

WHEN A MARRIAGE IS NOT A VALID MARRIAGE

A press release recently reported that thousands of Australian marriages may be invalid due to celebrants using incorrect words at wedding ceremonies and consequently not complying with the *Marriage Act*. Apparently an examination of last year's marriages by the Attorney-General's department revealed that 80% of the ceremonies did not meet these requirements. This pointedly came down to poor celebrant training – but is this enough for the Court to find a marriage invalid? For most people the end of a marriage is effective either by the ending of a spouse's life or divorce, but there are circumstances where a spouse can apply to the Court to void a marriage, which essentially means that it wasn't actually a valid marriage in the first place.

According to the *Marriage Act*, a marriage is void where:

- Either of the parties were lawfully married to some other person;
- The parties are within a prohibited relationship (e.g. where the parties are related);
- By reason of section 48 (i.e. that certain marriages not solemnized in accordance with the Marriages by authorised celebrants division of the act are invalid);
- The consent of either parties is not a real consent;
- Either party is not of marriageable age;

INCORRECT WEDDING CEREMONIES – IS THIS ENOUGH TO VOID A MARRIAGE?

The *Marriage Act* specifically states that if marriages are not solemnized in accordance with that particular division, it is an invalid marriage. However, the act then goes on to provide a list of reasons where a marriage wouldn't be invalid, even if the ceremony did not comply with the requirements. There are exceptions, though. For example, a marriage is not invalid if the following occurs:

- The forms and requirements of notice to the celebrant of the intended marriage is not complied with.
- There are not 2 persons over 18 present as witnesses.
- The celebrant does not explain the nature of the marriage relationship.
- The celebrant solemnizing the marriage is not an authorized celebrant, yet either party at the time of the marriage believes that the person was lawfully authorised.

However, it is indicated that in the ceremony each party in the presence of a celebrant must say words to the effect of "I call upon the persons here present to witness that I . . . take thee . . . to be my lawful wedded wife (or husband)." It is the exchanging of vows where celebrants have run into problems, the question being – how far can these words be stretched but still be within the ambit of "words to the effect of"? A narrow interpretation of these words have led to celebrants being allowed to leave out the words "lawful" or "wedded", but not both. However, spouses have more commonly sought to void a marriage after finding out their 'spouse' is married to someone else.

A CASE FOR A VOID MARRIAGE

If a party wishes to end a marriage on the basis that it is an invalid marriage, the party can make an application to the Court for a decree of nullity of the marriage. Whether this succeeds will depend on the basis claimed for the marriage to be void. The Court has noted that a decree of nullity will not be granted lightly.

A few months ago the Court considered a Husband's application for a decree of nullity.

THE FACTS:

- The Husband and Wife were married in Australia.
- The Wife was from the Philippines and after not being permitted to stay any longer on her visa after the ceremony, she returned.
- In the following year, the Husband travelled to the Philippines on a surprise visit to the Wife.
- During the Husband's visit he discovered the Wife was in a relationship with another man, to whom she had 2 children.
- The Husband requested that the Department of Immigration investigate. The Department's investigation revealed that at the time of the marriage, the Wife was still married to the other man.
- **COURT ORDER:**
- The subsequent marriage was void.

IS IT REAL CONSENT?

A marriage can also be void if the consent of the parties is not real consent. This would be the case if the consent was obtained by duress or fraud. What is considered as duress is a matter of degree and it must be sufficient to vitiate the reality of the consent and overbear the will of the party. It may involve violence or threatened violence, however this is not a prescribed requirement for duress to be established, but oppression must be made out. A marriage is also void if the party is mentally incapable of understanding the nature and effect of the marriage ceremony, or in the unusual situation where a party is mistaken as to the identity of the other party or as to the nature of the ceremony performed.

What does it mean to be mistaken about your Husband or Wife's identity? The Court will not recognise that a marriage is void on the basis of a partner misrepresenting their rank, family, fortune, age or habits of life.

However, in a recent case the Court did find a marriage to be void on the basis that the Wife believed she was marrying a man and not a person that was a hermaphrodite.

VOIDING A MARRIAGE

It should also be noted that a party cannot establish a case for a void marriage merely because the marriage occurred to enable one of the parties to obtain a visa to stay in the country. Immigration requirements differ to the requirements under the Marriage Act. If there is any doubt as to whether a marriage is void, legal advice should be sought as it is important to acquire advice specific to a person's situation.