

## DIVORCE OR NULLITY?

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There is a common misunderstanding that if one of the parties to a marriage enters it with an improper motive (e.g. immigration), or there is a failure by one of the parties to truly commit to the marriage, then it may be possible to obtain a nullity of the marriage (i.e. as if it had never happened), as opposed to a divorce.

Family Court case law is very clear as to what is required to obtain either a divorce or a nullity.

For a divorce there must be "irreconcilable differences", which is represented by 12 months separation.

For a nullity there must be a failure to comply with the *Marriage Act* requirements for the marriage ceremony. If someone has entered into a marriage for the purpose of gaining residency into Australia, this will not be a basis for the other spouse to seek a nullity.

This is distinct however, from how the Immigration Department may consider someone's motive for entering a marriage, when determining a residency Application.

### **Facts:**

- The Husband aged 27, was born in Fiji.
- The Wife was an Australian born citizen. The couple went through a valid marriage ceremony in New South Wales, but separated shortly after.
- The Husband applied for permanent residency in Australia on "spouse grounds" shortly after the wedding.
- The Minister for Immigration rejected the Application on the basis that a permanent residency visa normally cannot be granted until 2 years after the application is made and that this process was aimed at testing whether the relationship was continuing 2 years after the visa application.
- The requirements of the temporary visa required that the Husband remain in Australia as the spouse of the Wife.
- The Department of Immigration was not satisfied that the couple had a genuine and continuing marriage relationship.
- The Migration Tribunal was not satisfied that there was sufficient evidence of financial aspects of the relationship. It found that the Husband could not provide a satisfactory explanation as to why he was not living with the Wife.
- The Husband said that the marriage was genuine.

***Court Order:***

- There was insufficient evidence to satisfy that the Husband and Wife held themselves out to the world as being in a genuine matrimonial relationship.
- The Husband was Ordered to leave the country.

In this case, the Wife could not pursue a nullity of the marriage, only a divorce, and only once there had been 12 months separation.