



# Nullity OF Marriage notes

Family Law (Universiti Malaya)

## NULLITY OF MARRIAGE

In the annulment of marriages, there are two concepts that are relevant; void marriages and voidable marriages. In the case of *De Reneville v De Reneville*, Lord Greene stated that

*A void marriage is one that will be regarded in every court... in which the existence of the marriage is in issue as never have been taken place; a voidable marriage is one that will be regarded as every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.*

Distinction between void and voidable marriage

Void marriages	Aspects	Voidable marriages
Marriage is void ab initio (never existed since the beginning)	Existence of marriage	Marriage subsists until it is nullified
Whether marriage is valid depends at time of marriage	Validity	Validity of marriage depends on something that happened after the solemnization of the marriage
Validity can be challenged at any time while both are alive or either one of them passed away	Challenging the validity of the marriage	Validity can only be challenged when both of them are alive.
Third parties can challenge the validity	Who can challenge?	Only parties to the marriage can challenge it

## COURT JURISDICTION

S 67 of the LRA highlights the extent of power for a Malaysian court to grant relief. It reads as follows;

### *Extent of power to grant relief*

*67. Nothing in this Act shall authorize the court to make any decree of nullity of marriage except—*

*(a) where the marriage has been registered or deemed to be registered under this Act; or*

*(b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and (foreigners)*

*(c) where both the parties to the marriage reside in Malaysia at the time of the commencement of the proceedings*

There is no need to fulfil (a), (b) and (c) at the same time. There is a formula that can be use namely (a) + (c) OR (b) + (c).

*Cheng Sun Chuen*

The court decided that since both parties to the petition of annulment were not resident in Malaysia when during the commencement of the proceeding, the Malaysian court has no jurisdiction to grant the decree of annulment.

*Ng Wee Whye v Wong Sook Heng*

Concerning s 80 of the Singapore Women's Charter which is equivalent to s 67 of LRA. This section requires that the court must be satisfied that the residence of both parties in Singapore at the time of commencement of the proceedings. At the date of the petition, the wife was not residing in Singapore. The HC dismissed the husband's petition for want of jurisdiction.

Ultimately, both parties must reside in Malaysia, domicile does not matter.

### VOID MARRIAGES

S 69 of the LRA lays out the grounds that makes a marriage void.

*69. A marriage which takes place after the appointed date shall be void if—*

*(a) at the time of the marriage either party was already lawfully married and the former husband or wife of such party was living at the time of the marriage and such former marriage was then in force;*

*(b) a male person marries under eighteen years of age or a female person who is above sixteen years but under eighteen years marries without a special licence granted by the Chief Minister under section 10;*

*(c) the parties are within the prohibited degrees of relationship unless the Chief Minister grants a special licence under subsection 11(6); or*

*(d) the parties are not respectively male and female.*

Explaining s 69;

- a) There are 3 elements of s 69(a) that MUST be fulfilled. Either party to the marriage is already lawfully married/ former spouse was still living at time of marriage/ former marriage is still in force.
- b) S 69 (b) is in regards to a marriage that does not comply with s 10 of LRA (minimum age requirement)
- c) S 69 © is in regards to prohibited relationships that is highlighted under s 11 of LRA. Must get license from CM for such marriages
- d) Parties to a marriage must be of opposite sex. *Corbett v Corbett*.

*Lim Ying v Hiok Kian Ming Eric*

The petitioner wife discovered after the marriage that the respondent was born a female and undergone a sex-change operation. Repeated attempts to consummate the marriage had failed. She filed for a divorce and asked for a declaration that there was no marriage at the first place. The alternative application was for an annulment of marriage because of non-consummation due to respondent's incapacity. The court had to examine 2 subsidiary issues; (a) whether a person who has undergone sex-change operation could be regarded as

belonging to the sex for which reassignment surgery was undertaken for purposes of marriage under the Charter and (b) whether the fact that sex-change operation are permitted and a change of particulars in the identity card allowed, required the word 'man' and 'woman' to be given a meaning under the Charter to include a person with the reassigned sex. Rajah JC stated;

*It is desirable in the interest of certainty and consistency for the word 'man' under the Charter be given the ordinary meaning that is in contradistinction to woman. A person biologically a female with an artificial penis, after surgery and psychologically a male, must, for purposes of contracting a monogamous marriage of one man and one woman, under the Charter be regarded as a 'woman'.*

In Malaysia, court will look at gender at time of birth. But Singapore and England have expanded their law and look at the gender during time of marriage.

### VOIDABLE MARRIAGES

S 70 of the LRA provides 6 grounds on which a marriage may be voidable.

*70. A marriage which takes place after the appointed date shall be voidable on the following grounds only, that is to say:*

*(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;*

*(b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;*

*(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;*

*(d) that at the time of the marriage either party, though capable of giving a valid consent, was (whether continuously or intermittently) a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 [Ord. 31 of 1952] of such a kind or to such an extent as to be unfit for marriage;*

*(e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;*

*(f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.*

### Explaining s 70

#### Marriage has not been consummated due to INCAPACITY of EITHER party

Either party can bring an action. The petitioner may complain that he/she is incapacitated to consummate the marriage. There are cases where someone is medically potent but legally impotent. In the case of *L v L*, the parties were married and several attempts were made by the respondent to consummate the marriage but in each case, he failed to effect intromission as he could not maintain an erection. The couple lived together nearly for 2 years before the petitioner wife left the respondent. The medical inspectors appointed by the court discovered that the husband was anatomically normal and was apparently capable of performing sexual

intercourse. They also reported that the wife was still a virgin and there was no impediment on her part to consummate the marriage. Tan Ah Tah J agreed with the petitioner's counsel that a person might be generally capable of performing the act of coition and yet incapable of performing it with a particular individual owing to certain causes. A decree of nullity was pronounced.

#### Marriage has not been consummated due to WILFUL REFUSAL by RESPONDENT

The refusal has to relate to the post-marriage stage. If a woman consents to sexual intercourse prior to marriage but refuses to have sexual intercourse upon marrying the man, she has wilfully refused to consummate the marriage. Action cannot be brought by the person refusing to consummate

In *Dredge v Dredge*, the court gave meaning to the term 'consummation' to be 'having sexual intercourse AFTER marriage'. At the time of the marriage ceremony, the wife was already pregnant by the husband. The husband made every effort to consummate the marriage but was refused by the wife. It was held that the wife has wilfully refused to consummate the marriage and that the marriage was null and void. The fact that the 17-year-old child of the marriage would be 'bastardized' by a decree of nullity did not deter the court from making such an order.

In *Jodla v Jodla*, the parties were RC and entered into a ceremony of marriage at a register office. They knew fully well that their faith required a religious ceremony before their marriage could be consummated and the husband had promised to arrange one. As it turned out, he did not arrange such a ceremony although repeatedly requested by the wife. The wife was willing to fulfil her matrimonial obligations, subject to the ceremony taking place. Hewson J stated that by his refusal to proceed with the church ceremony... made it impossible for the wife to live with him as husband and wife, and his refusal, was in this case, a just excuse for her to refuse sexual intercourse, even if it had never been requested. The wife was therefore entitled to a decree of nullity on the ground of wilful refusal on the part of the husband to consummate the marriage.

Other cases include;

*Rathee v Shanmugam. Kaur v Singh. Tan Siew Choon v Tan Kai Ho. Kwong Sin Hwa v Lau Lee Yen.*

#### Either party did not VALIDLY CONSENT, in consq of DURESS, MISTAKE, UNSOUNDNESS OF MIND

##### **I. Duress**

When ground © states 'or otherwise', the words could include fraud or misrep. The lack of a valid consent may be due to duress. Thus, if owing to fear or threats, one of the parties to the marriage is induced to enter the marriage which, in the absence of compulsion, they would not have entered into, the marriage is voidable.

*Scott v Sebright*

The petitioner alleged that she was induced to be a part to the said marriage not of her own free will, but through fear and terror of resp. upon coming of age, the petitioner became entitled to a sum of 26,000 pounds. The resp then took advantage of her wealth to the point of bankruptcy. The petitioner was pressed for payment and

bankruptcy proceedings were threatened, as a result of which she underwent mental suffering. The resp assured her that the only method of avoiding bankruptcy was to marry him, to which she reluctantly agreed. The resp immediately before the ceremony threatened to shoot her if she showed that she was not acting on her free will. the decree of nullity was therefore granted.

Circumstantial duress- *H v H*

The petitioner alleged that being in fear at the time of the ceremony of marriage by reason of the circumstances prevailing in Hungary, she had resolved to escape from Hungary by means of a marriage to the resp, a French citizen. She stated that she would have not consented to the marriage had she not been in fear for her life, liberty and virtue. The petitioner obtained a French passport and left Hungary. Karminski J found that the fear of the petitioner was of such a kind as to negative her consent to the marriage. Therefore, there was no valid marriage. A decree of nullity was granted. This case was followed in *Buckland v Buckland*.

## **II. Mistake**

On lack of valid consent to a marriage due to mistake, two aspects are relevant; mistake as to whom petitioner is to marry and mistake as to the ceremony which forms the marriage.

*Mehta v Mehta*

The petitioner, who was at all material times domiciled in England, went through a marriage ceremony with the resp in Bombay, an Indian. The ceremony was conducted in Hindustani, a language not familiar to the petitioner. The petitioner thought at the time of the ceremony that it was for the purpose of conversion to the Hindu religion, to which she had previously agreed. After the ceremony, she was informed that she was not only converted, but is married to the resp. Barnard J was satisfied that the petitioner never had intention of marrying the resp and that the ceremony she went through was merely a fraud perpetrated on by the resp. a decree of nullity was granted.

## **III. Unsoundness of mind**

*In the Estate of Park, decd.*

The df sought to establish the pf was at the time of the marriage incapable of appreciating the nature of the marriage contract, and the duties and the responsibility which it created, and that accordingly there was no consent to the marriage. He asked the court to declare the marriage null and void and to pronounce in solemn form for a will executed before the marriage. Karminski J held that the marriage was valid and since the will was executed prior to the marriage, it was thereby revoked, and the deceased died intestate. CoA affirmed Karminski J's decision.

Mentally disordered- within meaning of **Mental Health Act 2001**

Resp suffer from venereal disease in a communicable form (**contagious**)

Resp is pregnant by some person other than resp.

## **BARS TO RELIEF**

The bars to relief are provided in section 71 of LRA.

*71. (1) The court shall not grant a decree of nullity on any of the grounds mentioned in section 70 if the respondent satisfied the court—*

*(a) that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and*

*(b) that it would be unjust to the respondent to grant the decree.*

*(2) Without prejudice to subsection (1), the court shall not grant a decree of nullity on the grounds mentioned in paragraph 70(e) or (f) unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged.*

### Explaining s 71

Because of the conjunction 'and' in between paragraphs (a) and (b), both paragraphs must be satisfied. The bars to relief under this section is only applicable to voidable marriages and not void marriages. S 71(1) is general bars whereas s 71(2) is specific bars.

### **General bars**

#### *W v W*

Attempts to consummate the marriage by the husband were unsuccessful. On the suggestion of the husband, the parties adopted a child. Subsequently, the husband left the wife, and later presented a petition for nullity of marriage on the ground that the wife was unable to consummate the marriage or alternatively, that she wilfully refused to do so. His Lordship stated that the adoption of the child had not only affected the parties to the marriage, but strangers too. There were circumstances proved which plainly implied on the husband's part a recognition of the marriage as to render it inequitable. The husband could only rebut this if he could prove he did not know his legal rights. In this case, he had not only failed to prove the above, but there was evidence that he initiated the adoption in the hope that the wife would overcome her repugnance to intercourse. His petition was dismissed.

#### *Slater v Slater*

Parties were married but never consummated due to husband's incapacity. Wife underwent artificial insemination from a donor other than her husband and the couple had also lived with a 2 yo boy and had a view of adopting him. adoption was granted. Some time later, she discovered that if she could prove her husband's impotence, there was available to her a remedy for nullity of marriage. She petitioned for the decree. The CoA held that when she underwent artificial insemination and adopted the child, she had no knowledge that the law provided remedy in her case. She was not barred and was granted the decree.

#### *Clifford v Clifford*

A husband had petitioned for decree of nullity 27 years after his marriage on the ground that his wife's incapacity to consummate the marriage. The incapacity was due to fear of childbirth so great as to cause contraction of muscles and render intercourse impossible. He tried for 17 years but failed, the ten-year delay in filing the petition was due to his poor

financial situation as a post office employee. The CoA held that the husband's 17 years of cohabitation did not constitute approbation of marriage having regard to his repeated complaints. The delay was excusable by the necessity of the husband to save money for the proceeding. The husband's collateral motive to be rid of financial liability to his wife is not improper and shows no indication of insincerity in presenting this petition.

### **Special bars**

Court cannot grant a decree of nullity for s 70 (e) and (f) unless it is satisfied that at the time of the marriage the petitioner was ignorant of the facts. Nevertheless, in a problem question, we must still discuss general bars as it applies to all the provisions under s 70. After this, we can move on to specific bars if the question is one that revolves around voidable marriages under (e) and (f).

#### *Smith v Smith*

The appellant husband and the resp wife were married and the marriage was consummated. The husband had been serving in the army for 10 months before the marriage. After the consummation, the husband returned to Germany. In February of the following year, the wife delivered a baby who was of full-term. He had consulted his parents who said that if the child is full term, it must have been conceived before the marriage. After he confronted her, the wife admitted that she was seduced by a man. He brought proceedings to annul the marriage but trial court dismissed it. The CoA agreed with the trial commissioner.

*'The facts laid before the husband were such that any reasonable man would have drawn the conclusion that the wife was pregnant during the time of marriage by some other person than himself. Having this information in mind, he chose to have intercourse with his wife instead of inquiring into the matter. By doing that, he has put himself outside the relief given by s 7.'*

### EFFECTS OF AN ANNULLED MARRIAGE

**S 73(1)** provides that if a court finds that the petitioner's case has been proved, it shall pronounce a decree of nullity. The section is not clear whether the decree to be pronounced should be a decree nisi. However, from rule 53(1) and Form 10 of the Divorce and Matrimonial Proceedings Rules 1980, it is clear that the court will first grant a decree nisi.

**S 73(2)** states that the effect of a decree of nullity would mean that the marriage only seems to exist on the date it comes to fore. In other words, the marriage would still exist from the date of marriage to the date the decree comes to force (similar to divorce). The position in Malaysia differs from the common law. In the case of *Dredge v Dredge*, the marriage is annulled from its inception (same as void marriages). Because of the effect of the decree, the child born during the annulled marriage in that case becomes illegitimate.

### LEGITIMACY OF CHILD

**S 75** provides for effect of decree of nullity on the status of children. Subsection (1) states that any child of an annulled marriage shall be deemed to be their legitimate child.

**Subsection (2)** states that the child of a void marriage shall be treated as the legitimate child IF both or either parties believed that the marriage was valid.



**Subsection 3(a)** provides that subsection (2) applies only where the father of the child was domiciled in Malaysia at the time of the marriage.