'

It is irrelevant and uncontentious that X and Y are of the **same sex** (*s 4AA(5)(a)*). And it is also uncontentious that X/Y is **legally married to someone else/in another de facto relationship** (*s 4AA(5)(b)*)

Preliminary matters

The geographical requirement must be satisfied. As per *s 90SD & 90SK*, X and Y must demonstrate that they have a connection with one of the referring states. This requires that either X or Y or both was ordinarily resident there when the application was made; and that in addition, both X & Y were resident there for a third of the relationship or X had made substantial contributions (*s 90SM(4)*), or in the alternative; both X & Y were resident in the jurisdiction when the relationship broke down.

Preliminary matters if it is a financial proceeding:

Before moving on to the factors that will help establish the relationship, there are some other preliminary matters to establish if X wants to enliven the court's jurisdiction to make property and maintenance orders/declarations under *ss 90SE, 90SG, 90SM,* or *90SL*. The court must be satisfied that, under *s 90SB*:

a) De facto relationship is **at least 2 years** (*can aggregate 2 or more periods; can include periods before 1/3/9 as long as relationship ended after that date*); OR
b) There is a **child** of the de facto relationship; OR
c) The applicant, i.e. X:
    i. Made **substantial contributions** as per **s 90SM(4)**

FLA s 90SM(4)

(a) Direct or indirect financial contribution made by or on behalf of a party to the de facto relationship, or a child of the de factor relationship
    (i) To acquisition, conservation improvement of property (owned jointly or separately)
    (ii) Otherwise in relation to that property
(b) A contribution (other than a financial contribution) etc.
(c) Contribution to the welfare of the family constituted by parties and children, including homemaker/parent contributions.

    ii. Would suffer **serious injustice** if the order or declaration was not made; OR
d) The relationship is/was **registered** in a State/Territory

Preliminary matters if it is a claim to establish parentage

- In assisted conception (*s 60(1)*)
- Adoption of a child by a de facto partner (*s 60HA*)

Establishing the relationship

After the preliminary matters have been sorted out and are out of the way, X must satisfy the definition of a de facto relationship to establish the relationship. The first two elements are not contentious and easily established. The third element, i.e. the "*living together*" component is the core element of the definition. The court will focus on the nature of X's and Y's relationship rather than on how it manifested itself in quantities of joint time

that lies at the heart of the statutory considerations (*at 66*, *Jonah v White*). There should be a merger of their lives into "*coupledom*".

- Held to be living together:
  - ✓ Sharing the same residence for only a small part of the week can satisfy the third element of the definition (*Moby v Schulter*).
  - ✓ Maintaining separate residences for some years before cohabiting (*Robinson v Rouse*)
  - ✓ Having adjoined interconnected residences (*S v B (No 2)*)
  - ✓ Having separate residence for privacy, family disapproval, or other reasons of convenience (*Houston v Butler*)
  - ~ About partners who spend most of their time at each other's houses but never shared a residence, state courts have held that a de facto relationship does exist, however, there is no authority as such at the federal level.
  - × Having a child together for a 5-year relationship, and long period of sex and romance, but not living together and not sharing finances – not enough to satisfy the "living together" component (*Sinclair v Hatcher*).
  - × Living on adjoining properties and socializing together but not sharing finances – this type of emotional entanglement is not sufficient to transform their relationship into a state of domestic coupledom (*Keene v Scofield*)
  - × Clandestine relationship of 13 years; respondent was married to someone else with children; wife was not aware about it; spent 5-6 nights per months; went on a two-and-a-half weeks trip; consistent sexual relationship; financial support of applicant by respondent; significant degree of mutual commitment, love, care and support were found: still no de facto relationship because: (*Jonah v White*)
    - Separate households maintained
    - No relationship between applicant and children of the respondent
    - Clandestine nature
    - Respondent made clear to applicant that if it comes down to a choice, he would pick his family over her
    - Regular monthly payments but no joint account
    - Rarely mixed with each other's friends
    - Respondent referred to it as an 'affair'
    - Respondent barely spent time with applicant's family
    - Very few public aspects of their relationship
    - '**Emotional communion**' (i.e. living together through phone calls and so on) insufficient to fall within the definition of living together

To determine whether a relationship exists, the court will draw upon the inclusive list of criteria set out in s *4AA(2)* and this exercise is a **question of fact**. No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether a de facto relation exists or not (*s 4AA(3)*). The court has the **discretion** to decide which criteria militates more/less in favour. An indicium may be given more weight in one case and less in another: *s 4AA(4)*. None of these of decisive factors because every relationship is very different.

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;

APPLYING FOR PARENTING ORDERS

WHAT ARE PARENTING ORDERS (64B, 64C) AND WHO CAN APPLY FOR THEM (65C)

A **parenting order** in relation to a child may be made in favour of **a parent of the child** or some other person (***s 64C***). A parenting order in relation to a child **may be applied** for by **(a)** either or both of the child's parents; **(b)** the child; **(ba)** a grandparent of the child; **(c)** any other person concerned with the care, welfare or development of the child (***s 65C***).

The **relevant legal principles** regarding **s 65C(c)** are succinctly stated in ***Kam & MJR*** by *Burr J:*
5.1.3. This provision imposes a **threshold test,** it being a test to be determined on the individual facts and circumstances of each case.
5.1.4. That the **degree or strength of the nexus or concern** with the care, welfare or development of the child is again an issue for determination in each case, depending upon the facts and circumstances of each case. There may well be circumstances in this Court where a mere "interest in" or "concern about" the child in question is sufficient to satisfy the threshold test. Once the threshold stage has been passed, the individual facts and circumstances of the matter again must be viewed in order to determine whether or not a parenting order is appropriate and in the best interests of the child, as would be the nature and form of any such order.

- **Remember**: When making a parenting order, the court must have regard to the best interests of the child as the paramount consideration – ***s 60CA***

As per ***s 64B***, a **parenting order** is an order under the ***FLA*** dealing with any aspect of parental responsibility for a child which could be 1 or more of the following matters:

a) the person or persons with whom a child is to live;
b) the time a child is to spend with another person or other persons;
c) the allocation of parental responsibility for a child;
d) if 2 or more persons are to share parental responsibility for a child--the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
e) the communication a child is to have with another person or other persons;
f) maintenance of a child;
g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
    (i) a child to whom the order relates; or
    (ii) the parties to the proceedings in which the order is made;
h) the process to be used for resolving disputes about the terms or operation of the order;
i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

WHERE ARE APPLICATIONS FILED?

Most are filed in FCCoA. FCoA tends to deal with more complex matters and appeals, though FCCoA still handles some complex cases.

THE LEGISLATIVE PATHWAY

The '***legislative pathway***' (despite not being legislatively mandated) sets out **3 related stages of analysis** through which courts must proceed when making parenting orders:

1. A best interest of the child assessment (**s 60CC**), with the objects and principles of Part VII (**s 60B)** informing the analysis.
2. A determination of whether the presumption in favour of equal shared parental responsibility (ESPR) applies (**s 61DA**).
    - This does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
        - Abuse of the child or another child, who, at the time, was a member of the parent's family (or that other person's family)
        - Family violence (**s 61DA(2)**)
    - Despite the fact that this presumption is not applied due to family violence or abuse, it is not uncommon that order for ESPR and/or shared time can and are still made.

3. A determination of the appropriate care arrangements (that is, parenting time) (**s 65DAA**).

This pathway was first articulated in ***Goode*** and the order specified in this case has become the predominant approach [A unanimous decision of the HCA in ***MRR v GR*** also went through the stages in this order], although the Full Court has approved undertaking this approach in reverse or in any order at all (*Starr v Duggan*).