

TRICKED INTO MARRIAGE

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Many people, in recent years, have sought a decree of nullity on the basis that they have been tricked into marriage by fraudulent misrepresentations. These applications have routinely failed because the Family Court, applying ancient principles of canon law, has held that fraud is only relevant if it goes to the nature of the ceremony or the identity of the person, and not the motivation for entering the marriage. This article argues that many of these cases are wrongly decided. They have been treated as if they are all governed by the same principles, when important distinctions need to be made between different categories of case. The courts have failed to apply standard principles of statutory interpretation to the Marriage Act 1961 (Cth). Furthermore, the view that fraudulent misrepresentations can never provide the basis for a decree of nullity needs to be reconsidered as a consequence of the enactment of the Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013 (Cth). Parliament has now made it a criminal offence to force someone into marriage, and the definition of forced marriage includes deception. If such deception is treated as negating consent, it would be anomalous to hold that the marriage remains valid.

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I INTRODUCTION

The law of nullity is a remote and little visited part of the landscape of Australian family law. The subject is rarely considered in articles,¹ and gets a fairly brief treatment in most textbooks.² Nullity is different from divorce, because when there is a decree of nullity, the effect is to declare that there was never a valid marriage.³

Section 23B(1)(d) of the *Marriage Act 1961* (Cth) (*Marriage Act*) is the relevant provision. A marriage may be void because:

- (d) the consent of either of the parties is not a real consent because:
 - (i) it was obtained by duress or fraud;
 - (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
 - (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony.

Section 23B is exhaustive as to the grounds for a decree of nullity. However, there are complex issues to consider when it comes to the question of what is a ‘real consent’ to marriage.

Perhaps the main reason for the lack of focus on nullity is that the law of divorce provides such an easy exit from marriage. This would seem to obviate the need to persuade a judge that the marriage was null and void. Dismissing an application from a woman for a decree of nullity in *In Marriage of Osman and Mourrali* (*Osman*), Nygh J commented:

Annulment had some attractions in the past when divorce was difficult and seen as socially shameful. The ground for divorce of one year separation

¹ To illustrate this, the last articles on nullity published in the *Australian Journal of Family Law* were: Brian Davis, ‘Fraud and Annulment of Marriage’ (1988) 2(2) *Australian Journal of Family Law* 138 (‘Fraud and Annulment of Marriage’); a subsequent comment by Owen Jessep, ‘Fraud and Nullity of Marriage in Australia’ (1989) 3(1) *Australian Journal of Family Law* 93; and a reply by Brian Davis, ‘Logic, Fraud and Sham Marriages’ (1989) 3(2) *Australian Journal of Family Law* 191. The law of nullity arises incidentally in relation to such issues as transgender status, and this has also been a subject of some discussion in the literature: see, eg, Rebecca J Bailey, ‘Family Law: Decree of Nullity of Marriage of True Hermaphrodite Who Has Undergone Sex-Change Surgery’ (1979) 53(9) *Australian Law Journal* 659; HA Finley, ‘Sexual Identity and the Law of Nullity’ (1980) 54(3) *Australian Law Journal* 115.

² See, eg, Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 106–10. The exception is Dickey’s book, in which nullity is given a substantial treatment: Anthony Dickey, *Family Law* (Thomson Reuters, 6th ed, 2014) chs 9–11.

³ *Sarvari v Atapati* [2017] FamCA 928, [3] (Cronin J).

requires no investigation of guilt and cannot produce any stigma. It is easily established and indeed the wife in this case, as I can now call her, would have been relieved far more expeditiously and cheaply from her bonds some time ago, if she had proceeded for dissolution.⁴

A divorce may, of course, be granted on the basis of irretrievable breakdown, proof of which is that the parties have lived separately and apart for 12 months before the application is filed.⁵ Divorce in Australia may be unilateral — that is, it does not require the consent of the other party. The only basis for opposing the divorce is that the parties have not in fact been living apart for the requisite period.⁶ The court is also required to consider the welfare of any child under 18,⁷ but it is the most exceptional case where this has provided a ground for delaying or refusing the divorce.⁸

Yet notwithstanding the ease of divorce, and, conversely, the cost of persuading a judge to grant a decree of nullity, there has been a steady stream of cases over the years in which an applicant has sought a decree of nullity on the basis that he or she has been tricked into marriage.⁹ There has even been

⁴ (1989) 96 FLR 362, 367 (*Osman*).

⁵ *Family Law Act 1975* (Cth) s 48 (*Family Law Act*).

⁶ Occasionally, divorce decrees have been defended on this basis in recent years: see, eg, *Price v Underwood* (2008) 39 Fam LR 614; *Wilson v Wilson* [2010] FMCAfam 435.

⁷ *Family Law Act* (n 5) s 55A.

⁸ See, eg, *In the Marriage of Evans* (1990) 14 Fam LR 136; *In Marriage of Maunder* (1999) 153 FLR 272. The reason why it is only in the rarest of cases that concern about the welfare of a child would justify holding up a divorce decree is because the court may grant the divorce even if it is not satisfied that proper arrangements have been made for the children, if the circumstances justify this. Parenting disputes are dealt with separately under pt VII of the *Family Law Act* (n 5), so the assumption is that when that dispute is resolved, whether by agreement or judicial decision, proper arrangements for the children will then be in place. Withholding a divorce decree, which simply prevents remarriage, could rarely be said to be efficacious in ensuring that proper arrangements have been made for the children.

⁹ See, eg, *In the Marriage of Deniz* (1977) 31 FLR 114 (*Deniz*); *In the Marriage of Otway* (1986) 11 Fam LR 99 (*Otway*); *Osman* (n 4); *Najjarin v Houlayce* (1991) 104 FLR 403; *In Marriage of Hosking* (1994) 121 FLR 196 (*Hosking*); *Aird v Hamilton-Reid* (2007) 208 FLR 46 (*Aird*); *Zacharia v Paradisio* [2008] FamCA 688 (*Zacharia*); *Lee v Duan* (2009) 230 FLR 258 (*Lee*); *Sullivan v Gin* [2010] FamCA 800 (*Gin*); *Khawaja v Sinha* (2011) 46 Fam LR 309; *Carroll v Sinclair* [2011] FamCA 651; *Marquis v Marquis* [2012] FamCA 137; *Valen v Chirere* [2013] FamCA 595; *Walton v Esposito* [2016] FamCA 336 (*Walton*); *Gani v Drasha* [2017] FamCA 475 (*Gani*); *Iqbal v Kadir* [2017] FamCA 315 (*Iqbal*).

one case where the applicant sought to rely on her own fraudulent misrepresentations to found a decree of nullity.¹⁰

Routinely, in recent years these applications have failed, and generally for the same reasons. The applications have been based upon the ground of fraud; but the Family Court has held that fraud, in the relevant section of the *Marriage Act*, is only relevant if it goes to the nature of the ceremony or the identity of the person, and not the motivation for entering the marriage. Yet litigants have kept coming, kept insisting that their marriage should be declared invalid when their consent has been induced by dishonest misrepresentations.

The very strict approach to the law of nullity taken historically has continued despite the easing of the restrictions on divorce over the years. It has not been reconsidered even in an age of no-fault divorce. The policy question, to which the ‘tricked into marriage’ cases give rise, is why the courts should insist upon the validity of marriages to which an informed consent has not been given at a time when marriage itself has become an optional means of family formation, when de facto relationships are given essentially the same status as marriages, sometimes immediately,¹¹ and otherwise after living together for two years or having a child,¹² and when the status of illegitimacy has been abolished.¹³ It may be that one reason for this is that the policy arguments for revisiting the strict view, given the modern treatment of de facto relationships as equivalent to marriages, have not been run.

This issue is of particular importance in a multicultural society in which there may be quite different cultural understandings of the significance of marriage and in which for some, divorce is quite shameful, particularly for women.¹⁴ To the secular mind, it may hardly seem worth the effort and expense of seeking a decree of nullity, when divorce is so easily obtained. Yet for those with strong cultural and religious values about the permanence of marriage, divorce may be seen quite differently.

¹⁰ *Moseley v Amidon* [2014] FamCA 403. She claimed to have told the husband that she was a single woman who had been ‘faithful to him for three years’ and planned to spend her life with him. However, she was, at the time, in a relationship with another person: at [8] (Hannam J).

¹¹ In the context of federal law, see *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth).

¹² *Family Law Act* (n 5) s 90SB.

¹³ See, eg, *Status of Children Act 1974* (Vic) s 3.

¹⁴ Patrick Parkinson, ‘Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities’ (1994) 16(4) *Sydney Law Review* 473, 489.

The purpose of this article is to review the line of cases on being tricked into marriage. It is argued that some at least are wrongly decided as a matter of statutory interpretation. A further reason for reconsidering the correctness of this line of cases is that as a consequence of the enactment of the *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) (*Crimes Amendment (Slavery) Act*), Parliament has now made it a criminal offence to trick someone into marriage. If it is now an offence to induce a person to enter into a marriage by deception, and such deception is treated as negating consent, it would be anomalous to hold that the marriage remains valid, notwithstanding that fraudulently-induced consent. Given that the law of nullity is enshrined in a statute, it ought as far as possible to be interpreted consistently with the rest of statutory law. That does not require amendments to the *Marriage Act* itself. All that is needed is to revisit the courts' interpretation of the word 'fraud'. The statute itself does not require the very strict view that the courts have adopted.

II NULLITY, CANON LAW AND THE INDISSOLUBILITY OF MARRIAGE

One of the problems with this area of law is that diverse kinds of cases are treated as if they are all governed by the same principles — that is, that neither fraud inducing consent nor shared mental reservations about marriage are sufficient to ground a decree of nullity. Yet the distinctions between cases are very important. There is a fundamental difference between a situation where one party tricks the other into believing that he or she intends to live with that person on a continuing basis, and a sham marriage case where neither intends to form a continuing relationship. There are also differences between cases involving fraudulent misrepresentation and improper concealment of material facts. Furthermore, there may be a material difference between fraud as to attributes and fraud as to the intention to form a *consortium vitae*.¹⁵ Yet all these, and other cases, are treated as if they give rise to the same issues.

¹⁵ This may be translated as 'partnership for life'.

The leading cases on fraud in procuring a marriage were determined at a time when a divorce could only be obtained by an Act of Parliament.¹⁶ A classic statement of the law in the first half of the 19th century is by the Privy Council in *Swift v Kelly* ('*Swift*').¹⁷ The Court said:

It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made.¹⁸

It remains an oft-quoted authority on the law of nullity. This was not, however, a case where either party was tricked into marriage. Rather, the two young lovers entered into a marriage in Rome in circumstances where the young woman, a minor, had been refused parental consent for her marriage. The alleged fraud involved a convenient conversion to Catholicism for the sole purpose of being eligible to be married by a Catholic priest. As the parties were Anglicans, the lack of parental consent for the marriage of a minor would have been an insuperable obstacle. After her mother was told of the clandestine marriage, the young woman repudiated it. The alleged fraud was

¹⁶ OR McGregor, *Divorce in England: A Centenary Study* (Heinemann, 1957) 15–17, quoting MI Cole, *Marriage Past and Present* (JM Dent & Sons, 1938) 55 n 1, who quotes the famous judgment of Maule J in the 1845 case of *R v Hall*, involving a charge of bigamy:

The law in its wisdom points out a means by which you might rid yourself from further association with a woman who had dishonoured you; but you did not think proper to adopt it. I will tell you what that process is. You ought first to have brought an action against your wife's seducer if you could have discovered him; that might have cost you money, and you say you are a poor working man, but that is not the fault of the law. You would then be obliged to prove by evidence your wife's criminality in a court of justice, and thus obtain a verdict with damages against the defendant, who was not unlikely to turn out a pauper. But so jealous is the law (which you ought to be aware is the perfection of reason) of the sanctity of the marriage tie, that in accomplishing all this you would only have fulfilled the lighter portion of your duty. You must then have gone, with your verdict in your hand, and petitioned the House of Lords for a divorce. It would cost you perhaps five or six hundred pounds, and you do not seem to be worth as many pence. But it is the boast of the law that it is impartial, and makes no difference between the rich and the poor.

¹⁷ (1835) 3 Knapp 257; 12 ER 648 ('*Swift*').

¹⁸ *Ibid* 661 (Lord Brougham).

in the false rejection of her Protestant beliefs, and thus a fraud on the Catholic Church, not on the husband.¹⁹

The strict approach to the law of nullity was understandable when the public policy of the day precluded divorce. Yet even after a law of divorce was introduced in England by the *Matrimonial Causes Act 1857*,²⁰ the bonds of matrimony continued to be very hard to escape. The right to divorce was limited, and the law of nullity continued to be strictly policed to avoid it becoming a basis for de facto divorce. The strict approach to nullity may also have been influenced by concerns about causing a child to be illegitimate if the marriage was void (which carried significant legal consequences for the child) or unsettling property rights flowing from marriage. None of these concerns exist in the state of the current law.

The leading authority in England is *Moss v Moss* ('Moss') decided in 1897.²¹ It has been cited regularly in Australia.²² In this case, Sir Francis Jeune refused to accept the notion that fraudulent misrepresentations that induce consent could ever be sufficient to be a ground for nullity. His Honour held that where there is consent, no fraud inducing that consent is material. Fraud is only relevant where it procures the appearance without the reality of consent.²³

Sir Francis Jeune relied upon principles of canon law.²⁴ His Honour also cited, in support, the decision of *Sullivan v Sullivan* ('Sullivan'), in which Sir William Scott wrote:

I say the strongest case you could establish of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this court to release him from chains which, though forged by others, he had rivetted on himself. If he is

¹⁹ I am indebted for this observation to Davis, 'Fraud and Annulment of Marriage' (n 1) 142.

²⁰ *Matrimonial Causes Act 1857* (UK) 20 & 21 Vict, c 85.

²¹ [1897] P 263 ('Moss').

²² See, eg, *Zacharia* (n 9) [35] (Burr J); *Gin* (n 9) [5] (Barry J).

²³ *Moss* (n 21) 269.

²⁴ *Ibid* 271–3, quoting John Ayliffe, *Parergon Juris Canonici Anglicani: Or, a Commentary, by Way of Supplement to the Canons and Constitutions of the Church of England* (Thomas Osborne, 2nd ed, 1734) 361–3. For a more recent explanation of canonical principles in Catholic doctrine, see, eg, William F Cahill, 'Fraud and Error in the Canon Law of Marriage' (1955) 1(2) *Catholic Lawyer* 83.

capable of consent and has consented, the law does not ask how the consent has been induced.²⁵

In fact, like the young couple in *Swift*, the parties to this marriage in *Sullivan* did not feel chained at all. They were connected only by bonds of affection. They had managed to get married without the young man's father's knowledge; and it was he who sought to set the marriage aside. His allegation was that:

[T]he marriage was effected by artifices and misrepresentations, and in a clandestine manner, and in a parish to which neither of the parties belonged, and entirely unknown to the father of the minor; and that it was celebrated by banns under a false designation of the woman.²⁶

Sir William Scott, understandably, saw no grounds to invalidate the marriage.²⁷

This illustrates how dicta from early 19th century cases, reflecting canon law principles, were held to establish general propositions about consent when there was, in those cases, absolutely no question about the enthusiastic consent that the couple gave to one another. These were cases where the young couple had managed to circumvent the need for parental consent under English law.

Moss was different. It was a case involving fraud as to attributes. The respondent, at the time of her marriage with the applicant, was pregnant by another man. She concealed this from the applicant, who, on discovering her condition, ceased the relationship with her. The Court refused a decree of nullity.²⁸ By way of contrast, American courts in the 19th century did consider pregnancy by another man to be sufficient as a ground for nullity,²⁹ and England amended its law to make the marriage voidable in such circumstances.³⁰

²⁵ (1818) 2 Hag Con 238; 161 ER 728, 731–2.

²⁶ *Ibid* 728 (headnote).

²⁷ *Ibid* 736–7.

²⁸ *Moss* (n 21) 278–9 (Jeune P).

²⁹ See, eg, *Reynolds v Reynolds*, 85 Mass 605 (1862); *Carris v Carris*, 24 NJ Eq 516 (1873).

³⁰ *Matrimonial Causes Act 1973* (UK) s 12(f) ('*Matrimonial Causes Act*').

Although in parts of the United States and Europe a more liberal approach to the law of nullity was taken,³¹ Sir Francis Jeune's view that fraud inducing consent was completely immaterial prevailed in England and has continued to apply in Australia. The law became established — as explained below — that fraud was relevant in only two situations: deception as to the identity of the person³² and fraud as to the nature of the ceremony.³³

III FRAUD AS TO A PERSON'S IDENTITY

Fraud as to the identity of the person is rarely accepted as a ground for nullity. One of the difficulties is that what to one judge may be a fraud as to identity, is to another judge merely a question of deception as to attributes. In *Allardyce v Mitchell*,³⁴ the Chief Justice of the Supreme Court of Victoria was prepared to grant a decree of nullity in a case where a criminal called James Mitchell claimed to be James Gordon. A woman married him believing this to be his identity. She knew of James Gordon and understood him to be from a respectable Scottish family. By way of contrast, in *C v C*,³⁵ a New Zealand Court refused a decree of nullity in a case where a woman was deceived into marrying a man who claimed to be Michael Miller, a well-known Australian boxer. Notwithstanding that the man had claimed a false identity, the judge concluded that the woman had agreed to marry that particular man. The mistake was as to his attributes.³⁶

A recent example where a decree of nullity was granted is *Campani v Suyapto*.³⁷ The female respondent in this case adopted a false identity. She was from Thailand but showed the male applicant a birth certificate setting out the particulars of a person whose mother was born in Italy and whose father was born in Germany. She also showed him a health care card and Medicare card in that person's name. That was the identity that she presented for the purposes of getting married. Understandably, the man believed that was the

³¹ See Robert C Brown, 'Duress and Fraud as Grounds for the Annulment of Marriage' (1935) 10(9) *Indiana Law Journal* 473, 473; *Vervaeke v Smith* [1983] 1 AC 145 ('*Vervaeke*'). See generally Joseph Jackson, 'Consent of the Parties to Their Marriage' (1951) 14(1) *Modern Law Review* 1.

³² *Swift* (n 17) 661 (Lord Brougham).

³³ *Ford v Stier* [1896] P 1; *Hall v Hall* (1908) 24 TLR 756.

³⁴ (1869) 6 W W & A'B (IE & M) 45.

³⁵ [1942] NZLR 356 (Supreme Court Auckland).

³⁶ *Ibid* 359 (Callan J).

³⁷ [2008] FamCA 1121.

identity of the person whom he married, until he found out otherwise.³⁸ Dawe J held:

On the basis of the information provided in the affidavit and the annexures to that affidavit, I am satisfied that the applicant has established that, at the time of the marriage, his consent to that marriage was not a real consent because he was mistaken as to the identity of the respondent at that time. That mistake was brought about by what can only be described as the fraudulent actions of the respondent.³⁹

IV FRAUD AS TO THE NATURE OF THE CEREMONY

Nullity applications have also succeeded in recent years where it could be shown that the applicant was deceived as to the nature of the ceremony. In *Garner v Lee*,⁴⁰ the applicant was induced to go through a ceremony of marriage with an authorised celebrant when he had been led to believe he was going to the relevant address in order to assist a young female student with an immigration issue. He had allowed her to stay in his house. From his account, there were some irregularities with the wedding; but in any event the proceedings were conducted in an Asian language that he did not speak, and he was not consenting to marry the student.⁴¹

The facts of *Ngo v Ngo*⁴² were quite similar. The applicant, a 23-year-old woman of Vietnamese ethnicity, was persuaded by the mother of a friend to assist a 19-year-old Vietnamese man whose student visa was about to expire. While Ms Ngo understood some Vietnamese, she was far from fluent in it. At the meeting she was asked to attend, conversations occurred in that language that she was unable to follow.⁴³ The trial judge concluded:

Insofar as it might be said that the circumstances gave rise to a fraud, it is quite clear that a number of people had discussions in the Vietnamese language which were exclusive of any involvement by the applicant. I am satisfied, on the evidence, that she did not understand that what everyone was doing was

³⁸ Ibid [8]–[11] (Dawe J).

³⁹ Ibid [12]. Another ground for nullity was that the woman was still married to another man at the time: at [13] (Dawe J).

⁴⁰ [2011] FamCA 1000.

⁴¹ Ibid [7]–[8] (Cronin J).

⁴² [2010] FamCA 1053.

⁴³ Ibid [9]–[18] (Cronin J).

arranging for documents to be signed purporting to be a marriage for the purposes of enabling a necessary foundation to be created for a migration application.⁴⁴

Other recent cases in Australia have succeeded on the ground of mistake as to the nature of the ceremony,⁴⁵ or otherwise being mistaken as to the nature of documents that a person was signing in a foreign language, which turned out to be documents consenting to a registration of marriage.⁴⁶

V FRAUDULENT MISREPRESENTATION ABOUT THE INTENTION TO COHABIT

What about fraud as to the intention to live together in a marital relationship? Here, a fundamental distinction needs to be drawn between cases where the parties agree to a sham marriage to deceive a third party (usually an immigration department) and situations where the deception is by one party to the marriage of the other.

The issue can be illustrated by the one case that succeeded on the basis of fraudulent motivation for entering into the marriage. In *In the Marriage of Deniz* ('*Deniz*'), Frederico J held that a marriage was void where the man involved had no intention of remaining in a marital relationship with a young woman and was motivated only by immigration concerns.⁴⁷ The female applicant was an Australian citizen in her fourth year of high school. Her family was Lebanese. The male respondent was a Turkish national who, at the time of his purported marriage to the respondent, was seeking permanent residence in Australia. The respondent sought, and was given, the permission of the applicant's parents to marry the applicant. He convinced the applicant that he loved her. She agreed to leave school and marry him. The parties went through a ceremony of marriage. Very soon after the wedding, he told her that the only reason he was marrying her was to obtain permanent residence in Australia. On learning this, she suffered a nervous breakdown and attempted to commit suicide. She told the Court, on her application for a decree of nullity, that she would rather die than be divorced.⁴⁸

⁴⁴ Ibid [23] (Cronin J).

⁴⁵ See, eg, *Rabab v Rashad* [2009] FamCA 69; *Breust v Devine* [2016] FamCA 892.

⁴⁶ See, eg, *Kemal v Kemal* [2017] FamCA 915.

⁴⁷ *Deniz* (n 9) 117.

⁴⁸ Ibid 115 (Frederico J).

Frederico J noted that given the shame associated with divorce in her culture, she would have extreme difficulty in being able to contract any future marriage should the existing marriage be dissolved, as distinct from being annulled.⁴⁹ His Honour granted a decree of nullity since the respondent did not have the slightest intention of fulfilling in any respect the obligations of marriage.⁵⁰ The parties never lived together and the marriage was never consummated.⁵¹ The marriage was therefore annulled.⁵² His Honour observed:

This is a case of consent being induced by trick, not as to identity or as to the nature of ceremony, but as to the very concept of the marriage itself. Despite the warnings in cases such as *Moss v Moss* of the dangers of too closely equating a marriage contract with a commercial contract, this is a case in which there has been a total failure of consideration.

The respondent has not had the slightest intention of fulfilling in any respect the obligations of marriage. He has used the unfortunate applicant as a tool of his own convenience. His conduct amounts to a total rejection of the institution of marriage and what it stands for. He clearly deceived the applicant into marriage for his own personal motives and with the intention of summarily rejecting her immediately after the ceremony.⁵³

The decision in *Deniz* was followed in various unreported judgments subsequently,⁵⁴ but the correctness of the decision was doubted in *In the Marriage*

⁴⁹ Ibid.

⁵⁰ Ibid 117.

⁵¹ Ibid 115 (Frederico J). In England and Wales, the lack of consummation would make the marriage voidable: *Matrimonial Causes Act* (n 30) ss 12(a)–(b).

⁵² *Deniz* (n 9) 117 (Frederico J). In very similar circumstances, a Canadian judge reached the same conclusion. In *Johnson v Smith* (1968) 70 DLR (2d) 374 (Ontario High Court), the man induced the woman to marry him in order to obtain permanent residence in Canada. Immediately after the wedding, he told her that he no longer loved her. Although they spent the wedding night in the same house, the marriage was never consummated. They separated on the following day: at 374 (Stewart J). The marriage was declared a nullity: at 376 (Stewart J). The decision has since been overruled, based upon the old English case law: *Iantsis v Papatheodorou* (1971) 15 DLR (3d) 53 (Ontario Court of Appeal) 59 (Schroeder, Kelly and Evans JJA).

⁵³ *Deniz* (n 9) 117. Anthony Dickey has argued that the reasoning of Frederico J is difficult to appreciate and suggests that perhaps considerations of sympathy and humanity might explain the decision, given the applicant's cultural opposition to being divorced: Dickey (n 2) 160.

⁵⁴ See, eg, *Osman* (n 4) 365, where Nygh J commented that *Deniz* (n 9) had been followed in previous unreported decisions, but did not himself follow *Deniz* in that case.

of *Otway* ('*Otway*') a few years later,⁵⁵ and it no longer represents the law in Australia. *Otway* was another immigration fraud case. The husband was an Australian citizen. The wife came from the Philippines. They married on 20 September 1985 and lived together until January 1986. At that time, the wife left and went to live in a de facto relationship with another man with whom she had long been in a relationship, but who did not want to marry her. She had informed Mr *Otway* about her desire to live with this other man only four days after the wedding. Mr *Otway* was aware that her desire to marry him was to have a right to live in Australia, but he was not aware of the existence of the other man or her desire to live with him instead.⁵⁶

McCall J felt able to distinguish *Deniz* on the basis that in *Otway*, at least, the parties had lived together for a short period, but his Honour affirmed the principle that fraudulent misrepresentations inducing consent do not constitute fraud within the meaning of the *Marriage Act*.⁵⁷

No applicant has succeeded in such a claim since. *Deniz* was also rejected by Kay J in *In Marriage of Soukmani*.⁵⁸ This was another alleged immigration fraud case. The evidence of a witness was that the husband had boasted on several occasions that he only entered the marriage in order to be allowed to stay in Australia. The wife, who sought the decree of nullity, had continued to live with her family since the wedding and had only met her husband a few times. The marriage had never been consummated. The husband denied the alleged motivation for entering the marriage.⁵⁹ Kay J held:

The long line of authority which indicates that the subjective intent of the parties at the date of the marriage is irrelevant is a preferable line and in the circumstances, even if the wife was able to demonstrate on the evidence the case as high as her counsel puts it, in my view there would not be the ground made out for the application.⁶⁰

For that reason, his Honour summarily dismissed the application.⁶¹

⁵⁵ *Otway* (n 9) 101 (McCall J).

⁵⁶ *Ibid* 99–100 (McCall J).

⁵⁷ *Ibid* 102.

⁵⁸ (1989) 96 FLR 388.

⁵⁹ *Ibid* 388–9 (Kay J).

⁶⁰ *Ibid* 390–1.

⁶¹ *Ibid* 391.

In *Osman*, Nygh J did proceed to hear the evidence and reached the following findings of fact:

[O]n the balance of probabilities I find that it was more likely than not that the respondent induced the applicant to marry him predominantly with the motive of securing permanent residence in this country and that he did not intend to live with her as man and wife once he had obtained the status of a permanent resident. It may be argued on the applicant's evidence that he had made this clear to her at the very first meeting, but he did not deny that prior to the ceremony he ardently wooed her and thus I am satisfied that she was deceived by him into believing that he loved her and intended to live with her as man and wife.⁶²

Notwithstanding this, his Honour refused to annul the marriage.⁶³

In *In Marriage of Hosking* ('*Hosking*'), Lindenmayer J also rejected an application based upon immigration fraud.⁶⁴ In this case, like in *Otway*, the female partner left soon after the marriage to go to live with another man with whom she had long been in a relationship. The husband's case was that she only married him because her residency visa was due to expire in the near future. His evidence was that the marriage was never consummated.⁶⁵ Lindenmayer J reviewed the authorities and said:

The remedy of a decree of nullity is concerned with the marriage itself, that is, the act of becoming married. This occurs when the ceremony of marriage is performed. If there has been fraud as to the other party or as to the nature of that ceremony, or there has been a mistake about it, the consent given by the party so affected is not a real consent and the marriage is void ab initio.

In this way, a distinction must be drawn, in cases where a party alleges a 'marriage of convenience', between how such a marriage is viewed by different areas of the law. This Court, in hearing nullity applications, is not concerned with how that newly acquired status may be used later. There may be, in appropriate circumstances, numerous consequential advantages that a party may obtain by being married. These could be in the arena of taxation, social security, immigration and so on. Likewise, there could be, motivating one or other of the parties, expectations of such consequential advantages, financial or social to be gained by entering into the marriage.

⁶² *Osman* (n 4) 364.

⁶³ *Ibid* 367.

⁶⁴ *Hosking* (n 9).

⁶⁵ *Ibid* 198 (Lindenmayer J).

Should a court ever be entitled to say that a party's reasons for marriage are so improper that it will declare their marriage void? The answer, in my view, must be a resounding 'no'.⁶⁶

This line of authorities has been affirmed by the Full Court of the Family Court.⁶⁷

Yet still, and despite changes to migration law that mean marriage is not such an immediate passport to permanent residence,⁶⁸ the attempted immigration fraud cases continue to come to the courts. In the 2016 case of *Walton v Esposito*, the husband complained (unsuccessfully) of being tricked into marriage by a 'mail-order bride' who had no intention of remaining with him.⁶⁹ His evidence was that she gave reasons for avoiding sexual intercourse after the wedding, and within two weeks after she received a notification of approval of her marriage visa, she left the matrimonial home.⁷⁰ The judge held that this did not satisfy the legal test for a decree of nullity.⁷¹

The 2017 case of *Iqbal v Kadir* ('*Iqbal*') was another such case in which the male applicant's account was that the female respondent did not want to cohabit.⁷² The evidence was that in the week following the marriage, the respondent learned that it was not certain that as a consequence of the wedding, she would obtain a bridging visa. She then told him that she had never wanted a marital or sexual relationship with him, and had married him only because she thought he was eligible for permanent residency in Australia.⁷³ She also told him that she had never loved him, nor would she love him into the future.⁷⁴ It was argued that the male appellant was 'conned' into the marriage.⁷⁵ Hogan J held that this was insufficient to establish fraud for the purposes of nullity. The fact that a party entered into a marriage

⁶⁶ Ibid 207.

⁶⁷ *Kennedy v Smith* [2003] FamCA 136; *Rick v King* [2011] FamCAFC 220 ('*Rick*').

⁶⁸ *Migration Act 1958* (Cth) s 5F. This defines a spouse as someone who is in a married partnership where the couple 'have a mutual commitment to a shared life as husband and wife to the exclusion of all others' and 'the relationship between them is genuine and continuing'. See also *Migration Regulations 1994* (Cth) reg 1.15A.

⁶⁹ *Walton* (n 9) [8] (Benjamin J).

⁷⁰ Ibid [11]–[12] (Benjamin J).

⁷¹ Ibid [24]–[26] (Benjamin J).

⁷² *Iqbal* (n 9).

⁷³ Ibid [36] (Hogan J).

⁷⁴ Ibid [39] (Hogan J).

⁷⁵ Ibid [41] (Hogan J).

because he or she ‘might have a better prospect of obtaining a certain, desired immigration status in a particular country’ was insufficient.⁷⁶

In all these cases, the evidence was that the promise by one spouse to the other to establish a *consortium vitae* — a life together for the long term — was a fraudulent one. In *Otway* and *Hosking*, the parties at least lived together for a short period; but the evidence was still that the purpose of the marriage, from the respondent’s point of view, was to gain a right of residency in Australia in order to live with another man. In the other cases, the parties did not actually set up a family home together. Again and again, the evidence in these cases is that the parties never had a sexual union.

This raises issues about what it is that the applicant and respondent in these cases consented to. The High Court’s constitutional definition of marriage requires first that there be a consensual *union*.⁷⁷ The *Family Law Act 1975* (Cth) (*Family Law Act*) s 43(1)(a), defines marriage as a union ‘to the exclusion of all others voluntarily entered into for life’.⁷⁸ It seems to be clear, if the applicant’s evidence is accepted (as it was, for example, in *Osman*),⁷⁹ that the respondent did not consent to a union of lives or even in many cases, to a sexual union. These were not situations where marriages, entered into in good faith and intended to endure, broke down irretrievably within a short time.

Consent to a marriage is something different from consent to a wedding. The wedding ceremony is not the end product of courtship, but the public articulation of an inward commitment to a presumptively lifelong partnership.⁸⁰ That is, it is the symbol and not the substance of the marital contract. It is the set of witnessed signatures at the bottom of a document; not the document itself.

Consider again *Iqbal*, in which the male applicant gave evidence that he had been tricked into marriage by a woman who told him soon afterwards that she married him only because she thought this would give her a visa, and

⁷⁶ *Ibid* [53].

⁷⁷ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 461 [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (*Commonwealth v ACT*).

⁷⁸ This definition is derived from the English common law: *Hyde v Hyde* (1866) LR 1 P&D 130, 133 (the Judge Ordinary): ‘[M]arriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.’

⁷⁹ *Osman* (n 4) 364 (Nygh J).

⁸⁰ The High Court, in *Commonwealth v ACT* (n 77) 461 [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), defined marriage in s 51(xxi) of the *Australian Constitution* as referring to ‘a consensual union formed between natural persons in accordance with legally prescribed requirements which is ... a union the law recognises as intended to endure.’

that she had never wanted a marital or sexual relationship with him.⁸¹ Hogan J emphasised that the husband had consented to go through a ceremony of marriage; and so he had.⁸² There was no fraud as to the nature of the ceremony or the identity of the person to whom he promised to live in a marital union. However, his spouse did not consent to marriage. She only consented to a wedding; and the husband did not consent to a sham and sexless ‘marriage’ to last only until his wife secured her desired immigration status in Australia. In contractual terms, there was simply no meeting of the minds as to the terms of the contract. He offered her a marriage, not a wedding. Her acceptance was merely of the latter.

It is very difficult to think of any rational public policy objective to be attained by insisting that those who have been tricked into marriage should be unable to obtain a declaration that there was not, in reality, any marriage at all. Indeed, in other jurisdictions where having a valid marriage is a passport to significant property rights, refusing a decree of nullity may in fact allow a perpetrator of fraud to gain a material advantage from his own wrong, at the expense of the innocent party. Consider, for example, the Californian case of *Re Marriage of Ramirez*.⁸³ The evidence indicated that prior to the marriage, the husband was having an affair with the wife’s sister and had every intention of continuing that relationship after the marriage (which he did). Immigration issues were also involved. As a consequence of the marriage, the husband had significant property rights based upon California’s community property regime which he sought to claim following the parties’ separation.⁸⁴ The Court applied a provision of California’s Family Code, which set out the obligations of marriage.⁸⁵ The Court held:

[H]istorically, annulments based on fraud have only been granted in cases where the fraud relates in some way to the sexual, procreative or child-rearing aspects of marriage ... Jorge’s actions here, in marrying Lilia while continuing to carry on a sexual relationship with her sister Blanca, directly relates to a sexual aspect of marriage — sexual fidelity. For emphasis, we again quote from Family Code section 720: ‘Husband and wife contract toward each other obli-

⁸¹ *Iqbal* (n 9) [36] (Hogan J).

⁸² *Ibid* [54]–[59].

⁸³ 165 Cal App 4th 751 (Ct App, 2008) (*‘Ramirez’*). See also Timothy Follett, ‘*Re the Marriage of Ramirez: Sex, Lies, and California’s Annulment for Fraud Based on Fidelity*’ (2013) 43(3) *Golden Gate University Law Review* 433.

⁸⁴ *Ramirez* (n 83) 754–6 (Ramirez PJ, Richli J agreeing).

⁸⁵ Cal Fam Code § 720 (West 2015).

gations of mutual respect, fidelity, and support.’ At the time of the 2001 marriage, Jorge purposely deceived Lilia into thinking that he would perform one of the central obligations of the marriage contract — the obligation of fidelity. ... Jorge committed fraud and Lilia is entitled to a judgment of annulment.⁸⁶

The same issue of property rights doesn’t arise in Australia, since a void marriage gives rise to the same proprietary remedies as a valid one,⁸⁷ but the issue remains that to allow someone to take advantage of their own wrong by tricking another party into marriage violates fundamental principles of public policy.

VI CONSENSUAL SHAM MARRIAGES

In situations where both parties consent only to a wedding, the case is very different. There is no fraud upon the other party.

A recent example is *Lee v Duan*.⁸⁸ The parties entered into a marriage with a view to obtaining an Australian visa. Burchardt FM found:

I am completely satisfied that this was never a marriage in the sense of the union of a man and woman for life to the exclusion of all others. It was a contract whereby the applicant agreed to sponsor the respondent and her daughter to Australia in exchange for money and nothing more or less than that.⁸⁹

Later in his judgment, Burchardt FM noted that he ‘did not think that there had ever been a marriage’⁹⁰ but felt bound by authority to treat it as valid.⁹¹ His Honour commented:

I confess I find that a curious outcome ... it seems extraordinary to me that a marriage can be deemed valid where the parties at no time whatever, and least

⁸⁶ *Ramirez* (n 83) 759 (Ramirez PJ, Richli J agreeing).

⁸⁷ *Family Law Act* (n 5) s 71.

⁸⁸ *Lee* (n 9).

⁸⁹ *Ibid* 260 [13].

⁹⁰ *Ibid* 270 [112].

⁹¹ *Ibid* 271 [121]. Traditionally, the English courts have refused to annul sham marriages made for immigration purposes based upon the parties’ mental reservations: see, eg, *H v H* [1954] P 258, 264 (Karminski J); *Silver v Silver* [1955] 1 WLR 728. This is based upon an older principle that a person should not be able to assert his or her own mental reservation as a justification for nullifying the marriage: *Dalrymple v Dalrymple* (1811) 161 ER 665.

of all at the time of the ceremony itself, had any intention of joining together as man and wife, to effect a union to the exclusion of all others for life.⁹²

That view echoes the position taken by no less an authority than Learned Hand J in the United States. In a judgment concerned with a criminal offence of conspiracy to bring in a foreigner by false representations, his Honour considered the validity of the marriage of a couple who entered into a marriage purely to give the Czechoslovak woman a right to remain in the country. They immediately separated. Learned Hand J considered that the couple were never married at all. His Honour held:

It is quite true that a marriage without subsequent consummation will be valid; but if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others.⁹³

That position has been rejected in other common law countries,⁹⁴ including, in a similar criminal law context, Australia.⁹⁵

There is no room in Australia to adopt Learned Hand J's view so far as the law of nullity is concerned. While the decisions of courts in other jurisdictions are of persuasive authority, especially as to the common law, the law of nullity in Australia ultimately requires interpretation of the statutory law in this country. The only grounds for nullity are as stated in s 23B of the *Marriage Act*. The grounds for saying that a marriage is void for lack of a real consent are limited to duress, fraud, mistake and incapacity.⁹⁶ In a sham marriage, the parties have a meeting of minds as to the relationship that they are entering into. There is no fraud on one another. As Nygh J explained in *Osman*: 'Parties who enter into a marriage knowingly for some ulterior purpose cannot afterwards claim having been defrauded simply because they each knew what they were doing.'⁹⁷

⁹² *Lee* (n 9) 271 [122].

⁹³ *United States v Rubenstein*, 151 F 2d 915, 919 (2nd Cir, 1945).

⁹⁴ See, eg, *Puttick v A-G* [1980] Fam 1 ('*Puttick*'); *Vervaeke* (n 31); *Martens v Martens* [1952] 3 SA 771 (Local Division).

⁹⁵ *R v Cahill* [1978] 2 NSWLR 453.

⁹⁶ *Marriage Act 1961* (Cth) s 23B(1)(d) ('*Marriage Act*').

⁹⁷ *Osman* (n 4) 366.

There may be an intended fraud on the immigration authorities, but the existence of an illegal purpose does not necessarily invalidate the marriage itself. An analogy may be drawn with the law of resulting trusts. In *Nelson v Nelson*,⁹⁸ the High Court had to consider the impact of an illegal purpose on rights to ownership of property. In this case, the mother contributed the purchase moneys for a house in her son and daughter's names, although she intended to be the beneficial owner and sought to adduce evidence of her real intent in order to rebut the presumption of advancement. The reason to put the house in her children's names was to preserve her eligibility for a subsidised home loan from the Government under the *Defence Service Homes Act 1918* (Cth), which she could only gain if she did not already own property. The High Court held that the illegal purpose did not prevent her from asserting beneficial ownership of the property.⁹⁹ It was a question of construing the purpose of the statute that rendered her purpose illegal. In this case, Parliament had determined the sanctions for fraudulently seeking a loan to which the mother was not entitled. There was no reason to give to that statute the additional effect of preventing her from adducing evidence of her illegal purpose in order to rebut the presumption of advancement.¹⁰⁰

In the same way, it might be argued that it is for Parliament to determine the appropriate sanction for immigration or other fraud in the form of a sham marriage where both parties share in the deception.¹⁰¹ There are good reasons why Parliament would not want to permit a party engaging in such a sham marriage to obtain a decree of nullity; for allowing a party to use their own wrongdoing to get such a remedy would contradict that foundational principle of public policy that a person should not be able to gain an advantage from her or his own wrongdoing.¹⁰² Neither party is a victim of fraud. Both are, in essence, perpetrators of fraud.

It is therefore understandable that Parliament has chosen not to give such a remedy in these circumstances. The parties' status can reasonably be left to

⁹⁸ (1995) 184 CLR 538.

⁹⁹ *Ibid* 571 (Deane and Gummow JJ), 580–1 (Dawson J), 586–7 (Toohey J), 616 (McHugh J).

¹⁰⁰ *Ibid* 570–1 (Deane and Gummow JJ), 581–2 (Dawson J), 597–8 (Toohey J), 616–17 (McHugh J).

¹⁰¹ See generally JH Wade, 'Limited Purpose Marriages' (1982) 45(2) *Modern Law Review* 159.

¹⁰² *Puttick* (n 94) 5 (Baker P).

themselves to sort out through the law of divorce. That would seem to be a reasonable public policy position. As Professor Bromley commented:

It is very much in the public interest that persons should not be permitted to abuse the marriage laws of the state by entering into a marriage purely to obtain some collateral advantage and with no intention of fulfilling the purpose for which marriage exists. The English judges have sought to control this by refusing to look at the parties' motives: in other words, if two people take advantage of the opportunity to marry that the law provides, they will [be] saddled with all the legal consequences of their act.¹⁰³

Equally, one would not expect Parliament to allow the perpetrator of a fraud upon an innocent victim to successfully claim a decree of nullity. As Romer LJ held (in obiter) in *Nachimson v Nachimson*:

[I]f a man should persuade a woman to marry him, her intention being to form a union for life, and his being, unknown to her, to form a union for a day or two, I see no reason why the Courts of this country should assist him in his nefarious scheme by refusing to recognize the validity of the marriage.¹⁰⁴

In light of these public policy considerations, it is no surprise that a decree of nullity is available neither to participants in a sham marriage nor to the perpetrators of a fraudulent misrepresentation as to intention to cohabit.

VII FRAUD AS TO ATTRIBUTES

The cases where there is, allegedly or as found by the court, no intent either by one party or both parties to establish a *consortium vitae* and to found a family need to be distinguished from those in which the allegation was that a party to the marriage had lied about certain attributes.

There have been a number of recent cases in Australia concerning alleged fraud as to attributes. In *Aird v Hamilton-Reid*, a judge accepted the evidence of a woman that she would not have married the man concerned if she had known that he had been married before and had two children from his previous marriage.¹⁰⁵ Following the line of authority on fraud inducing consent, the judge refused to annul the marriage.¹⁰⁶ Similarly, in *Gani v*

¹⁰³ PM Bromley, 'The Validity of "Sham Marriages" and Marriages Procured by Fraud: Johnson (Falsely Called Smith) v Smith' (1969) 15(2) *McGill Law Journal* 319, 322.

¹⁰⁴ [1930] P 217, 244.

¹⁰⁵ *Aird* (n 9) 49 [19], 56 [51] (Watt J).

¹⁰⁶ *Ibid* 56-7 [50]-[55] (Watt J).

Drasha, a decree of nullity was refused in circumstances where the husband alleged that his wife had concealed a previous divorce from him.¹⁰⁷

In *Rick v King* ('*Rick*'),¹⁰⁸ the husband sought a decree of nullity on the ground that the wife did not disclose to him that she was a diagnosed AIDS patient. He would not have married her had he known this. The trial judge, Crooks J, dismissed the application and the Full Court affirmed that decision on appeal, saying that 'the failure of the wife to inform the husband of her true medical status did not vitiate the husband's consent to the marriage'.¹⁰⁹

These cases may all be classified as cases of alleged fraud as to attributes, rather than identity of the person or the nature of the ceremony; but in all of the cases above, the alleged fraud consisted in a failure to disclose information that a reasonable person might consider to be essential for the other party to give an informed consent to marriage. That is, they were cases of unfair concealment. *Zacharia v Paradisio*, on the other hand, was different.¹¹⁰ It involved a fraudulent misrepresentation. In this case, the applicant was induced to marry a man because he said he was dying of cancer and had concerns about the care of his children. On the wedding night, he announced that he was not dying of cancer but had hepatitis C and that he had been in prison for trafficking drugs.¹¹¹ A decree of nullity was refused.¹¹²

There is an important difference between unfair concealment and fraudulent misrepresentation. It is at least arguable that silence on a matter that a reasonable person might have thought should be disclosed does not amount to fraud, however unwise or morally reprehensible such a failure to disclose might be.

VIII FRAUD, REDUNDANT PROVISIONS AND STATUTORY INTERPRETATION

So, can the traditional view be sustained that fraud is only relevant where it relates to the identity of the person or the nature of the ceremony? Do those tricked into marriage really have no remedy other than divorce to deal with their marital status? Insisting on the traditional position requires a belief that

¹⁰⁷ *Gani* (n 9).

¹⁰⁸ *Rick* (n 67).

¹⁰⁹ *Ibid* [15] (May, Thackray and Crisford JJ).

¹¹⁰ *Zacharia* (n 9).

¹¹¹ *Ibid* [8]-[18] (Burr J).

¹¹² *Ibid* [55]-[56] (Burr J).

Parliament intended to do nothing more than restate the general law. Given there is now a statutory codification of the law of nullity, the statute must prevail over the general law if the statute appears to be inconsistent with that prior body of law.

The view that the statute was not intended to change the law has been most clearly expressed by McCall J in *Otway*, who held:

In my view the provisions of the *Marriage Act* were doing little more than putting into statutory form the law as it was then understood, and did not intend to liberalize or expand the meaning of ‘fraud’. At best the separation of fraud from mistake and the qualifications attached to mistake in the sub-paragraph only clarified the fact that an innocent as well as fraudulent mistake could result in the relevant lack of consent to the marriage.¹¹³

However, there are a number of difficulties with this view. First, were such clarification necessary, it does not explain why mistake, in the statute, is limited to the identity of the other party or as to the nature of the ceremony performed, whereas ‘duress’ and ‘fraud’ are not qualified by any limiting words. Fraud is left at large in the statute. Had Parliament intended just to codify the 19th century law of nullity that the only relevant fraud was as to identity or ceremony, and to ‘clarify’ the position in relation to mistake, as McCall J held, it could have drafted the relevant subsection as follows:

- (d) the consent of either of the parties is not a real consent because
 - (i) it was obtained by duress;
 - (ii) that party either has been deceived or is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
 - (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony.

Such a provision would restate the law as interpreted by the courts, but it is not actually what the statute says.

Second, McCall J’s judgment ignores an important principle of statutory interpretation, that all words should be given meaning. His Honour’s view requires an interpretation that the word ‘fraud’ is redundant; for it is a feature of all the cases where there has been fraud concerning the identity of the person or the nature of the ceremony that the applicant could equally have succeeded on the basis of mistake, which is an independent ground of nullity in s 23B. So fraud, as interpreted by the Australian courts, adds nothing to

¹¹³ *Otway* (n 9) 102.

mistake as a ground for nullity.¹¹⁴ That is, all fraud cases involve a mistake as to the nature of the ceremony or the identity of the person, although not all mistake cases involve fraud.¹¹⁵ If this is so, then what does ‘fraud’ add?

McCall J’s interpretation of the statute renders the term ‘fraud’ in s 23B(1)(d)(i) entirely superfluous. Long-established authority indicates that the court should strive to avoid such an interpretation. In *Project Blue Sky Inc v Australian Broadcasting Authority*, McHugh, Gummow, Kirby and Hayne JJ held:

[A] court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* [(1905) 2 CLR 405, 414] Griffith CJ cited *R v Berchet* [(1688) 1 Show KB 106; 89 ER 480] to support the proposition that it was ‘a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.’¹¹⁶

To similar effect, Gibbs J held in *Beckwith v The Queen*: ‘As a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains.’¹¹⁷ It is therefore reasonable to assume that Parliament did not intend a redundancy. It is only possible to give the word ‘fraud’ a ‘useful and pertinent’ meaning (to echo Griffith CJ) if it is given an ambit of application that is not co-extensive with mistake. Furthermore, as Gageler J has commented: ‘Legislation is sometimes harsh. It is rarely incoherent. It should not be reduced to incoherence by judicial construction.’¹¹⁸ The interpretation given to s 23B(1)(d) of the *Marriage Act* by McCall J necessarily treats some of the statutory language as superfluous and renders the section incoherent.

Third, regard ought also to be had to the purpose of the statute. Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides that in ‘interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.’ The relevant section of the *Marriage Act* makes the purpose sufficiently clear. It

¹¹⁴ This point was made by Frederico J in *Deniz* (n 9) 116.

¹¹⁵ Davis, ‘Fraud and Annulment of Marriage’ (n 1) 152.

¹¹⁶ (1998) 194 CLR 355, 382 [71].

¹¹⁷ (1976) 135 CLR 569, 574.

¹¹⁸ *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459, 480 [76].

provides that a marriage is void if ‘the consent of either of the parties is not a real consent because ... [of] fraud’.¹¹⁹ It follows that the statute ought to be given a meaning that wherever, as a consequence of fraud, a person does not give a ‘real consent’. There seems no reason to read the test down further than the language of the statute. Any deception that vitiates a ‘real consent’ to a union of lives ought to suffice. In the context of consent to medical treatment, ‘real consent’ has been interpreted to mean informed consent which has not been procured by fraud or misrepresentation.¹²⁰ Consent to marriage is of far greater significance than consent to have an injection or to stitch up a wound. There seems no principled reason for having such a limited view of ‘fraud’ as the Family Court has insisted upon, in relation to such an important decision.

IX FORCED MARRIAGE AND DECEPTION

The arguments from statutory interpretation of the *Marriage Act* are now reinforced by the statutory provisions enacted to deal with forced marriages.¹²¹ There is a case for saying that Parliament must now be deemed to have formed the view that deception, other than as to the nature of the ceremony or the identity of the person, vitiates the ‘real consent’ to which s 23B of the *Marriage Act* refers. Section 270.7A(1) of the *Criminal Code Act 1995* (Cth) defines a marriage as being forced if ‘because of the use of coercion, threat or deception’, one party ‘entered into the marriage without freely and fully consenting’. That is, deception, for the purpose of this statute at least, is not only treated as being as serious as duress, but is defined as a form of duress, or ‘force’.

¹¹⁹ *Marriage Act* (n 96) s 23B(1)(d)(i).

¹²⁰ In *Freeman v Home Office (No 2)* [1984] 1 QB 524, Donaldson MR (with whom Fox LJ agreed) observed: ‘Consent would not be real if procured by fraud or misrepresentation but, subject to this and subject to the patient having been informed in broad terms of the nature of the treatment, consent in fact amounts to consent in law.’: at 556. See also *Rogers v Whitaker* (1992) 175 CLR 479, 489 (Mason CJ, Brennan, Dawson, Toohey, and McHugh JJ).

¹²¹ On the legislation, see generally Frances Simmons and Jennifer Burn, ‘Without Consent: Forced Marriage in Australia’ (2013) 36(3) *Melbourne University Law Review* 970.

This provision was introduced by the *Crimes Amendment (Slavery) Act*.¹²² The current definition of forced marriage, in full, is as follows:

270.7A Definition of forced marriage

- (1) A marriage is a *forced marriage* if one party to the marriage (the *victim*) entered into the marriage without freely and fully consenting:
 - (a) because of the use of coercion, threat or deception; or
 - (b) because the party was incapable of understanding the nature and effect of the marriage ceremony.
- (2) For the purposes of subsection (1), *marriage* includes the following:
 - (a) a registered relationship within the meaning of section 2E of the *Acts Interpretation Act 1901*;
 - (b) a marriage recognised under a law of a foreign country;
 - (c) a relationship registered (however that process is described) under a law of a foreign country, if the relationship is of the same, or a similar, type as any registered relationship within the meaning of section 2E of the *Acts Interpretation Act 1901*;
 - (d) a marriage (including a relationship or marriage mentioned in paragraph (a), (b) or (c)) that is void, invalid, or not recognised by law, for any reason, including the following:
 - (i) a party to the marriage has not freely or fully consented to the marriage (for example, because of natural, induced or age-related incapacity);
 - (ii) a party to the marriage is married (within the meaning of this subsection) to more than one person.

Note: Section 2E of the *Acts Interpretation Act 1901* covers relationships registered under a law of a State or Territory that are prescribed by regulations under that Act.

- (3) Paragraph (1)(a) applies whether the coercion, threat or deception is used against the victim or another person.

¹²² *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Act 2013* (Cth) sch 1 item 12. The provision was slightly amended in 2015 by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) sch 4 items 1–3.

- (4) For the purposes of proving an offence against this Division or Division 271, a person under 16 years of age is presumed, unless the contrary is proved, to be incapable of understanding the nature and effect of a marriage ceremony.¹²³

The terms ‘deceive’ and ‘deception’ are defined in s 271.1. To deceive is to ‘mislead as to fact (including the intention of any person) or as to law, by words or other conduct’; ‘deception’ has a corresponding meaning.¹²⁴ So the definition clearly includes misleading the other person as to one’s intentions. This would comfortably apply to the cases in which the party had no intention to establish a *consortium vitae* and to form an enduring relationship.

The definition may also be broad enough to cover cases where one party misleads the other as to facts. Indeed, the Explanatory Memorandum to the *Crimes Amendment (Slavery) Act* evinces an intention that the term ‘deception’ should be given a broad interpretation. It says:

The terms ‘coercion’, ‘threat’ and ‘deception’ are defined in section 270.1A of the *Criminal Code* ... The intention is that these terms capture a broad range of conduct (both physical and non-physical) that may be used by a person to cause a victim to enter a marriage without their full and free consent.¹²⁵

The language of full and free consent reflects the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* of 1962.¹²⁶ Article 1 of that Convention provides: ‘No marriage shall be legally entered into without the full and free consent of both parties.’¹²⁷

That a person should ‘freely’ consent to a marriage implies that it should not be procured by duress or illegitimate pressure. As the plurality of the High Court said in *Thorne v Kennedy*:

The question whether a person’s act is ‘free’ requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them. Pressure can deprive a person of free choice in this sense where it

¹²³ *Criminal Code Act 1995* (Cth) s 270.7A.

¹²⁴ *Ibid* s 271.1 (definition of ‘deceive’).

¹²⁵ Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012* (Cth) 23 (emphasis in original).

¹²⁶ *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, opened for signature 10 December 1962, 521 UNTS 231 (entered into force 9 December 1964).

¹²⁷ *Ibid* art 1(1).

causes the person substantially to subordinate his or her will to that of the other party.¹²⁸

So, what does it mean to say that someone ‘fully’ consents? It is here that the deception as to facts or intentions may be most relevant. Where there has been gross deception going to matters which would affect the decision of a reasonable person about entering into the marriage, one could readily argue that there is not a full consent because of the misrepresentation. It is not merely that there is not informed consent; rather there is misinformed consent.

Of course, that the *Crimes Amendment (Slavery) Act* holds that deception vitiates a full and free consent does not mean necessarily that Parliament intended to overrule the case law interpreting s 23B of the *Marriage Act*. Nonetheless, the intentions of Parliament in 2013 were clearly enough expressed that the case law on fraud in relation to nullity of marriage cannot be reconciled with that legislation. It would be astonishing for the courts to hold that Parliament intended to criminalise the procurement of consent to marriage by deception based upon fraudulent misrepresentation of either fact or intent, and yet to uphold the validity of marriages so procured. Impliedly, the case law on fraud and nullity has been overruled by Parliament, to the extent of any inconsistency.

The question remains to what extent should the previous case law now be regarded either as always in error (as an interpretation of the statute) or now impliedly overruled by the *Crimes Amendment (Slavery) Act*. The clearest case for change to judicial interpretation is deception as to the intention to form a *consortium vitae*. In cases where the court accepts either that the respondent had no intention of establishing a mutual life, or if he or she did, that it would last only as long as necessary to establish some collateral purpose such as securing a particular immigration status, the case seems clear that the applicant for a decree of nullity has been tricked into going through a wedding ceremony. The respondent had no intention of establishing a marital relationship that is intended to endure.

More difficult are the cases where someone has been tricked into marriage because of someone’s attributes. Here, a clear distinction should be drawn between fraudulent misrepresentations and concealment of information that might have affected a person’s decision to marry. Cases where a party has

¹²⁸ (2017) 350 ALR 1, 11 [32] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) (citations omitted).

concealed a previous divorce,¹²⁹ or even the fact that the party has children from a prior relationship,¹³⁰ do not involve deception. They just involve concealment. The same is true of the case of *Rick*, in which the wife concealed that she had AIDS. In any event, this information was most relevant to the decision whether to engage in sexual intercourse, and if so, with what protection against acquiring a sexually transmitted disease or illness. Gone are the days when marriage is a moral precondition for sexual intercourse. The applicant had grounds to feel aggrieved by the non-disclosure even if they had not married or lived together in a de facto relationship. It was consent to sexual relations that was not informed by the knowledge of her HIV status.¹³¹

Furthermore, as a matter of statutory interpretation, it is reasonable to conclude that at least some kinds of fraud as to attributes do not render a marriage void. Section 21(1) of the *Matrimonial Causes Act 1959* (Cth) provided a number of grounds upon which marriage was voidable at the election of one of the parties. It included that the wife was pregnant to another man.¹³² This might have been a situation of fraudulent concealment (if the marriage took place before visible signs of the pregnancy), but it could also be a case of fraudulent misrepresentation if the wife told the husband that the child was his. Another ground on which a marriage was voidable was that either party was suffering from a communicable venereal disease.¹³³ Interestingly, neither of these grounds of voidability were premised on concealment or misrepresentation. That is, a marriage could be voidable at any stage even years after the marriage, if either party had a venereal disease at the time of the wedding, or the wife was pregnant to another man, whether or not the other party was aware of the circumstances at the time of the marriage.

Given that the provisions concerning voidable marriages were not carried over into the *Family Law Act*, there is reason to argue that at least a pregnancy to another man or a communicable venereal disease were not considered sufficient to ground a decree of nullity. Having said this, there could still be a

¹²⁹ See, eg, *Gani* (n 9).

¹³⁰ See, eg, *Aird* (n 9).

¹³¹ The wife may have been in breach of the criminal law either for failing to disclose her HIV status or for failing to take reasonable precautions to prevent infecting her partner: see generally Denton Callander, 'Punishing One Person for STI Transmission Weakens Public Health Efforts', *The Conversation* (online, 21 September 2017) <<https://theconversation.com/punishing-one-person-for-sti-transmission-weakens-public-health-efforts-84210>>, archived at <<https://perma.cc/EY92-X49E>>.

¹³² *Matrimonial Causes Act 1959* (Cth) s 21(1)(d).

¹³³ *Ibid* s 21(1)(c).

case for saying that fraudulent misrepresentation that induces someone to consent to a marriage to which they would not otherwise have consented ought to come within the scope of fraud, vitiating a real consent. An example would be a man tricked into marrying a woman by a representation that she was pregnant to him, when in fact she knew that another man was the father, in circumstances where he felt obliged to marry her only because of the pregnancy.

It follows that care needs to be taken in working out whether fraud as to attributes could now justify a decree of nullity. Not only must there be an intentional misrepresentation (as opposed to a concealment), but the misrepresentation must be directly relevant to the decision to enter into a marriage, as opposed to having sexual relations. The representation must also be sufficiently material. In *Deniz*, Frederico J recognised this, observing that:

[T]here would be general consternation if an application was granted on the basis of fraud by reason of one party deceiving the other as to being possessed of natural teeth. The case of the person who marries to gain money, rank or title as distinct from the more usually professed reasons would also cause concern.¹³⁴

His Honour proposed a test that the fraud must go to the root of the marriage contract.¹³⁵ That seems to be self-evidently satisfied on the facts of that case. By way of contrast, a case in which ‘money rank or title’ was in issue is *Sullivan v Gin*.¹³⁶ The applicant’s case was that the wife had represented to him that she was employed and owned a residential property worth \$200,000. Later, he discovered it was only worth about \$140,000 and there was only \$20,000 equity.¹³⁷ Thus, the alleged deception was only as to her financial capacity. Such cases do not go to the heart of the marriage contract, however aggrieved the husband may have been that he did not have an accurate understanding of his wife’s finances.

¹³⁴ *Deniz* (n 9) 116–17.

¹³⁵ *Ibid* 117.

¹³⁶ *Gin* (n 9).

¹³⁷ *Ibid* [3] (Barry J).

X THE CHANGING NATURE OF MARRIAGE

In considering the future interpretation of the *Marriage Act*, consideration also needs to be given to the way in which marriage has changed over the last few decades. In an article published in the *Harvard Law Review* at the end of the 19th century, Harvard scholar Justice Franklin Fessenden wrote:

Whether marriage is looked upon as a contract or as an institution or as a status, it is perhaps the most important of all conditions in civilized communities. It is created by the contract of the parties, and continues during their joint lives. But from the time the marriage ceremony is performed they have no power by mutual consent to dissolve it. From that time the public alone by legislative act or judicial decree can put an end to it. Public interest and public morality alike demand that we shall never permit any loosening of the marriage tie, save in extreme cases when grievous wrong is done to innocent persons. It is of the gravest public concern that the marriage should be permanent.¹³⁸

The old English authorities on fraud and nullity, derived from the ecclesiastical courts, reflect this view of marriage, one which has long since disappeared. Marriage is now freely dissoluble in Australia after a year's separation, and by unilateral decision (subject to the formality of a divorce decree).¹³⁹ Marriage is shifting from a public law model to a private law model. As Rabbi Michael Broyde has said:

In the private law model, marriage and divorce are fundamentally private activities. Couples marry by choosing to be married and divorce by deciding to be divorced; no government role is needed. Law is employed only to regulate the process to the extent that there is a dispute between the parties, or to adjudicate whether the proper procedure was followed. Government is not a necessary party in either marriage or divorce.¹⁴⁰

¹³⁸ Justice Franklin G Fessenden, 'Nullity of Marriage' (1899) 13(2) *Harvard Law Review* 110, 110.

¹³⁹ *Family Law Act* (n 5) ss 48, 49, 55A. On the rare use of s 55A to delay the grant of a divorce, see above n 8.

¹⁴⁰ Michael J Broyde, 'New York's Regulation of Jewish Marriage: Covenant, Contract, or Statute?' in Joel A Nichols (ed), *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (Cambridge University Press, 2012) 138, 149.

On this view, there is no justification for having a more limited view of fraud than applies in the law of contract where there are remedies for fraudulent misrepresentations inducing consent to the contract.

For many, marriage has a deep religious and emotional significance and divorce is seen as shameful. In the context of a multicultural society in which different conceptions of marriage co-exist, it is time to modernise the law of nullity so that those who are tricked into marriage have an appropriate civil remedy, as well as being able to make a complaint about a criminal offence.