Divorce and Nullity: Pt VI

1. Preliminary: relationship and relief

Here, [XY] is legally married under s 5 MA

VALIDITY DISPUTED:
If [X] argues that the marriage was invalid from the outset because of [duress, fraud, lack of real consent or another ground], [X] may seek a **decree of nullity** under s 51 FLA to declare that there was never a valid marriage.

2. Jurisdiction

[X/Y] is [an Australian citizen **ordinarily resident** in Australia] so the jurisdictional requirement under s 39(3) is [satisfied/not satisfied].

3. Ground for divorce

S 48(1): the sole ground for divorce is that the marriage has **broken down irretrievably**.
S 48(2): the court must be satisfied that the parties have **lived separately** for a continuous period of **at least 12 months** immediately preceding the filing of the application.

- Here, [X] asserts that the marriage irretrievably broke down on [date], when [describe relevant conduct]. If the parties have been separated since that date, the requisite period of separation would [have/not have] elapsed by [proposed filing date].
- [X] [may apply for divorce now/must wait until the statutory period is satisfied].

4. Whether the parties have separated

4.1 Intention, action and communication

Separation means **more than physical separation** to involves the **destruction of the martial relationship.** This **will be a question of facts:** Price & Underwood; Todd & Todd.

- It may be necessary to examine and **contrast the state of the martial relationship before and after the alleged separation:** Price & Underwood

The question is whether [X] intended to end the marital relationship, acted consistently with that intention and communicated it to [Y], directly or indirectly: Price & Underwood.

- [X] **formed the intention** to end the marriage on [date], as evidenced by [statements, conduct, decision to move out or other circumstances].
- [X] **acted upon** that intention by [moving out, ending shared domestic arrangements, ceasing marital activities or otherwise changing the relationship].
    - **Physical separation is not conclusive:** Cessation of cohabitation may provide prima facie evidence of separation: Linden & Templeman, but alone is not necessarily sufficient. However, [**continued shared domestic or marital arrangements**] may suggest that the relationship had not yet ended. The court must **consider the parties' relationship as a whole**, rather than relying solely on [their physical living arrangements].
    - **Separation under one roof:** parties may be separated notwithstanding that they continue living under the same roof: s 49(2). The critical question is whether the marital relationship has **ended in substance**: Price & Underwood.
        - Here, despite remaining in [the family residence], [X and Y] [ceased sharing domestic routines, slept separately, maintained separate finances or otherwise changed their relationship]. These changes support the conclusion that their marital relationship ended on [date].
        - **Co-residence was financially necessary:** Here, [the parties' changed relationship and communicated intention to separate] supports the conclusion that continued co-residence was [a practical necessity rather than a continuation of the marital relationship].
- [X] **communicated** the intention to separate to [Y] by [expressly stating that the marriage had ended, sending a message, leaving the shared home or other conduct]. [Y] [was/was not] **made aware** of [X's] decision to end the marriage.
    - **Unilateral intention:** separation may occur where cohabitation is brought to an end by the conduct of one party: s 49(1). However, it must be **sufficiently communicated** to [Y], directly or indirectly: Price & Underwood; Falk. Given [the relevant statements and conduct], separation is [likely/unlikely] to have occurred on [date], notwithstanding [Y's opposition].

Having regard to [the intention, conduct and communication], the parties are [likely/unlikely] to have separated on [date].

5. Temporary reconciliation

S 50: where parties have separated and subsequently resume cohabitation for **one period not exceeding three months**, the periods of separation before and after that reconciliation **may be aggregated** for the purposes of the 12-month requirement.

- As the reconciliation lasted [duration], which [does/does not] exceed three months, the earlier and later periods of separation [may/may not] be aggregated under s 50. The relevant separation period is [the combined qualifying periods], and the requirement in s 48(2) [is/is not] satisfied.

6. Arrangement for children

S 55A: the court will need to be satisfied that **proper arrangements have been made** for children under 18 before the divorce order will take effect (do not have to be formal)

- Here, the existing arrangements involve [living arrangements, time with each parent, schooling, care and financial support] are **arguably [proper/inadequate]** because [explain their adequacy in meeting the children's needs].

S 55A also permits a divorce order in the relevant circumstances notwithstanding the absence of proper arrangements.

- [X] should address [the relevant deficiencies] and demonstrate why the court should [be satisfied with the arrangements/make the divorce order notwithstanding those deficiencies].

7. Effect of divorce and financial proceedings

7.1 When does divorce take effect?

S 55 FLA: a divorce order ordinarily takes effect **one month** after it is made. Here, the marriage will ordinarily be legally terminated after [one month later].

- Under s 59, a party may remarry once the divorce order has taken effect.

7.2 Time limit for property and financial proceedings

S 44(3): proceedings for property adjustment or relevant financial relief ordinarily must be commenced **within 12 months** after the divorce order takes effect, unless leave is obtained. [X] should take steps to resolve or commence the relevant financial proceedings before [the applicable deadline].

Where divorce has not yet taken effect

As [X and Y] have [not divorced/the divorce order has not yet taken effect], the 12-month post-divorce limitation period has [not yet commenced]. However, [X] **should nevertheless consider the financial consequences** of divorce and the desirability of resolving outstanding financial matters.

8. Nullity: if the validity of the marriage is disputed

8.1 Nullity rather than divorce

S 52: the court must not make a divorce order where both an application for nullity and an application for divorce are before it. The central question is whether the marriage is void under s 23B(1) of the Marriage Act 1961 (Cth) (MA).

8.2 Grounds for a void marriage

S 23B(1): a marriage may be void where [one party was already married, the parties were within a prohibited relationship, relevant formal requirements were not satisfied, **consent was not real**, or a party was not of marriageable age].

8.3 Fraud

S 23B(1)(d)(i): consent may be invalid where it was obtained by fraud concerning the **identity** of the other party or **the nature of the marriage** ceremony.

- Rick & King: the failure to disclose medical information did not constitute fraud as to the spouse's identity.
- Trengrove & Bennes: misunderstandings concerning the spouse's personal qualities or legal status did not establish the relevant fraud.

Here, [X] claims that [Y] misrepresented [the relevant matter]. However, the alleged misrepresentation concerns [identity or nature of ceremony / personal qualities, expectations or other collateral matters]. Accordingly, the alleged fraud is [likely/unlikely] to vitiate consent under s 23B.

8.4 Duress

S 23B(1)(d)(i): consent may be invalid where it was obtained through duress. The critical question is whether threat, pressure as such as to **destroy the reality of consent** and **overbears the will** of the individual: Radtke & Pagano

- Damus & Anders: emphasises examining the **effect of pressure** on the person concerned and does not treat total deprivation of the ability to make a decision as a necessary condition.
- Radtke & Pagano: threats and pressure, including physical and emotional abuse, were relevant to whether the reality of consent had been destroyed.

Here, [Y] subjected [X] to [threats, intimidation, physical violence, emotional pressure or coercion] before or during the marriage. The pressure was particularly significant given [X's age, vulnerability, dependence or lack of maturity]. These facts are analogous to Radtke & Pagano, where violence and exploitation of the applicant's vulnerability supported a finding of duress.

- [Y] may argue that [X] voluntarily participated in planning the wedding, expressed enthusiasm or otherwise acted consistently with genuine consent]: Damus & Anders. However, [X's participation in the ceremony or preparations] must be considered against [the broader context of coercion and its actual effect].

[X's] consent was [likely/unlikely] to have been vitiated by duress.

8.5 Mistake about the nature of the ceremony

S 23B(1)(d)(ii): a marriage may be void where a party was mistaken about the nature of the ceremony.

- Ryba & Achthoven: the applicant believed that she was participating in a staged marriage ceremony for a video. The court **emphasised the applicant's subjective state of mind** rather than whether the belief was objectively reasonable.

Here, [X] believed that [the ceremony was a joke, staged performance or otherwise not a genuine marriage ceremony]. This belief is supported by [lack of formal preparation, absence of family, communications describing the event as a prank or other circumstances]. Although [Y] may argue that [the ceremony was formally conducted or X should have recognised its significance], the relevant inquiry concerns [X's actual understanding].

[X] [may/may not] establish a mistake as to the nature of the ceremony.

8.6 Age, existing marriage, prohibited relationship or formal invalidity

S 23B(1), the marriage may also be void because

- (a) Either party was **already married**
- (b) where there is a 'prohibited relationship'
- (c) It is **invalid** due to non-compliance with notice and other legislative requirements
- (d)(iii) that party **did not understand the nature and effect** of the marriage ceremony
- (e) Not of 'marriageable age'

Ss 11-12 MA, parties ordinarily must be at least 18 years old to marry, subject to exceptional circumstances.

Here, [specific facts] suggest that [the relevant statutory condition] [was/was not] satisfied. Accordingly, the marriage is [likely/unlikely] to be void on this ground.

8.7 Financial consequences of a void marriage

S 4(2) FLA the meaning of marriage **includes a void marriage** for the relevant purposes of the FLA. Given [the parties' financial interests], the consequences of nullity for [any proposed financial relief] should be considered separately.

9. If the parties were in a de facto relationship

The relevant issue is whether their de facto relationship existed and subsequently broke down.

9.1 Existence

S 4AA(1), a de facto relationship exists where two persons who are not legally married to each other or related by family are **living together** as a couple on a **genuine domestic basis**. Relevant circumstances under s 4AA(2) include:

- the **length of the relationship**
- whether and how much the couple **live together** at the **same residence**
    - Living together was understood as sharing life as a couple, rather than necessarily sharing the same residence: Fairbairn. However, [lack of mutual commitment or substantially different understandings of the relationship] may weigh against de facto status: Cizek & Mihov; Braun & Sanchez
        - Murphy J in Jonah & White: the key is the manifestation of a relationship where **'the parties have so merged their lives that they were, for all practical purposes**
        - Braun & Sanchez: Same sex relationship for 23 years. No merged financial or other assets. Share life was limited. No de facto.
- whether a **sexual relationship** exists
- the degree of **financial dependence or interdependence**, and any arrangements of **financial support**, between them
- the **ownership**, **use** and **purchase** of **their property**
- the degree of **mutual commitment to a shared life**
- whether the relationship is or was **registered** under state or territory law
- the care and support of **children**
- the **reputation** and **public aspects** of the relationship.

No particular finding in relation to any circumstance is to be regarded as necessary: s 4AA(3). A court is entitled to **attach such weight to any matter** as may seem appropriate: s 4AA(4)

- May exist between 2 people of the **same sex**: s 4AA(5)(a)
- Can exist even if one of the people in that relationship is married to someone else or in a de facto relationship with someone else: s 4AA(5)(b)

Here, [the parties' circumstances] suggest that [they were/were not] in a de facto relationship.

9.2 Breakdown

A de facto relationship breaks down when, considering all the circumstances, the parties no longer live together as a couple on a genuine domestic basis: Fairbairn. Intention, action and communication may be relevant but not determinative: Mayson & Wellard

- End or breakup of what had been an **enduring emotional bond**: Fairbairn
- **Not precluded by the presence of an ongoing relationship of some sort**: Fairbairn
- Depends on the nature and history of the relationship : Onslow & Onslow

Here, [the parties' changed conduct, withdrawal of mutual support, separate arrangements or refusal to accommodate the other's needs] suggests that the relationship broke down on [date]. However, [continuing shared activities or financial arrangements] may suggest that aspects of the relationship persisted.

- Fairbairn: Whilst there had been a degree of mutual commitment to a shared life, that **commitment ceased when the respondent refused to make the necessary or desirable adjustment in support** of the appellant and come up by his conduct, acted contrary to her needs

[X and Y's] de facto relationship [likely/unlikely] broke down on [date], as the parties [have/have not] been separated for the requisite period of 12 months. [X] [may apply for divorce now/should wait until the statutory period is satisfied/should address the outstanding arrangements].

Family violence protection

1. Preliminary: identify the protection sought

Given [the nature of the alleged violence, any **immediate risk** and **existing family law proceeding**s], [X] should consider [an interim FVIO, a final FVIO and/or appropriate FLA relief] against [Y]. If [X] is successful, this will impact their parenting matters.

2. Family violence intervention order: FVPA

2.1 Does [Y]'s conduct constitute family violence? — ss 5-8 FVPA

Under s 5 FVPA, family violence includes behaviour by a person **towards a family member** that is [physically or sexually abusive, **emotionally or psychologically abusive**, **economically abusive**, **threatening, coercive, or otherwise controlling** or dominating in a manner **causing fear for safety** or wellbeing]. It also includes behaviour **causing a child** to hear, witness or otherwise experience the effects of such conduct.

- [Y's conduct] is [likely/unlikely] to constitute family violence because [the decisive statutory category and supporting facts]. This provides the basis for considering an IVO.

Physical or sexual abuse

[Y's] [assault, physical intimidation or sexual conduct] falls within the conduct contemplated by s 5(1)(a)(i). This is supported by [specific incidents, injuries, threats or other evidence].

Emotional or psychological abuse — s 7

Under s 7, emotionally or psychologically abusive behaviour includes conduct that **torments, intimidates, harasses or is offensive** to another person.

- Here, [Y's repeated insults, threats, intimidation, harassment or other behaviour] may constitute psychological abuse because [explain the conduct and its effect on X]. [The nature, context and pattern of the conduct] suggest that it [does/does not] exceed ordinary interpersonal conflict.

Economic abuse — s 6

Under s 6, economic abuse includes **coercive, deceptive or unreasonably controlling** conduct, without consent, which deprives a person of financial autonomy or withholds necessary financial support in the specified circumstances. Here, [Y] [controlled X's access to money, restricted financial decisions or withheld financial support despite X's dependence], suggesting economic abuse because [facts establishing coercion, control and its consequences].

Threatening, coercive or controlling behaviour

Even if [Y's conduct] does not constitute physical or economic abuse, it may fall within s 5 because [threats, coercion, domination or other conduct]. Here, [particular incidents] demonstrate [the threatening or controlling character of the conduct], particularly given [any pattern, power imbalance or fear experienced by X].

2.2 Is [X] eligible to apply for an FVIO? — s 45 FVPA

Given [X's safety concerns, any police involvement and the urgency of protection], [X/police] should consider applying for an FVIO under s 45 FVPA. [X] is eligible to apply for an FVIO as an affected family member per s 8. Alternatively, police may make an application, including where [X] does not personally seek an order.

Family member — s 8

The conduct must involve a 'family member', broadly defined in s 8 to include [**current or former spouses or domestic partners**, persons in intimate personal relationships, **relatives, children** who reside or previously resided with a person, and children of persons involved in intimate relationships].

- Here, [X] is [Y's spouse/former spouse/domestic partner/former intimate partner/relative], and therefore falls within s 8.

2.3 Interim FVIO — ss 53-54 FVPA

The court may make an interim FVIO pending final determination where satisfied **on the balance of probabilities** that the order is necessary to [ensure the safety of an affected family member, preserve property or protect a child]. Here, [X] requires **immediate protection** because [recent violence, escalating threats, stalking, ongoing contact, threatened property damage or risk to a child]. In particular, [Y's conduct] suggests that delaying protection until a final hearing may expose [X/child] to [specific harm].

- [X] has a [strong/moderate/weak] basis for seeking an interim FVIO under s 53. An interim order may also be made ex parte under s 54.

2.4 Final FVIO — s 74 FVPA

Under s 74(1), the court may make a final FVIO if satisfied on the balance of probabilities that [Y] has committed family violence against [X] and is **likely to continue doing so** again.

Likelihood of continuing or repeated violence

[The frequency of incidents, escalation, threats following separation, denial of responsibility, continued attempts to contact X or breach of previous boundaries] supports a finding of **future risk**. [Y] may argue that [the conduct was isolated, the parties have separated, there has been no further contact or circumstances have materially changed]. Nevertheless, [identify the strongest evidence concerning future conduct] suggests that further violence is [likely/unlikely].

As [Y] has [committed/not committed] family violence and the evidence [supports/does not support] a likelihood of repetition, [X] is [likely/unlikely] to obtain a final FVIO under s 74.

2.5 Protection of children — s 77 FVPA

S 77(2)(a): Here, [child] [witnessed violence, overheard threats or experienced its effects], suggesting that [child] also requires protection, the court must also make a final order for [child].

2.6 Appropriate conditions — ss 80-81 FVPA

S 80 FVPA: the court might include conditions in the FVIO and must give **paramount consideration** to the safety of the affected family member and any children

- [X] **should seek conditions prohibiting** [Y] from [**prohibiting family violence, locating or attempting to locate the protected person**, using an animal to commit violence, **approaching or contacting the protected person**, and **attending specified locations]** per s 81

Where the parties have children together

If [X and Y] must communicate regarding [child], the order may contain appropriately limited exceptions for [written communication confined to child arrangements, mediation or communication through lawyers], but any exception should be sufficiently narrow to avoid [continued harassment or control].

2.7 Exclusion from the family home — ss 81-83 FVPA

[X] should seek an FVIO condition excluding [Y] from [the residence]. Here, [X] and [child] currently reside at [the family home], where [child] has [established schooling, care arrangements and support networks]. Requiring [X/child] to relocate may cause [disruption, financial hardship, loss of support or instability]: s 82. Excluding [Y] from the residence may [better preserve the safety and stability of X and child / be unnecessary or disproportionate]: s 81.

2.8 Duration, variation and revocation

S 97 FVPA: the court may specify the duration of an FVIO. Where no duration is specified, s 99 provides for its continuation until revoked or set aside. Given [the continuing nature of the risk], [X] should seek an order for [appropriate duration].

- S 100: an application may be made to vary, revoke or extend the order

7.3 Breach and enforcement — ss 123-123A FVPA

If [X] is successful, there may be criminal consequences for upon to 2 years in prison and/or 240 penalty units under s 123 FVPA if [Y] contravenes the FVIO. S 123A provides for a more serious offence involving contravention intended to cause harm or fear for safety.

8 Which protection mechanism should X seek?

[X] should prioritise [an interim/final FVIO] as it may be more practical given [the need for immediate protection and enforceability]. FVIO **may be obtained quickly**, on an interim and ex parte basis, and breaches attract **criminal consequences**.