DOES ANYONE UNDERSTAND THE EFFECT OF 'THE MARRIAGE CEREMONY'? THE NATURE AND CONSEQUENCES OF MARRIAGE IN AUSTRALIA

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> HUSBANDS AND WIVES. — A husband and wife are one in law; though there is often anything but unity in other matters. A man cannot enter into a legal agreement with his wife, but they often enter into disagreements which are thoroughly mutual. If the wife be in debt before marriage, the husband, in making love to the lady, has been actually courting the cognovits she may have entered into; and if the wife is under an obligation for which she might be legally attached, the husband finds himself the victim of an unfortunate attachment. A wife cannot be sued without the husband, unless he is dead in law; and law is really enough to be the death of any one. A husband or a wife cannot be witness for or against one another, though a wife sometimes gives evidence of the bad taste of the husband in selecting her. By the old law, a husband might give his wife moderate correction; but it is declared in black and white that he may not beat her black and blue, though the civil law allowed any man on whom a woman had bestowed her hand, to bestow his fists upon her at his own discretion. The common people, who are much attached to the common law, still exert the privilege of beating their wives; and a woman in the lower ranks of life, if she falls in love with a man, is liable, after marriage, tu [sic] be a good deal struck by him. — Punch.[1]

In simple terms, the real 'effect of the marriage ceremony' is to create a valid marriage. Marriage and the consequences of it are, however, anything but simple. Marriage is about relationships – between the parties to it and between those parties and the state. It is a contract. It imparts rights and demands obligations between partners and between those partners and the state. It is both public and private.

This article examines the legal rights and obligations that accrue from marriage in Australia. It is this writer's contention that while it

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1 Extract from *Punch* (3 October 1844), 1(15) *The Colonial Literary Journal* 235 <http://www.nla.gov.au/ferg/colonial/13276638/18441003/00010015/0110235.htm> at 26 June 2006.

is assumed that most participants understand the general nature of a marital contract, the full legal consequences of such a marriage contract are rarely known and yet, ironically, they are considered to be so important that they are reserved only to certain members of society. It effectively excludes many, including same sex partners in our society who are deemed incapable. Indeed, a definition of marriage was inserted into the *Marriage Act 1961* (Cth) in 2004 by a legislature keen to ensure that only heterosexual couples should be entitled.

Several cases will be examined. Many of these concern the capacity to marry – whether the participants had sufficient understanding of the marital contract (the *effect* of the marriage ceremony). There are other cases, too, which are revealing of the legal consequences of an institution which is mostly taken for granted. Further, there are two cases which highlight the public or notorious side of marriage. The sad case of Terri Schiavo (in Florida, USA) and that of Richard Eames (in Tasmania) have elements in common. Both cases raise issues of public policy and serve to highlight the 'public' consequences (the rights and obligations) of marriage in Australian and American society. They are examples of the 'public face' of the institution of marriage because they were newsworthy.

It is possible also to glean information from legislation: legislation which has been drafted with the express purpose of placing same-sex couples on an equal legal footing to those of the opposite sex.

I INTRODUCTION

The *Marriage Act 1961* (Cth) regulates marriage as we know it in Australia. It prescribes capacity, details the requirements for a valid ceremony and provides the circumstances under which marriages will be void. It effectively regulates the formation of marriage. Curiously there is nothing in the Act that requires an understanding of marriage as an institution. Sections 23 and 23B are the closest we have to a requirement for understanding but it is an understanding of the *ceremony* not the institution. In simple terms, the real 'effect of

the marriage ceremony'[2] is to create a valid marriage. Marriage and the consequences of it are, however, anything but simple.

Marriage is about relationships – between the parties to it and between those parties and the state. It is a contract and a status. It imparts rights and demands obligations between partners and between those partners and the state. It is both public and private. It is also a matter of legal, social and economic status, gender (im)balance and discrimination. It suggests an impossible mixture of emotion, morality and legality.

It is also the butt of jokes and the subject of witticisms. Do you remember the one about….?

> Marriage is a great institution, but I'm not ready for an institution, yet. (Mae West)
>
> I was disappointed in Niagara - most people must be disappointed in Niagara. Every American bride is taken there, and the sight of the stupendous waterfall must be one of the earliest, if not the keenest, disappointments in American married life. (Oscar Wilde, Personal Impressions of America, Lecture, 10 July 1883.)
>
> Marriage is the triumph of imagination over intelligence. Second marriage is the triumph of hope over experience. (Oscar Wilde)
>
> Both marriage and death ought to be welcome: The one promises happiness, doubtless the other assures it. (Mark Twain)

This paper examines marriage and the rights and obligations that accrue from it in Australia. It is argued that while it is generally assumed that most participants understand the nature of a marital contract,[3] the legal consequences of a marriage contract are rarely known. As was said in the 1929 Canadian case of *Chertkow v Feinstein*:

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2 See the *Marriage Act 1961* (Cth) ss 23(1)(d)(iii), 23B(1)(d)(iii).

3 It is assumed that most participants understand the nature of the marriage *ceremony*, but whether there is a greater understanding is unknown – and not required to be known.

> I believe she knew she was being married but I think that she didn't fully appreciate the consequences of the marriage. In this connection I may refer to what took place in the Forster case, 39 Times LR, at p 659, in which counsel asked an expert if the party was in a condition to understand all the consequences of matrimony, when the President interjected with the question, 'Did you ever know anybody who was in a condition to understand all the consequences of matrimony?' to which the witness answered 'No, my Lord'.[4]

There are cases which highlight some of the 'public' consequences of marriage. Two of these cases were publicised. The sad case of Terri Schiavo (in Florida, USA) and that of Richard Eames (in Tasmania) have several things in common. The first is the element of drama which surrounded both. In the case of Theresa Marie Schiavo it is pure tragedy. For Richard Eames it is more akin to soap opera. Importantly, however, there are a select few other cases, which are less well-known, that also serve to highlight the inherent rights and obligations.

Obtaining information from legislation about the scope of these rights and obligations is more challenging. The *Marriage Act 1961* (Cth) provides little assistance; it merely regulates the formation of marriage. More useful is legislation which has sought to place same-sex couples on the same or similar legal footing as their heterosexual peers. For instance, the *Relationships Act 2003* (Tas) became operational in January 2004, and on 28 March 2006, the government of the Australian Capital Territory presented the Civil Unions Bill 2006 (ACT) into parliament. The intention of the proposed Australian Capital Territory legislation was to provide the mechanism for two people, regardless of sex, to enter into a union 'that attracts the same rights and obligations as would attach to married spouses'[5] under ACT law. However, the *Civil Unions Act 2006* (ACT) was short-lived. Taking the view that such legislation

4 *Chertkow v Feinstein* [1929] 3 DLR 339, 346.

5 Explanatory Statement, Civil Unions Bill 2006 (ACT) <http://www.legislation.act.gov.au> at 15 April 2006.

offended against the institution of marriage, the federal government disallowed the legislation.[6]

II MARRIAGE: SOME LEGAL, HISTORICAL, ECONOMIC AND SOCIAL CONSIDERATIONS

Marriage is not an invention of the modern age or the Christian religion. According to Smith, '[a]ll known societies recognise [stable sexual relationships] and institutionalise it in marriage. Socially sanctioned heterosexual marriage is a remarkably persistent cross-cultural and historical universal…'.[7] This is so even though there are other social arrangements (or models) which are possible.[8] The social and economic implications of such arrangements are clear. As an institution, marriage is designed to maximise male sexual access over his partner with associated 'secondary control rights [being]... a separable mix of decision rights over property, employment, earnings, domestic duties and children.'[9] It is a base economic work unit, particularly in poor societies where the labour of the wife and children is necessary for the survival of the family.

> The notion that a couple love each other and wish to raise a family and grow old together, offers a fine motivation for marriage but not a justification for the historical shape of the marital institution itself. Applying transactional theory, marriage can be conceived as fundamentally a hierarchical governance solution to mitigate hazards generated by asymmetric information in sexual relationships.[10]

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6 Under s 35 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), on 14 June 2006.

7 I Smith, 'The foundations of marriage: are they crumbling?' (2004) 31(5/6) *International Journal of Social Economics* 487, 487.

8 Spontaneous or *ad hoc* sexual relationships or even group marriages are purported to be the arrangements most favoured by primitive societies. See Smith, above n 7, 487, quoting both Morgan and Engels.

9 Smith, above n 7, 491.

10 Ibid 496.

There are two hierarchies. As Henry Finlay wrote, marriage (and divorce) is about 'double standards, about one law for the rich and one for the poor; one law for men and one law for women.'[11]

The historical model of marriage to which Blackstone referred[12] reflected the social mores of its day. It favoured men. The doctrine of unity[13] espoused by Blackstone was probably the point in English legal history where the adverse consequences of marriage for women were at their peak. A variety of disabilities for the wife flowed from the fact that, because of marriage, her legal existence was incorporated into that of her husband. And yet, marriage was a woman's only real vocational and social option.[14] For the upper classes, a *good* marriage bestowed status and security. For the lower classes, devoid of power and money, such a relationship ensured protection and allowed a pooling of physical and economic resources, however meagre. It also favoured the wealthy, for whom marriage was, above all, a settlement and means of preserving property and inheritance rights to legitimate offspring.

Further, in England, it was the domain of the church. For a while marriage was not an invention of the church, the rituals associated with its formation and continuance were subsumed by the established church. As Harrison wrote, 'Ecclesiastical jurisdiction over marriage and formulation and termination can be said to have survived in England until 1857 when the *Matrimonial Causes Act* conferred jurisdiction to grant divorces in civil courts.'[15] This is also stated by Brennan J, in *R v L*:

> The legal nature of the institution of marriage is not to be found in the common law… The doctrines of the law of marriage were developed in the ecclesiastical courts, not in the courts of common law. Sir William Scott (later Lord Stowell) in Lindo v Belisario (1795) 1 Hag Con 216, at pp 230-231 (161 ER 530, at pp 535-536)

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11 H Finlay, 'Victorian Sexual Morality: A Case of Double Standards' (1999) 14 *Australian Journal of Law and Society* 43, 44.

12 William Blackstone, *Commentaries on the Laws of England* (1765) Vol 1, 339.

13 Ibid 432-3.

14 See here the novels of Jane Austen among others.

15 M Harrison, 'Informal Marriages' (Working Paper No 1, The Australian Institute of Family Studies, 1982) 1-2.

> referred to differing opinions as to the nature of marriage: the early opinion of the Ecclesiastical Court that marriage is 'a sacred, religious, and spiritual contract', another opinion that it is merely a civil contract. His Lordship thought that neither of those opinions was completely accurate, holding marriage to be 'a contract according to the law of nature, antecedent to civil institution, ... a contract of the greatest importance in civil institutions, ... charged with a vast variety of obligations merely civil'.[16]

Having inherited the laws (as applicable) from England, in the early days of the colonies, authorities were keen to 'impose an official model of marriage on a recalcitrant working class population'[17] given that the 'lower orders [were] plagued by licentiousness and debauchery among the single of both sexes.'[18] The reality was, however, different. There was a huge gender imbalance with the number of males far outweighing females for several decades after the initial colonisation.[19] There were very few single, available women. Moreover, times were tough economically and socially, and the structure of the relationships which evolved reflected the tough times. Marriage (or a marriage-like relationship) was essential for protection and advancement.[20] This period of Australian history affords fascinating reading, which is well beyond the scope of this paper. Suffice to say that marriage as we know it in contemporary Australia is a product of our history, both legal and social.

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16 *R v L* (1991) 174 CLR 379, 391.

17 A Simmonds, ' "Promises and pie-crusts were made to be broke": Breach of Promise of Marriage and the Regulation of Courtship in early Colonial Australia' (2005) 23 *Australian Feminist Law Journal* 99, 100, referring to the work of Kirsten McKenzie, *Scandal in the Colonies: 1820-1850* (2004).

18 Per Forbes J, *R v Maloney* (1836) NSWSC (11 February 1836) as cited in the *Sydney Herald* 15 February 1836, in Simmonds, above n 17, 106.

19 See H Finlay, 'Divorce and the Status of Women. Beginnings in the Nineteenth Century Australia.' (Seminar Paper, Australian Institute of Family Studies, 20 September 2001) <http://www.aifs.gov.au/institute/seminars/finlay.pdf> at 19 June 2006.

20 See here the novel by Sian Rees, *The Floating Brothel* (2001) which tells the story of the women convicts who left England aboard the *Lady Julian*.

III THE STATUS OF MARRIAGE

A dictionary definition of *status* refers to the 'relative social, professional, or other standing of someone or something.'[21] This would suggest a ranking or classification and in this context there are several cases which shed light on the concept. This is helpful given that *status* may refer simultaneously to the relationship and also to rights and duties which might attach.

In *Ford v Ford*, Latham CJ said this:

> A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created by any agreement of such persons. An alien, for example, as distinct from a subject of the Crown, a married person as distinct from an unmarried person, a bankrupt as distinct from other persons generally, are all persons who have a particular status.[22]

Further, while considering the validity of s 94 of the *Marriage Act 1961* (Cth) in *Attorney-General (Vic) v Commonwealth*, Dixon CJ said:

> It may be said at once that the power conferred by s51(xxi) should receive no narrow or restrictive construction. In Quick and Garran at p 608 a wide connotation of the words 'with respect to marriage' is suggested by a reference to a denotation which perhaps needs a little explanation. For it covers 'consequences of the relation including the status of the married parties, their mutual rights and obligations, the legitimacy of children and their civil rights'. These are indefinite and highly abstract words but the status of the married parties evidently refers to the particular legal position they hold by reason of their married state considered as a legal position which unmarried persons do not share; their mutual rights and obligations means those arising out of the married state and the legitimacy of children refers to the status of children born

21 *The New Oxford Dictionary of English* (1998).

22 *Agnes Irvine Ford v Morgan Ford* (1947) 73 CLR 524, 529.

> to them in wedlock. In all this 'marriage' is considered as the source of the mutual rights and of the legal consequences which flow from it but requiring the definition, the support and the enforcement of the federal law.[23]

That there are consequences of the status was also stated by Brennan J in *R v L*:

> Marriage is an institution which not only creates the status of husband and wife but also, without further or specific agreement, creates certain mutual rights and obligations owed to and by the respective spouses.[24]

Thus it would appear that in this context, status refers to an attribute or relationship which, upon creation, gives rise to a distinct set of rights – irrespective of the will of the persons involved. Determining the full extent of those rights and obligations is the hard part.

IV *THE MARRIAGE ACT* (CTH)

The relevant powers under which the Commonwealth may enact laws relating to marriage, divorce and matrimonial causes are located in s 51 of the *Australian Constitution*[25] at placita xxi and xxii:

> 51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> ...
>
> (xxi) marriage;
>
> (xxii) divorce and matrimonial causes, and in relation thereto, parental rights, and custody and guardianship of infants.

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23 *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 543.

24 *R v L* (1991) 174 CLR 379, 392.

25 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12.

Throughout the 20th century there were several cases in which the High Court held that the meaning of terms used in the *Constitution* were fixed in time as at 1901, however, their application may change according to circumstances.[26] Accordingly, in relation to the meaning of *marriage*, the case of *Re Wakim* is of particular interest here, when McHugh J said:

> [I]n 1901 'marriage' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the future may mean, a voluntary union for life between two people to the exclusion of others.[27]

Just five years later any notion that the Commonwealth parliament would legislate to allow for a union between two *people* was stymied. Borrowing from the classic definition provided for in *Hyde v Hyde and Woodmansee*[28] by Lord Penzance, *marriage* has now been specifically defined under s 5 of the *Marriage Act 1961* (Cth)[29] as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. This clearly runs counter to McHugh J's comments and according to the Honourable Alistair Nicholson:

> With very limited exceptions relating, for example, to a person's age or the consanguinity of the parties to the proposed marriage, the legal capacity to marry has never been expressly restricted in Australian law.
>
> Recent legislation has changed that position.[30]

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26 See, for instance, *Attorney-General (NSW) v Brewery Employees' Union of NSW* (1908) 6 CLR 469; *R v Brislan; Ex Parte Williams* (1935) 54 CLR 262; and, more recently, *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 ('*Re Wakim*'), 553-4 (McHugh J).

27 *Re Wakim* (1999) 198 CLR 511, 553-4.

28 *Hyde v Hyde and Woodmansee* (1866) [LR] 1 P&D 130.

29 See the *Marriage Amendment Act 2004* (Cth).

30 A Nicholson, 'The Legal Regulation of Marriage' (2005) 29 *Melbourne University Law Review* 556, 556, referring to ss 11, 23, 23B of the *Marriage Act 1961* (Cth).

Thus the elements are, that it is now, a *heterosexual* monogamous 'union', which is freely entered into – 'for life'. As Nicholson also says:

> Lord Penzance's definition was inaccurate at the time that he gave it and it remains inaccurate today. It is difficult to understand how, even in 1866, marriage could be defined as a 'union for life' having regard for the passage of the *Divorce and Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85, which established civil divorce. Given that the rate of divorce is increasing it is even more nonsensical to refer to a marriage as a union for life today.[31]

This new definition is discriminatory[32] but achieves its purpose. It reasserts *marriage* as a religious institution and refreshes its ecclesiastical origins. It was clearly intended as an exclusive measure preserving the rights that flow from marriage to a particular group only. As the Attorney-General, Philip Ruddock, said in the second reading speech of the amending bill:

> The bill is necessary because there is significant community concern about the possible erosion of the institution of marriage.
>
> The amendments to the Marriage Act contained in this bill will make it absolutely clear that Australia will not recognise same-sex marriages entered into under the laws of another country, whatever that country may be.
>
> As a result of the amendments contained in this bill, same-sex couples will understand that, if they go overseas to marry, their marriage, even if valid in the country in which it was solemnised, will not be recognised as valid within Australia.[33]

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31 Ibid, 558.

32 It conflicts, for instance, with the guarantees for equality and non-discrimination given under the *International Covenant on Civil and Political Rights*, which was opened for signature on 16 December 1966, 999 UNTS 171, arts 2(1), 26 (entered into force 23 March 1976) to which Australia is a signatory.

33 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004 (Philip Ruddock, Attorney-General, Second Reading Speech, Marriage Amendment Bill 2004).

Newly defined (and confined), *marriage* remains as a contract between husband and wife. However, it is different to other civil contracts in its formation, organisation and dissolution. The capacity to marry is different as are the formalities required to enter into the arrangement. The usual contractual remedies do not apply. Moreover, once contracted the marriage cannot be simply dissolved even if there is agreement between the parties. Marriage and divorce are regulated by the *Marriage Act 1961* (Cth) and the *Family Law Act 1975* (Cth) respectively. And, as Dickey says, one of the very important differences between a marriage and an ordinary civil contract is that 'the legal consequences of marriage are fixed by law.'[34] Nor can the parties decide otherwise.

V SOME UNDERSTANDING OF THE 'EFFECT OF THE MARRIAGE CEREMONY'

Sections 23(1) and 23B(1) of the *Marriage Act 1961* (Cth) provide that a marriage is void where:

> (d) the consent of either of the parties was not a real consent because:
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> ...
>
> (iii) that party was mentally incapable of understanding the nature and effect of the marriage ceremony;[35]

But while it is generally assumed that most participants do understand the nature of a marital contract (the *effect* of the marriage ceremony) this is not always so. There are issues surrounding the capacity to understand, as the following cases show.

A *Canadian cases*

In *Chertkow v Feinstein,*[36] the Alberta Supreme Court considered whether a nullity of marriage should be granted to a husband on the

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34 A Dickey, *Family Law* (4th ed, 2002) 250.

35 *Marriage Act 1961* (Cth) ss 23(1), 23B(1).

grounds that his wife was, and had been, incapable of understanding the nature of the marriage contract and the duties and responsibilities which it created on the grounds of her insanity. The couple had married in 1920 and the 'evidence indicates that both before and after the marriage the defendant was subject at times to spells of moodiness and eccentric behaviour.'[37] Relying on the precedent of *Durham v Durham,* Harvey CJA repeated the words of Sir J Hannen, who said that,

> the capacity to enter into a valid contract of marriage is 'a capacity to understand the nature of the contract, and the duties and responsibilities which it creates.' As pointed out this still leaves for determination the meaning of the word 'understand'…
>
> I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman. I agree with the Solicitor General that a mere comprehension of the words of the promises exchanged is not sufficient.[38]

Despite evidence from various medical practitioners, the husband failed to provide sufficient proof of the wife's insanity as at the time that she entered into the contract of marriage. Timing here was crucial, as evidence of her poor mental state at the time of the hearing was insufficient to ground such proof at the time of the wedding. Moreover, it is clear that the judge considered that a contract of marriage was 'a simple one' and one which did not take 'a high degree of intelligence to comprehend' suggesting that very

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36 *Chertkow v Feinstein* [1929] 3 DLR 339.

37 Ibid 340 (Harvey CJA).

38 *Durham v Durham* (1885) 10 PD, 82 cited by Sir J Hannen in *Chertkow v Feinstein* [1929] 3 DLR 339, 342.

few would be so incapacitated as to not understand. And this despite the following:

> [Dr Fitzpatrick] says, 'I believe she knew she was being married but I think that she didn't fully appreciate the consequences of the marriage.' In this connection I may refer to what took place in the Forster case, 39 Times LR, at p 659, in which counsel asked an expert if the party was in a condition to understand all the consequences of matrimony, when the President interjected with the question, **'Did you ever know anybody who was in a condition to understand all the consequences of matrimony,' to which the witness answered 'No, my Lord.'**[39]

It begs the question as to the proper meaning of *understanding* in this context if no one that enters into marriage ever understands 'all the consequences'! It is a frightening thought.

The later cases of *Hart v Cooper*[40] and *Barrett Estate v Dexter*[41] followed this earlier authority. The *Barrett* case, in particular, referred to *Chertkow* as having settled the law relating to capacity to marry in Alberta. In both instances the plaintiffs failed to establish incapacity. The 2004 case of *Butler v Brown*[42] is even more poignant. Mr Butler brought an action for an order to appoint him as guardian of the property and person of Hilda Brown in order that he might marry her. The application failed, Hockin J finding that it was beyond doubt that Hilda Brown was incapable and as the judge noted 'without the capacity to marry, Mr Butler, as Mrs Brown's guardian would find himself occupying both sides of the marriage contract.'[43] Difficult indeed.

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39 *Chertkow v Feinstein* [1929] 3 DLR 339, 346 (emphasis added).

40 *Hart v Cooper* (1994) CanLII 262 (BC SC).

41 *Barrett Estate v Dexter* (2000) ABQB 520 (CanLII) the appeal dismissed in *Barrett v McClellan* (2004) ABQB 22 (CanLII).

42 *Butler v Brown* (2004) CanLII 35098 (ON SC).

43 Ibid [6].

B *English cases*

The test to determine mental capacity, or incapacity in relation to marriage, in England is defined by the common law. In *In the Estate of Park, Dec'd Park v Park*, it was held that the test is whether the person was

> capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality it cannot be said that he understands the nature of the contract.[44]

The English authorities were considered more recently in a series of decisions by Munby J of the Family Division of the High Court, particularly in *Re E (An Alleged Patient); Sheffield City Council v E & S*.[45] The background facts to this case reveal that E, who was aged 21, had hydrocephalus and spina bifida. There were allegations by the local authority, Sheffield City Council (SCC), that she had a mental age of a 13-year-old and was therefore vulnerable to exploitation. E had met S and, shortly afterwards, moved in to live with him. S was considerably older than E (37), and had been convicted of violent sexual crimes. Having discovered that E and S were planning to marry, the SCC began proceedings to stop E from marrying or associating with S.

In order to resolve this it was necessary to determine the appropriate test for capacity, given that it is presumed that every adult has capacity and the burden of proof falls to those who assert otherwise – in this case the SCC. Further, capacity is issue specific. It is related to the transaction which is to be effected.[46]

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44 *In the Estate of Park, Dec'd Park v Park* [1954] P 112, 127 (Singleton LJ) ('*Estate of Park*'); approved by the Privy Council in *Hill and Hill* [1959] 1 All ER 281, 283.

45 *Re E (An Alleged Patient); Sheffield City Council v E & S* [2004] EWHC 2942 (Fam) (15 December 2005) ('*Re E*').

46 See *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA 1889 (Civ); see also *PS (an adult), Re* [2007] EWHC 623 (Fam), [4].

Counsel for the SCC proposed that the test was whether E had the capacity to understand the marriage contract generally as well as the responsibilities that flowed from it. Counsel for E asked:

> Is the test… whether E is 'capable of understanding the nature of the contract into which she is entering'… or is the test, as SCC appears to submit, whether E has the capacity to understand the implications of marriage to S?[47]

Was the court being asked whether E had the capacity to marry at all or was it being asked to determine the wisdom of this particular marriage? Justice Munby referred to the authorities and came back to the decision in *Park v Park*[48] and *Durham v Durham*[49] approving the words of Sir John Hannen. It was held that the only question for the court was whether E had the capacity to marry and the appropriate test was that proposed by Singleton LJ in the *Estate of Park*. Further, the court had

> no jurisdiction to consider whether it is in E's best interests to marry or to marry S. The court is concerned with E's capacity to marry. It is not concerned with the wisdom of her marriage in general or her marriage to S in particular.[50]

A person had to understand the nature of the marriage contract, meaning that he or she had to be mentally capable of understanding the duties and responsibilities that normally attached to marriage.

> Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing

47 *Re E* [2004] EWHC 2942 (Fam) (15 December 2005), [14].

48 *Park v Park* (1954) P 89 (Karminski J) ('*Park v Park*'), and later on appeal, affirming the earlier decision, *In the Estate of Park, Dec'd Park v Park* [1954] P 112 (Singleton LJ) ('*Estate of Park*').

49 *Durham v Durham* (1885)10 PD, 82

50 *Re E* [2004] EWHC 2942 (Fam) (15 December 2005), [14].

> of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance.[51]

Nor was it sufficient that someone appreciated that he or she was taking part in a marriage ceremony or understood its words, even though it was held (mirroring the words of Karminski J in the earlier case of *Park v Park*) that the contract of marriage was in essence a simple one, which did not require a high degree of intelligence to comprehend. E was found to have the capacity.

Justice Munby presided over a further three cases concerning vulnerable adults and the capacity to marry,[52] and referred (unsurprisingly with approval) to the earlier decision in *Re E*. The line of cases effectively establishes that the test to determine mental capacity or incapacity in relation to marriage is that which was stated by Singleton LJ in *In the Estate of Park* as quoted above.

C *Australian legislation and cases*

Sections 23(1) and 23B(1) of the *Marriage Act 1961* (Cth) set out the only grounds on which a marriage may be void and include (d)(iii):

> (1)(d) the consent of either of the parties is not a real consent because…
>
> (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony;[53]

This legislative test was first introduced as s 18 of the *Matrimonial Causes Act 1959* (Cth), which was later replaced by s 51 of the *Family Law Act 1975* (Cth) which repealed the former Act.

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51 *Re E* [2004] EWHC 2942 (Fam) (15 December 2005), [14].

52 *M v B, A and S (By the Official Solicitor)* [2005] EWHC 1681 (Fam); *Re SA (A Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam); *X City Council v MB, NB and MAB (By his Litigation Friend and the Official Solicitor)* [2006] EWHC 168 (Fam).

53 *Marriage Act 1961* (Cth) ss 23(1)(d)(iii), 23B(1)(d)(iii).

Following further legislative amendments, the test is now located in the *Marriage Act 1961* (Cth) as above. Interestingly, it would appear that the cases in Australia which consider the capacity to understand the nature and effect of the marriage ceremony relate to elderly people suffering from some form of senile dementia. This is unlike the English authorities. Nor are there many Australian cases on the point.

The earliest relevant case is that of *Dunne v Brown*,[54] which was an application for nullity brought by the husband's daughter from a previous marriage. It involved an elderly, hospitalised man marrying the woman with whom he had been living in a defacto relationship for some 15 years. Despite the husband's mild dementia, McCall J concluded that the evidence of witnesses to the ceremony coupled with the fact of the long-standing relationship were sufficient to satisfy the court that the husband understood the nature and effect of the marriage ceremony. The marriage was held to be valid. It was, after all, 'regularizing a fact'.[55] *Dunne v Browne* later was considered by the NSW Supreme Court by Young CJ, in 2005 in the case of *Privet v Vovk*,[56] in the context of the court's jurisdiction to hear the matter. The Supreme Court proceedings arose out of a will which was purported to have been made by the deceased in anticipation of her marriage. The facts of the case were such that after (brief) consideration of s 23 of the *Marriage Act 1961* (Cth), both the marriage and the will were held to be invalid.

AK v NC (Nullity of a Marriage: Capacity)[57] was an application for nullity on the grounds that the 'wife' (AK) was suffering from senile dementia and therefore incapable of giving her consent to the marriage. At issue was whether capacity to marry involves understanding of marriage generally or whether it relates to the particular marriage in question.

The circumstances were unusual. Both AK and the 'husband' (NC) were in their 80s and had been married to each other before (in

54 *Dunne v Browne* (1982) 60 FLR 212.

55 Ibid 223.

56 *Privet v Vovk* [2005] NSWSC 1258.

57 *AK v NC (Nullity of a Marriage: Capacity)* [2003] FamCA 1006 ('*AK v NC*').

1947) but had divorced in 1993. They had lived apart after the divorce although in close proximity. Following an illness in 2000, AK was admitted to a nursing home and a guardian was appointed to look after her affairs. NC visited AK frequently and the wedding ceremony took place when he had visited her in the home and taken her for an outing. The application for nullity was brought by AKs Next Friend.[58] The proceedings were further complicated because NC spoke only faltering English (and needed an interpreter) and was deaf. Further, although he was unaware of the legal system and the specific issues involved in this case he was mostly unrepresented. Nevertheless, the matter proceeded.

Chisholm J examined the relevant authorities including Park v Park,[59] Hill v Hill,[60] *Mathieson (falsely called Perry) v Perry*,[61] *Faull v Reilly*,[62] *Evans v Brenton (Falsely called Tredennick)*,[63] and Dunne v Brown.[64] He indicated that Park v Park has been treated as a leading authority when it was held that 'the person in question was capable of understanding the nature and effect of marriage, although he was not capable of making a valid will.'[65] The judge in the earlier case of Park v Park (Karminski J) had also quoted the telling remark by Sir James Hannen in Durham v Durham,[66] where he opined that a contract of marriage was essentially simple and that as such a did not require a 'high degree of intelligence to comprehend'. There is no single test of capacity. The test varies depending on the type of task involved. Thus in Gibbons v Wright, the court held:

> The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation

58 As Chisholm J noted, for practical purposes it was AK's niece and nephew, who had been appointed guardians by the NSW Guardianship Tribunal, who sought a declaration of nullity.

59 *Park v Park* (1954) P 89 (Karminski J).

60 *Hill v Hill* [1959] 1 WLR 127.

61 *Mathieson (falsely called Perry) v Perry* (1939) 56 WN (NSW) 89.

62 *Faull v Reilly* [1971] ALR 157.

63 *Evans v Brenton (Falsely called Tredennick)* (1887) 3 WN (NSW) 129c.

64 *Dunne v Browne* (1982) 60 FLR 212.

65 *AK v NC* [2003] FamCA 1006 [19].

66 *Durham v Durham* 10 PD, 82.

> to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.[67]

Accordingly, the standard or test for capacity in this context is at a lower level than the standard required to execute a will and in *Park v Park*, Karminski J was able to find that the deceased had the:

> capacity to marry at 11.30 on 30 May 1949… having previously been found by Pearce J and a jury not to have had the capacity to make a will early in the afternoon of the same day (Re Park, Culcross v Park (1950) The Times December 2).[68]

Chisholm J then went on the note that:

> Both in law and in society, a marriage has a large variety of consequences. Few lawyers, let alone non-lawyers, would be able to make a comprehensive list of even the legal consequences…[69]

And that:

> It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences. Of course if there were such a requirement, few if any marriages would be valid.[70]

Does this prove the old adage that love is blind? Perhaps, although Chisholm J was keen to note, despite the view from the authorities, that even though a marital contract is simple, 'there are some problems in applying the standard, particularly in a case like this.'[71] Clearly awareness of going through a wedding ceremony is

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67 *Gibbons v Wright* (1954) 91 CLR 423, 437.

68 *Re E (An Alleged Patient); Sheffield City Council v E and S* [2004] EWHC 2942, [25] (Munby J).

69 *AK v NC* [2003] FamCA 1006 [20].

70 Ibid [21].

71 *AK v NC* [2003] FamCA 1006 [22].

insufficient. There needs to be more. But how much more? It also extends to a need to understand the *effect* of the ceremony. Citing a passage from *Dunne v Brown*,[72] he concluded that a valid consent to marriage involves either an understanding of the consequences of a marriage or the specific consequences for the particular marriage in issue. However, he did not feel that it was necessary to rule on the apparent inconsistency of these approaches. Rather, he held that for a marriage to be valid it was not necessary for the party whose consent was in question to have a detailed and specific understanding of the legal consequences of marriage either as it relates to marriage generally or to the particular circumstances.

Thus despite the fact that AK was suffering from dementia and was under guardianship it was not established that she was incapable of understanding the nature and effect of the marriage ceremony. This accords with the authorities.

> [T]his case is not about the wisdom of her remarriage but about her mental capacity to consent to it.
>
> In my view the evidence is consistent with the wife having an understanding that marriage to the husband involved some sort of public choice to be involved in life with him, and, circumstances permitting, going to live with him as man and wife. It is not clear to what extent she understood the precise legal consequences of marriage in relation to such matters as inheritance, maintenance, ownership of property, and her ability to live where she chose, but as earlier indicated the validity of a consent to marriage does not require such knowledge.[73]

The *AK v NC* case was considered in the more recent case of *Babich v Sokur & Anor*,[74] and the apparent inconsistency of approaches, as indicated but not resolved by Chisholm J, was addressed. This newer case again involved an application for nullity of the marriage on the grounds that the wife, Mrs Babich, was mentally incapable of understanding the nature and effect of the marriage ceremony that

72 *Dunne v Browne* (1982) 60 FLR 212.

73 *AK v NC* [2003] FamCA 1006 [169], [170].

74 *Babich v Sokur & Anor* [2007] FamCA 236.

was officiated in September 2004. The facts reveal that the husband had moved into a flat attached to Mrs Babich's home in 1998 as a boarder, and that he lived there rent free in return for his assistance to cut the grass, wash and shop. At that time the wife's first husband was living in a nursing home. They were of Ukrainian extraction. The wife was then aged 74 and the husband was 59. Evidence was presented of the steady decline of the wife's mental state over the years between the time that she took him in a boarder, her first husband's death and the marriage to Mr Sokur in 2004. Unlike in the earlier case of *Dunne v Brown,* where McCall J had indicated that the marriage was 'regularizing a fact',[75] or even of *AK v NC* where the parties had originally been married for 46 years (divorced and then re-married), the relationship between Mrs Babich and Mr Sokur was, evidently, of an entirely different nature. Mullane J found the evidence of the husband, as to any personal intimacy between the couple, to be unconvincing. Indeed he found that the 'husband married the wife for financial advantage, and that was his priority'.[76]

Because of the particular facts of *AK v NC* and his application of the English authorities, Chisholm J had felt it unnecessary to resolve the apparent ambiguity of approaches to the test as to consent under s 23B(1)(d)(iii). This case of *Babich* was, however, different. Further, Mullane J cast doubt on the apparent assumption by earlier Australian courts that the English case law is directly applicable to the Australian legislative test.[77]

In reviewing the relevant authorities, including *AK v NC*, Mullane J now addressed the issue of whether the test as provided under Australian law required a general understanding of the consequences of ***a*** marriage or a more specific understanding of the consequences of ***the*** particular marriage.

> 252. The questions arises [sic] whether under the Australian test there needs to be a general understanding of marriage and its consequences or an understanding of specific consequences of the marriage that the person is about to enter into.

75 *Dunne v Browne* (1982) 60 FLR 212, 223.

76 *Babich v Sokur & Anor* [2007] FamCA 236, [30].

77 Ibid [240].

> 253. Dr Anthony Dickey QC has also expressed a view:
>
> Although S 23B(1)(d)(iii) refers to a person being mentally incapable of understanding the nature and effect of the marriage ceremony, it would seem that there is in fact only one substantial requirement here, for an application of the nature of a marriage ceremony necessarily involves an appreciation of its general effect. (Such an approach was adopted by the majority of the Court of Appeal in *In the Estate of Park* (1954) p89 at 127 and 133, applied in Australia in *Brown and Brown* (1982) 60 FLR 212 at 222-223.)[78]

This further led to an interpretation of the legislative provision, and he was able to say, in answer to the question posed, that

> it is in my view significant that the legislation not only requires a capacity to understand 'the effect' but also refers to 'the marriage' rather than 'a marriage'. In my view taken together those matters require more than a general understanding of what marriage involves. That is consistent with consent in contract being consent to the specific contract with specific parties, consent in criminal law to sexual intercourse being consent to intercourse with the specific person, and consent to marriage being consent to marriage to the specific person.[79]

He concluded that although Mrs Babich had a general understanding of what is involved in ***a*** marriage:

she was incapable of applying that in considering what marriage to the husband would involve and in deciding whether to enter the marriage. She was incapable of considering the effect of the marriage on her. She was mentally incapable in that regard of understanding the effect of the marriage ceremony, and her consent was not real.[80]

78 Ibid [252]-[253].

79 Ibid [255].

80 Ibid [256].

Thus, according to Mullane J, the test provided for under the relevant section of the *Marriage Act 1961* (Cth) is of a higher standard than that of the English common law. It not only involves a general understanding of the consequences of marriage it also requires specific understanding of ***the*** nature and effect of ***the*** marriage ceremony in which participants take part. It does not, however, go so far as to require a detailed knowledge of ***all*** of the consequences of marriage generally. That, it seems, is too much.

VI THE LEGAL CONSEQUENCES OF MARRIAGE

A *To have and to hold from this day forward*

Many of the consequences which used to flow, historically, from the doctrine of unity have now been effectively removed. First, there were complex common law rules concerning a wife's property – or rather her lack of it. These no longer apply. Second, a husband and wife could not sue each other (in either tort or contract).[81] Nor could a husband be guilty of raping his wife,[82] although he could bring action for loss of consortium against anyone who enticed her away or injured her.[83]

Importantly, also, spouses were not considered to be competent or compellable witnesses against each other (spousal immunity).[84] According to s 100 of the *Family Law Act 1975* (Cth), the position is quite clear. They are now both competent and compellable.

> **S 100 Evidence of husbands and wives**
>
> (1) The parties to proceedings under this Act are competent and compellable witnesses.
>
> (2) In proceedings under this Act, the parties to a marriage are competent and compellable to disclose communications made between them during the marriage.

81 Now reversed by s 119 of the *Family law Act 1975* (Cth): 'Either party to a marriage may bring proceedings in contract or in tort against the other party'.

82 *R v L* (1991) 174 CLR 379.

83 See s 120 *Family Law Act 1975* (Cth).

84 See *Magill and Magill* [2006] HCA 51.

> (3) Subsection (2) applies to communications made before, as well as to communications made after, the date of commencement of this Act.

The position according to the criminal law, is, however, more complex, for while they are now competent,[85] they are not always compellable.[86] The position differs according to the jurisdiction.

But despite these movements away from the doctrine of unity, it is still not the case that there is no difference between marriage and cohabitation. One of the more obvious examples, which is often overlooked, is that one of the consequences of marriage is that you cannot marry again without obtaining a divorce. Marriage is a contract which, unlike other contracts, cannot be simply dissolved even if there is agreement between the parties.

B *Forsaking all others*

1 *Bigamy*

The case of *R v Eames*[87] is both recent and 'public'. Bigamy, it seems, is a fascinating topic. In the immortal words of Oscar Wilde, 'Bigamy is having one wife too many. Monogamy is the same.' Richard Eames' case highlighted one of the less attractive consequences of marriage – that it is public policy and legislatively defined[88] that marriage is monogamous and that it is a criminal offence to enter into the arrangement twice.

> Bigamy is a statutory offence. It was made a felony in 1603. 'With us in England' (says Blackstone, Commentaries, Vol 4, bk IV, Ch 13, s 2) 'it is enacted by statute 1 Jac I, c 11, that if any person,

85 Various statutory provisions in all jurisdictions have now altered the common law rules, eg, *Evidence Act 1995* (NSW) s 12.

86 See *Regina v Fowler* [2000] NSWCCA 352; *Regina v Glasby* [2000] NSWCCA 83.

87 *R v Eames* (Unreported, Hobart Magistrates Court, Ian Matterson M, 28 April 2005).

88 Section 94 *Marriage Act 1961* (Cth) '(1) A person who is married shall not go through a form or ceremony of marriage with any person. Penalty: Imprisonment for 5 years.'

> being married, do afterwards marry again, the former husband or wife being alive, it is felony…'.[89]

Mr Eames was not the first person in Tasmania (or Australia) to indulge.[90] The first person to be charged with bigamy in Tasmania was Sarah Nicholls who pleaded guilty to a charge of bigamy and was remanded for sentence on Tuesday March 2, 1841. She was sentenced the following day to six months at the Cascades Female Factory for having been a 'bad' bigamist.[91]

> Sarah Nicholls was brought up for sentence, when his Honor [sic] observed, that although this was the first case for bigamy which had come before the court, it was a very bad one; she had married her first husband in 1839, and while he was absent whaling, she had married another man, and even made a matter of jocularity of it as she returned from church! His Honor [sic] was very glad that the Attorney-General had prosecuted the prisoner, for bigamy was by no means unfrequent [sic] in this colony, in consequence of the impunity with which it had been hitherto permitted. The sentence that he should pass was, that the prisoner be transported for seven years, and he hoped that the publicity which would be given to this sentence would have the effect of putting a stop to so bad a practice.[92]

Cases of bigamy were not always prosecuted. According to Monahan and Young,[93] there was a double standard which existed in

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89 *Thomas v R* (1937) 59 CLR 279, 302 (Dixon J).

90 R Grace, 'Bigamist gets 22 months' prison', *Herald Sun* (25 April 2005) <http://www.heraldsun.news.com.au/printpage/0,5481,15114000,00.html> at 11 May 2005. 'The case is Tasmania's first bigamy charge since 1981 and only one of 14 since 1952'.

91 It begs the question as to what is a 'good' one.

92 *R v Nicholls* [1841] TASSupC 11 (3 March 1841). Source: *The Hobart Town Courier and Van Diemen's Land Gazette*, 5 March 1841. See also *Hobart Town Advertiser*, 5 March 1841. According to AOTSC 41/4, p 69, by order of the Colonial Secretary, Nicholls was to be sent to the Cascades Female Factory for six months and then assigned. See < http://www.austlii.edu.au//cgi-bin/disp.pl/au/other/TASSupC/1841> at 28 April 2007.

93 G Monahan and L Young, *Family Law in Australia* (6th ed, 2006) 7.

relation to convicts and their transportation to the colonies which severed their marriages and became a mechanism for *ersatz* divorce given the virtual impossibility of reconciliation. This popular doctrine was based on the common law presumption of death which provided that 'a person could be presumed dead, who had not been heard of for seven years by those who would be most likely to hear of them if they were alive'[94] and was a defence to bigamy. This had been provided for by the Act passed in 1603, but with further social disruption as the result of colonial expansion, further Acts enabled even easier remarriage. 'One [Act] in 1822, enabled men and women to remarry provided they signed an affidavit to the effect that their spouse had died.'[95] Conditions in the early colonies of New South Wales and Van Diemen's Land were not conducive to the establishment and maintenance of formal marriages. They were new, dislocated 'civilisations' where men vastly outnumbered women. 'Numerous cases of bigamy occurred, often committed under cover of the doctrine, and often without criminal intent. It is doubtful whether all but a very small proportion were ever pursued in court.'[96] A review of the early decisions of the Superior Courts in NSW, 1788-1899 reveals only five prosecutions for the crime.[97] In Tasmania (Van Diemen's Land) after searching the decisions of the 19th Century Tasmanian Superior Courts, there only appears to be one – that of Sarah Nicholls, as above.

Even in more 'modern' times there are few reported cases of bigamy. The seminal Australian case would appear to be the High Court case of *Thomas v R.*[98] This was an appeal against a decision from the Victorian Supreme Court. Mr Thomas had been found guilty of bigamy in the Victorian Court. He was charged and found guilty of going through a marriage ceremony with A during the life

94 Smith and Hogan, *Criminal Law* (6th ed, 1988) 711 cited in Finlay, above n 19, 8.

95 D Kent and N Townsend, 'Some Aspects of Colonial Marriage: A Case Study of the Swing Protesters' (1998) 74 *Labour History* 40, 42.

96 Finlay, above n 19, 10.

97 *R v Kelly* [1837] NSWSupC 80 (15 November 1837); *R v Maloney* [1836] NSWSupC 24 (19 April 1836); *R v Lindsay* [1841] NSWSupC 46 (12 May 1841); *Davis v Crispe* [1834] NSWSupC 100 (3 October 1834); *In re Bradbury* [1836] NSWSupC 54 (15 July 1836). See <http://www.law.mq.edu.au/scnsw/html/subject_index_a-c.htm>.

98 (1938) 59 CLR 279; [1938] VLR 32; [1938] ALR 37; (1938) ALJ 343.

of his former wife B (who had been married before). Central to the issue was his mistaken, but honest, belief that the divorce granted to B's former husband had never been made absolute – hence his marriage to B was not valid. The jury in the Victorian case had found that he did believe 'bona fide and on reasonable grounds' that the divorce had not been made absolute. Despite this, they found him guilty. The High Court varied the Victorian decision, and applying the principle established in the 1889 case of *R v Tolson*,[99] found Thomas not guilty. Along the way Dixon J upheld the 'innocence' of marriage when he said the following:

> It must be remembered that, although it is going through the ceremony of marriage that exposes the party to punishment, marriage itself is perfectly innocent. The essence of the offence lies in the previous marriage and its continuance. It is only because of the wrong done by the wickedness of going through a form of marriage with the knowledge of the impediment of the prior marriage that subsequent marriage merits punishment.[100]

The law of bigamy in Australia in the 21st century, is statute based. Section 94 of the *Marriage Act 1961* (Cth) provides as follows:

> (1) A person who is married shall not go through a form or ceremony of marriage with any person.

Further:

> (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that:
>
> (a) at the time of the alleged offence, the defendant believed that his or her spouse was dead; and
>
> (b) the defendant's spouse had been absent from the defendant for such time and in such circumstances as to provide, at the time of the alleged offence, reasonable grounds for presuming that the defendant's spouse was dead.

99 *R v Tolson* (1889) 23 QBD 168.

100 *Thomas v R* (1938) 59 CLR 279, 311 (Dixon J).

Section 94(8) expressly excludes the operation of State legislation, nevertheless, s 92 of the NSW *Crimes Act 1900*, provides that anyone who marries another person during the life of a former spouse is guilty of the offence and liable to imprisonment for seven years. The NSW Act also provides that there will be no conviction if the former spouse has been absent for seven years (or five if ordinarily domiciled in NSW) and there is an honest belief that that spouse is not living – the presumption of death doctrine.

The Commonwealth offence is dealt in a court of summary jurisdiction – Local Court – and the maximum penalty provided is two years imprisonment. The fact that such matters are dealt with in the lower courts goes a long way to explaining why there are very few reported cases[101] and why Mr Eames case was so newsworthy.

C *For better or for worse*

Two of the most important consequences of a marriage are the creation of mutual rights and obligations in respect of maintenance and the alteration of property interests as between spouses. As Dickey says:

> From the moment a couple become husband and wife, s 72 of the *Family Law Act 1975* (Cth) imposes a liability upon each spouse to maintain the other in certain circumstances. Moreover, from the very moment of marriage, each spouse may institute proceedings under s 79 for an alteration of their property interests; that is for an order that an interest in property belonging to one spouse be transferred to the other not by virtue of the ordinary rules of common law and equity but on account of other, broader factors that concern events and circumstances relating to marriage.[102]

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101 Note that there are also a handful of cases which discuss bigamy from the Immigration Review Tribunal. See for instance, APPLICANT: *Ms Sakineh Kalantarizadeh Principal: Mr AnwarUl Hassan IRT reference: S94/01814 No 5593*; [1995] IRTA 5593 (30 June 1995).

102 Dickey, above n 34, 274-5.

These important provisions in the *Family Law Act 1975* (Cth) set married couples apart from those that are merely cohabiting, even though the various Acts which regulate property interests between non-married separated couples, which have been passed by all the states and territories, have made inroads.[103] However, it is still the case that the relevant provisions of these statutes are not triggered from the moment of cohabitation. There are necessities to establish that the relationship exists and there are 'qualifying' periods of time specified[104] before the right to take action accrues. The only exception here is the *Relationships Act 2003* (Tas) where a couple in a personal relationship can register the relationship providing proof of the existence of the relationship and a commencement date. Thus the relationship is not begun by the act of cohabitation but by the registration process.

Further, in all but one jurisdiction, maintenance, if present at all, is limited.[105] The exception here is Western Australia, where legislative amendment in 2002,[106] has provided separated de facto couples with the same rights regarding property adjustment and maintenance as those enjoyed by married couples.[107] Traditionally, the two schemes (for married as opposed to non-married couples) have been different because it has been public policy to keep them separate and apart, assuming that the couples in question have chosen to opt out of the institution of marriage so that they are not so bound. A logical retort to this argument is that this may well be the case for those for whom marriage is an option but there are those who would wish to marry but who are denied – same-sex couples.

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103 *Property (Relationships) Act 1984* (NSW); *Property Law Act 1958* (Vic); *Property Law Act 1958* (Qld); *Family Relationships Act 1975* (SA); *Relationships Act 2003* (Tas); *Domestic Relationships Act 1994* (ACT); *De Facto Relationships Act 1991* (NT); *Family Court Act 1997* (WA) Part 5a — De facto relationships.

104 See s 17 *Property (Relationships) Act 1984* (NSW) which requires that the couple have lived together in a *domestic relationship* for a period of at least two years.

105 Section 26 of the NSW Act specifies that there is no general right to maintenance between parties to relationship.

106 *Family Court Amendment Act 2002* (WA).

107 This has been achieved by inserting 'mirroring' provisions in the *Family Court Act 1997* (Cth), for instance s 205ZC (Right of a partner to maintenance) mirrors s 72 of the *Family Law Act 1975* (Cth). Note, however, that the couple must be separated. Cf the provisions of the *Family Law Act 1975* (Cth).

Since legislative amendments at the end of 2002, superannuation interests can now be treated as property under the *Family Law Act 1975* (Cth),[108] and separating married couples can choose to split or flag the superannuation entitlements. This can be done by either agreement or by an order of the court. This same benefit does not flow to de facto separated couples. Courts in the various states and territories, are left with few choices as to how to deal with superannuation given that superannuation is treated as a financial resource, they lack a way to quantify the benefit and cannot either split or flag the resource. In this circumstance the recent New South Wales Court of Appeal decision in *Chanter v Catts*[109] is illuminating. The court held that the superannuation in this case was property and could, therefore, be included in the pool of funds to be adjusted under s 20. This is most unusual but it is also worth noting that the fund in question here was a self-managed fund, over which the beneficiary had control. Nor did the court provide any guidance as to how such 'property' could be adjusted in the absence of legislation.

It is worth noting that further legislative change in this area of regulating the property interests of non-married partners is planned. New South Wales, Queensland, Victoria and the Northern Territory have referred their powers in relation to same-sex and de facto couples. South Australia and the Australian Capital Territory are yet to do so, while Western Australia has no need. The decision to refer such powers was made in 2002, however, a difficulty now lies with the federal government's 'reception'. In 2004 the *Marriage Act 1961* (Cth) was amended to define *marriage*, and to specifically exclude same-sex couples. It now seems likely that the federal government will legislate to exclude same-sex couples here as well, thus maintaining a separate, 'us-and-them' system.

108 *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth).

109 *Chanter v Catts* (2006) DFC 95-329.

D *To love and to cherish*

The right to maintenance of a non-fiscal type (sometimes called mutual society, comfort and support) has been recognised by the common law. Referring to them as *connubial rights*, Brennan J said in *R v L*,

> the abolition of jurisdiction to decree restitution of conjugal rights or judicial separation has eliminated the occasions when the courts have found it necessary to spell out the mutual rights of the spouses and the occasions when, in consequence of a breach of connubial obligation by one spouse, the courts have granted relief to the other. It must be said that the Family Law Act, in its provisions relating to divorce, operates without reference to the rights and obligations of the parties arising from the marriage, but it does not abolish connubial rights and obligations. If it had that effect the Act would be invalid, for the institution of marriage and the status of husband and wife are inseparable from the connubial rights and obligations which are the incidents of the institution and which give content to the status.[110]

A description of such mutual rights had been included earlier, when he said,

In Powell v Powell (1948) 77 CLR 521, at p 524, Latham CJ said:

> Neither a husband nor a wife can repudiate the status of marriage - they remain married whether they like it or not - but one of them may so behave as to destroy some or all of the various elements which constitute married life. Cussen J indicated these elements in Tulk v Tulk:- 'Marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and in private, correspondence during separation, making up as a whole the consortium vitae…'.[111]

These obligations are akin to a position of guardianship, which role the next-of-kin or spouse most usually assumes unless there are

110 *R v L* (1991) 174 CLR 379, 397-8.

111 Ibid 394.

cogent reasons not to. Thus the role flows quite seamlessly to a spouse, but without marriage such a role has to be formalised.

E *In sickness and in health*

1 *Guardianship*

Difficulties may arise for non-married couples during serious illness and after death. As indicated above, the role of *guardian* is akin to the obligation of support that spouses owe to each other, however, guardianship can be vexed. This was shown in the sad and much-publicised US case of *Schiavo.*[112] Theresa Marie Schiavo died on 31 March 2005 after a period of 15 years in which she had lain in a permanently vegetative state in a Florida hospital. Terri had suffered a heart attack in 1990 which had lead to apparently irreversible brain damage. She had been married to Michael Schiavo since 1984. In times of sickness, when an individual loses the capacity to make or express decisions regarding his or her own care and welfare, medical decisions must be made by another person. This 'guardian' role mostly falls to the next-of-kin; the spouse. It is part of the mutual care obligations that which are owed between spouses.[113] In this case, this role was confirmed to Michael Schiavo by the court on 18 June 1990. For the next 15 years of Terri's life her husband and parents fought over how best to care for Terri and eventually over who should make the ultimate life/death decisions for her. Even the State of Florida intervened.[114]

In Australia, formal orders which appoint such guardians are not necessarily made unless there is a break down in arrangements. The next-of-kin, usually the spouse, assumes the role unless a medical

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112 *In re Schiavo*, 2002 WL 31817960 (Fla Cir Ct Nov 22, 2002) (No 902908-GB-003) Nov 22 2002 (concerning the guardianship held by Michael Schiavo of his wife and her right to refuse life-sustaining treatment). The relevant dates were obtained from <http://www.miami.edu/ethics2/schiavo/timeline.htm> at 10 April 2005.

113 Marriage ceremonies used to include vows to look after each other 'in sickness and in health'.

114 *Bush v Schiavo*, 866 So 2d 140 (Fla 2nd DCA, 2004) (on intervention by the Florida Governor, Jeb Bush, to prevent the removal of the gastrostomy tube).

guardian has been appointed.[115] Advance health directives, which express wishes about future care (including, importantly, wishes not to be revived) and/or appoint someone to act can be made under legislation in all jurisdictions,[116] except Western Australia where the Bill to enable the creation of advance health directives is yet to pass.[117]

Under the laws of Florida it would have been possible for Terri Schiavo to formally express her wishes under an advance directive. She had not done so,[118] however, the very public circumstances surrounding her death and the apparent willingness of the Governor to intervene and overrule her husband suggest that those wishes would not have been respected had they expressed a desire not to be kept alive artificially.

F *For richer for poorer*

Certain rights and liabilities flow from the status of marriage as between married couples and the state. Determining the extent of these rights and liabilities is the difficult part. For while it is true that consequences are fixed and unalterable they are not summarised anywhere and are largely unknown. Benefits accrue in the areas of taxation, welfare, immigration, succession, workers' compensation as well as other areas of civil and criminal law. The complexity of arrangements which need to be put in place in order to simulate

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115 Although note the definition of person responsible under 4(c) of the *Guardian and Administration Act 1995* (Tas) '(c) where the other person is of or over the age of 18 years, one of the following persons, in order of priority:
(i) his or her guardian;
(ii) his or her spouse;
(iii) the person having the care of the other person;
(iv) a close friend or relative of the other person.'

116 See *Medical Treatment Act 1994* (ACT) s 13; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 7, 8; *Medical Treatment Act 1988* (Vic) s 5A; *Guardianship Act 1987* (NSW) s 6E(1)(d); *Guardian and Administration Act 1995* (Tas) s 25(1)(e); *Powers of Attorney Act 1998* (Qld) s 15.

117 Acts Amendment (Consent to Medical Treatment) Bill 2006 (WA) proposes to insert definition of 'advance health directive' into s 3(1) of the *Guardianship and Administration Act 1990* (WA) to enable such under Part 9B.

118 B Noah, 'Politicizing the End of Life: Lessons from the Schiavo Controversy' (2004) 59 *University of Miami Law Review* 107, 133.

marriage is sobering. As indicated above, there are many instances where heterosexual couples have been effectively equated. But this is not always the case, particularly for same-sex couples, as Jenni Millbank wrote,

> In New South Wales alone over 120 pieces of legislation make reference to spouses and thus codify their legal relations in numerous contexts. Nationwide there are obviously hundreds and perhaps thousands of Acts which make reference to spouses. 'Spouse' in many laws specifically includes both married and heterosexual de facto spouses but not lesbian and gay partnerships…
>
> Often statutes do not specify heterosexuality in their definitions of spouses, but the courts have read in this requirement unless lesbians and gays are specifically included or another 'catch-all' non-spousal category is available. Likewise almost all laws that regulate parent–child relationships either specify or assume a biological relationship and so do not recognise the relationship of a lesbian co-mother or gay co-father who is a caregiver with no biological relationship to the child. There are a few notable exceptions, mostly in areas of law concerning compensation for injury or death, as well as in the Family Law Act itself, where the relationship of psychological parent or caregiver is recognised.[119]

The point which needs to be stressed here is that in order to place non-married couples in the same position vis-à-vis the state as their married peers, there needs to be conscious, legislative intervention.

Following a fatal accident where a person is wrongfully killed, survivors, who have been dependant on the deceased, are entitled to take action for compensation for their loss. There are acts in all states and territories[120] which operate for the benefit of certain

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119 Millbank, 'If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?'(1998) 12 *Australian Journal of Family Law* 99, 104-5, noting that since this article has been written all states and territories have established statutory property regimes for separating couples de facto and several jurisdictions include same sex couples.

120 *Compensation to Relatives Act 1897* (NSW); *Wrongs Act 1958* (Vic); *Supreme Court Act 1921* (Qld); *Wrongs Act 1936* (SA); *Fatal Accidents Act 1959* (WA); *Fatal*

people related or dependant on the victim. Such people are spouses, siblings, parents and children of the victim, however, all jurisdictions allow claims by de facto spouses. This was not always the case. The inclusion of de facto spouses in the category of those who could maintain actions and obtain benefits needed statutory intervention.

Workers' compensation legislation has been passed in all jurisdictions in Australia including the Commonwealth and in each of these jurisdictions both married and de facto spouses are now included. The rights, duties, benefits and entitlements of injured workers and their dependants, however, vary according to each jurisdiction. Under the Commonwealth legislation,[121] for instance, there are no entitlements for same-sex partners.

In areas such as health, taxation, pensions and social security, de facto heterosexual couples are most usually placed the same position as their married peers in various state and federal acts. However, same-sex partners are specifically excluded from being able to share in such benefits accrued from the Commonwealth.[122] Under the *Social Security Act 1991* (Cth), couples living in de facto, or 'marriage-like' relationships are treated in the same way as married couples. However, same-sex partners are not. Under s 4(2) of the Act:

> a person is a member of a couple for the purposes of this Act if:
>
> (a) the person is legally married to another person and is not, in the Secretary's opinion (formed as mentioned in subsection (3)), living separately and apart from the other person on a permanent or indefinite basis; or
>
> (b) all of the following conditions are met:
>
> (i) the person has a relationship with a person of the opposite sex (in this paragraph called the partner);
>
> (ii) the person is not legally married to the partner;

Accidents Act 1934 (Tas); *Compensation (Fatal Injuries) Act 1974* (NT); *Compensation (Fatal Injuries) Act 1968* (ACT).

121 *Safety Rehabilitation and Compensation Act 1988* (Cth).

122 M Pelly, 'Judicial backing for gay couples', *Sydney Morning Herald* (Sydney), 16 June 2006, 3.

(iii) the relationship between the person and the partner is, in the Secretary's opinion (formed as mentioned in subsections (3) and (3A)), a marriage-like relationship;

(iv) both the person and the partner are over the age of consent applicable in the State or Territory in which they live;

(v) the person and the partner are not within a prohibited relationship for the purposes of section 23B of the Marriage Act 1961.[123]

G *From this day forward until death do us part*

1 *Death, inheritance and testators family maintenance*

Who will inherit the property of a deceased is determined by whether there is a valid will or not, but in both circumstances, a distinction remains between married and non-married couples. This is constant in all jurisdictions.[124]

New South Wales has recently overhauled its legislation regulating wills and probate with the new (but yet to be proclaimed) *Succession Act 2006* (NSW). And yet, the distinction remains. First, a marriage will revoke a will[125] unless it has been made in contemplation of a marriage. The commencement of cohabitation has no effect. Conversely, the divorce of a testator (or the annulment of his or her marriage) revokes any gift to the testator's former spouse. As with the commencement of cohabitation, separation from a de facto partner has no effect here. Also, the minimum age for making a will remains at 18.

(1) A will made by a minor is not valid.

(2) Despite subsection (1):

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123 *Social Security Act 1991* (Cth) s 4(2).

124 *Wills Probate and Administration Act 1898* (NSW); *Administration and Probate Act 1958* (Vic); *Succession Act 1981* (Qld); *Administration and Probate Act 1919* (SA); *Administration and Probate Act 1935* (Tas); *Administration and Probate Act 1979* (NT); *Administration and Probate Act 1966* (ACT); *Administration Act 1903* (WA).

125 *Succession Act 2006* (NSW) s 12 (cf *Wills, Probate and Administration Act 1898* (NSW) s 15).

> (a) a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place, and
>
> (b) a minor who is married may make, alter or revoke a will, and
>
> (c) a minor who has been married may revoke the whole or any part of a will made while the minor was married or in contemplation of that marriage.[126]

Two points are worth noting here. As s 5(2)(b) provides, the minimum age of marriage is 18 (for both parties) unless one of the underage parties has been given consent by the court. So it is arguable that this provision will have little practical effect. However, as with adults, the will of a minor made in contemplation of marriage can be valid, but again there is no allowance for a will made in contemplation of the commencement of a de facto relationship. The two simply do not equate.

Where there is no valid will, the person having died intestate, there are provisions in the various pieces of legislations which provide for intestate succession, altering the common law rules. In New South Wales, the *Wills Probate and Administration Act 1898* (NSW) was amended in 1999 so that 'de facto spouse' is now given the same meaning as under the *Property (Relationships) Act 1984* (NSW). In circumstances where the intestate person is survived by both a legal and a de facto spouse, the de facto will only inherit if he/she was in a de facto relationship with the intestate person for a full two years before the death. Nor could the intestate person have lived with the legal spouse any of that period.[127] The position is different in other jurisdictions. In Victoria, for instance, where the intestate person is survived by both a legal spouse and a domestic partner, then the entitlement to the estate is determined under s 51A of the *Administration and Probate Act 1958* (Vic) which provides a 'sliding scale'. Accordingly, if the de facto spouse and the deceased

126 *Succession Act 2006* (NSW) s 5.

127 *Wills Probate and Administration Act 1898* (NSW) s 61B(3A).

have lived together for less than four years, then the de facto spouse is only entitled to one third of the estate and the legal spouse to two thirds. It is only if the de facto spouse had lived with the deceased for six years or more that the entire estate goes to the de facto partner.

In all jurisdictions in Australia there are now statutes[128] which vary the terms of a will or the laws of intestacy so as to provide for dependants who have been inadequately provided for. There is a requirement to show eligibility to apply and that proper support and maintenance has not been provided. Generally, eligibility is determined as at the date of death and all lists of applicants, regardless of jurisdiction, include spouse and children. Other persons, including de facto partners, may be able to apply but only if they specifically included in the legislation.

Apart from the distribution of property under a will or the laws of intestacy, there are other legal issues which arise on death. Given that it is not possible to include a binding direction for preferred funeral arrangements (burial or cremation or even the place of body disposal) disputes can and do arise. Further, funeral arrangements are usually made before and without reference to any will. Thus, disputes can occur between blood relatives, spouses and de facto spouses. This issue was considered in *Mankelow* v *The Public Trustee*,[129] where the court considered the issue of a de facto spouse's rights in relation to the burial place of his deceased partner. The de facto was keen that the deceased be buried in Western Australia, however, this was opposed by the Public Trustee of WA and the children of the deceased who wanted the body to be cremated in South Australia. They later acceded to burial. The court first had to consider whether the de facto partner had standing to make the application and it was decided that he did. Further the court considered, and relied on, the decision by Young J in *Smith v*

128 *Family Provision Act 1982* (NSW); *Administration and Probate Act 1958* (Vic); *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT); *Succession Act 1981* (Qld); *Inheritance (Family Provision) Act 1972* (SA); *Testators Family Maintenance Act 1912* (Tas); *Inheritance (Family and Dependants Provision) Act 1972* (WA).

129 *Mankelow v The Public Trustee* (2002) DFC 95-239.

Tamworth City Council,[130] where it was found that after the death, the executors have a right to the custody and possession of the body until it is properly buried or cremated. The de facto spouse was found to have a preferred right over the body. The court also decided that the issue should be decided by the practicalities of burial without unreasonable delay.

VIII ALTERNATIVES TO MARRIAGE: CIVIL UNIONS AND REGISTERED PARTNERSHIPS

A *The Relationships Act 2003 (Tas)*

There are two jurisdictions in Australia where governments have sought to place non-married partners in the same or similar position as married partners – with limited success.

In Tasmania, the *Relationships Act 2003* (Tas) became operational in January 2004. This Act allows for the registration of personal relationships which are either caring or significant. Under s 4(1) 'a significant relationship is a relationship between two adult persons – (a) who have a relationship as a couple; and (b) who are not married to one another or related by family.' Clearly this covers both same-sex and heterosexual relationships. This Act, however, differs from those of other jurisdictions in that it allows for the registration of both caring and significant relationships effectively dispensing with the need to establish a commencement date for the relationship or prove any of the other indicia.

> S 4 (2) If a significant relationship is registered under Part 2, proof of registration is proof of the relationship.
>
> (3) If a significant relationship is not registered under Part 2, in determining whether two persons are in a significant relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:
>
> (a) the duration of the relationship;
>
> (b) the nature and extent of common residence;

130 *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

(c) whether or not a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;

(e) the ownership, use and acquisition of property;

(f) the degree of mutual commitment to a shared life;

(g) the care and support of children;

(h) the performance of household duties;

(i) the reputation and public aspects of the relationship.[131]

Under these provisions couples are not placed in the same position as their married peers however, by providing a system of registration, there is a significant move in that direction.[132] The registration allows for a public recognition of the relationship in much the same way as a wedding ceremony does. However, whether the relationship is registered or not it only gives couples access to the provisions of this State Act, not the *Family Law Act 1975* (Cth). Unlike the *Civil Unions Act 2006* (ACT), however, it remains in force. It is the only legislation of its kind in Australia, although it is certainly not unique world-wide. Germany, for instance, passed its German Life Partnership Act 2001,[133] modelling it closely on the Nordic approach, but stepping back from creating an exact counterpart to a German marriage.

131 *Relationships Act 2003* (Tas) s 4(2), (3).

132 To date (3 September 2007) the numbers of registered relationships in Tasmania are: 95 Significant Relationships and 1 Caring Relationship. Four Significant Relationships have been revoked. (This information was kindly provided by email from the Tasmanian Department of Justice on 3/9/07.)

133 BGBI2001,1,266 in N Witzleb, 'The German "Registered Life Partnership" A Marriage That Dares Not Speak Its Name' (2002) 16 *Australian Journal of Family Law* 227.

B *Civil Unions Act 2006 (ACT) and Civil Partnerships Bill 2006 (ACT)*

On 26 March 2006 the government of the Australian Capital Territory presented the Civil Unions Bill 2006 (ACT) into parliament accompanied by an Explanatory Statement which read:

> The intention of the Civil Unions Bill 2006 (the Bill) is to provide a scheme for two people, regardless of their sex, to enter into a formally recognised union (a civil union) that attracts the same rights and obligations as would attach to married spouses under Territory law.
>
> The civil union scheme will deliver functional equality under ACT law for couples who either do not have access to marriage under the Commonwealth *Marriage Act 1961* or who prefer not to marry. The purpose of the civil union scheme is to provide a mechanism for people to establish their relationship by making a formal declaration of their intention to enter a civil union. A civil union is then given the same legal recognition under ACT law as marriage.
>
> Like marriage, a civil union is a particular form of domestic partnership. Because of the formal nature of civil union in providing a clear statement of the intention of the parties, where ACT laws still differentiate between marriage and domestic partnerships, then a civil union would be treated in the same way as a marriage.[134]

The Bill provided that any two people over sixteen years of age could enter into a civil union, regardless of their sex, provided that neither party was already married or a party to another civil union and that they were not in a 'prohibited relationship'.[135] Formation of the civil union was to be a formal process. The union was to be officiated by a celebrant after appropriate notice had been given of the intention to enter into the union. Further, the participants were to be fully informed about the proposed relationship they were about to

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134 Explanatory Statement, Civil Unions Bill 2006 (ACT) <http://www.legislation.act.gov.au> at 15 April 2006.

135 As provided under the *Marriage Act 1961* (Cth) s 23, 23B.

enter into. '[T]he authorised celebrant must give the parties a notice of information about the nature and effect of a civil union. The intention of this notice is to ensure that the parties are aware of the nature of the relationship they are creating.'[136]

Achieving 'functional equality' under Australian Capital Territory laws was to be no mean feat. Schedule 1 of the Bill included details of the following Territory legislation which required amendment consequential to the provisions of the Bill. The *Administration and Probate Act 1929, Adoption Act 1993, Adoption Regulation 1993, Births, Deaths and Marriages Registration Act 1997, Births, Deaths and Marriages Registration Regulation 1998, Civil Law (Property) Act 2006, Civil Law (Wrongs) Act 2002, Crimes Act 1900, Crimes (Restorative Justice) Act 2004, Discrimination Act 1991, Domestic Relationships Act 1994, Domestic Violence and Protection Orders Act 2001, Duties Act 1999, Evidence Act 1971, Family Provision Act 1969, First Home Owner Grant Act 2000, Guardianship and Management of Property Act 1991, Instruments Act 1933, Land (Planning and Environment) Act 1991, Land Titles Act 1925, Legal Aid Act 1977, Legislation Act 2001, Married Persons Property Act 1986, Parentage Act 2004, Perpetuities and Accumulations Act 1985, Powers of Attorney Act 1956, Rates Act 2004, Sale of Motor Vehicles Act 1977, Supreme Court (Admission of Legal Practitioners) Rules 1998, Testamentary Guardianship Act 1984, Wills Act 1968* and *Witness Protection Act 1996.*

Accordingly, in order to achieve 'functional equality', even if confined only to the laws of the Australian Capital Territory, there was a necessity to amend legislation in areas including wills and estates, adoption, registration for birth, death and marriages, property, torts, family law (domestic relationships and domestic violence), stamp duties, guardianship, powers of attorney, first home ownership grants, rates, admission of legal practitioners, crime and witness protection. This, effectively, is a short list of the areas where rights accrue from the status of marriage.

136 Explanatory Statement, Civil Unions Bill 2006 (ACT) re Clause 9 <http://www.legislation.act.gov.au> at 15 April 2006. The statement is dated 28 March 2006.

Fearing disallowance by the Commonwealth government, amendments to the original Bill issued on 11 May 2006. They were accompanied by a Supplementary Explanatory Statement, including:

> The effect of this amendment is to include an explicit statement that a civil union is different to a marriage. The new note 1 notes that marriage is defined in the Commonwealth *Marriage Act 1961* as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. The purpose of this amendment is to remove any possible perception that because a civil union is treated in the same way as a marriage, then it somehow is a marriage by another name. It is not. This amendment explicitly states this and in doing so removes any possible confusion over the distinction between a marriage and a civil union. It is not the intention of the provision to imply in any way that a civil union is the same as a marriage, only that it is to be treated in the same way as a marriage for the purposes of ACT law.[137]

However, the *Civil Unions Act 2006* (ACT) was short-lived. Taking the view that such legislation offended against the institution of marriage, the federal government disallowed the legislation,[138] citing community concern. However, not to be deterred, a further bill was presented to the ACT parliament on 12 December 2006: the Civil Partnerships Bill 2006 (ACT).

> The purpose of the Civil Partnerships Bill 2006 (the Bill) is to provide a mechanism for two people, regardless of their sex, to enter a formally recognised relationship, known as a civil partnership. A civil partnership is a type of domestic relationship. Two people who are in a civil partnership are to be taken, for all purposes under territory law, to be in a domestic partnership.

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137 Supplementary Explanatory Statement, Civil Unions Bill 2006 (ACT) <http://www.legislation.act.gov.au> at 20 May 2007. The statement is dated 11 May 2006.

138 Under s 35 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), on 14 June 2006.

> The Bill sets out eligibility to enter a civil partnership, a process for entering a civil partnership and a process for ending a civil partnership.[139]

Clearly this bill is intended to more closely resemble the Tasmanian Act. Most telling is the change in terminology from 'union' to 'partnership', removing any similarity to the definition of marriage under the *Marriage Act 1961* (Cth), which refers to the '*union* of a man and woman'. Nor is there any stated purpose to 'deliver functional equality under ACT law for couples' particularly for those who 'do not have access to marriage under the Commonwealth *Marriage Act 1961'*. Rather the purpose here is to create a process for formal and public recognition of relationships, which would dispense with the need to prove a qualifying length of relationship in order to access the provisions of the *Domestic Relationships Act 1994* (ACT). As the Explanatory Statement says:

> **Amendment 1.3** substitutes new section 12(1). The substituted provision effectively provides that where the domestic relationship is a civil partnership, the requirement that the court may only make an order if satisfied that the relationship has existed for not less than 2 years does not apply. That is, where the parties seeking relief are in a civil partnership, the court may make an order regardless of the length of time the parties have been in a civil partnership.

The consequential amendments are now only to the *Domestic Relationships Act 1994* (ACT) and the *Legislation Act 2001* (ACT). This bill is before the Legislative Assembly and is yet to pass.

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139 Explanatory Statement, Civil Partnerships Bill 2006 (ACT) <http://www.legislation.act.gov.au> at 20 May 2007. The statement is dated 12 December 2006.

VIII CONCLUSIONS

Marriage in Australia is regulated by the *Marriage Act 1961* (Cth), however, this Act is mute in identifying any of the legal consequences of marriage. Rather, it prescribes the formation of a valid marriage but does not require that any of the participants have any more than the *mental capacity to understanding of the effect of the ceremony*, not an understanding of the nature of marriage as an institution with all its consequences. Sections 23(1)(d)(iii) and 23B(1)(d)(iii) provide that a marriage will be invalid if the consent of either of the parties was not a real consent because 'that party was mentally incapable of understanding the nature and effect of the marriage ceremony'. The 'nature and effect of the marriage ceremony'? In simple terms, the real 'effect of the marriage ceremony'[140] is to create a valid marriage. Consent? There is no evidence that such consent rests on any information about the nature of marriage or its consequences. '[T]he validity of a consent to marriage does not require such knowledge.'[141] Under these circumstances when is such consent ever *real*? And yet marriage and the consequences of it are very real and anything but simple. Identifying the consequences – let alone understanding them - is an almost heroic task. As Chisholm J noted in the case of *AK v NC*,

> Both in law and in society, a marriage has a large variety of consequences. Few lawyers, let alone non-lawyers, would be able to make a comprehensive list of even the legal consequences…
>
> It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences. Of course if there were such a requirement, few if any marriages would be valid.[142]

This is somewhat curious, particularly in light of Australia's soaring divorce rate[143] and particularly also because the institution and its

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140 See the *Marriage Act 1961* (Cth) ss 23(1)(d)(iii), 23B(1)(d)(iii).

141 *AK v NC* [2003] FamCA 1006 [170].

142 Ibid [20], [21].

143 At Figure 15 of the Report of the Federal Magistrates Court, the divorce statistics are given as 42,059 for 2003-04, 48,115 for 2004-05 and 48,481 for 2005-06. Elsewhere in

consequences were considered to be so important that only one group in our society are considered 'worthy' of participating - heterosexual partners. And yet the consequences are matters of both public and private law and encompass wide areas including wills and estates, property, torts, taxation, superannuation, social security, guardianship, crime and compensation.

Does anyone understand 'the effect of the marriage ceremony'? The short answer to this question posed in the title of this paper has probably been answered by Chisholm J in his decision in *AK v NC* as above. '[F]ew lawyers, let alone non-lawyers' would be able to list the consequences, but, apparently, it does not matter. For this writer, at least, this appears to be an absurdity. The institution of marriage would be strengthened by the requirement for information about the nature of marriage and its legal consequences to underpin real consent.

the report the latest figures are given as 46,512 representing 63.5% of all family law matters. Federal Magistrates Court, *Annual Report 2005-2006* Federal Magistrates Court <http://www.fmc.gov.au/pubs/docs/05-06pt3.pdf> pg 30 at 21 May 2007.