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Polygamous marriages recognised under Australian law—but not gay marriages

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In 2004, Prime Minister John Howard amended the *Marriage Act 1961 (Cth)* to expressly restrict the ability of couples to marry, unless they are a heterosexual couple. In *Ghazel & Ghazel* [2016] FamCAFC 31, the Full Court of the Family Court of Australia considered the question of whether an unintended consequence of the amendments was to invalidate polygamous and potentially polygamous overseas marriages. These marriages were recognised as valid prior to 2004, if they were valid in the country in which the marriage occurred.

Status of polygamous marriages under the *Family Law Act*

Although not discussed in *Ghazel*, polygamous marriages are recognised under the *Family Law Act 1975*. Section 6 of that Act provides:

> "For the purposes of proceedings under this Act, a union in the nature of a marriage which is, or has been at any time, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage".

Section 88E(4) of the *Marriage Act 1961* protects the application of s 6 *Family Law Act* from the operation of Pt VA *Marriage Act*. Pt VA governs the recognition of foreign marriages in Australia. This means that orders can still be sought under the *Family Law Act* in relation to a polygamous marriage which is invalid for the purposes of the *Marriage Act.*

Background

Mr Ghazel was born in Iran and Mrs Ghazel was born in England. They married in Iran in 1981 according to the law of that country. That law permitted a husband, subject to certain conditions, to take up to 3 additional wives. Although this was Mr Ghazel's first marriage, the parties' marriage in Iran was "a potentially polygamous marriage".

The parties moved from Iran to England, and in late 1981, they went through another marriage ceremony at an English Registry Office. On the English marriage certificate the parties were described as "bachelor" and "spinster".

In 2003, Mrs Ghazel and the 2 children of the marriage migrated to Australia. Mr Ghazel followed in 2005.

In 2008, the parties filed a joint application for divorce in Australia. The application only referred to their marriage in England. A divorce order was made by the Federal Magistrates Court of Australia (as it then was) in early 2012.

In August 2013, in proceedings initiated in Iran by Mrs Ghazel (apparently to determine how it was that Mr Ghazel was able to marry again in Iran allegedly without Mrs Ghazel's consent), an Iranian Court concluded that the Iranian marriage between Mr and Mrs Ghazel was still in existence.

The Family Court proceedings

In November 2014, Mrs Ghazel filed an application in the Family Court of Australia seeking an order that the marriage between herself and Mr Ghazel in 1981 in Iran be declared valid in accordance with s 88D *Marriage Act*.

Mr Ghazel opposed the making of the declaration.

Justice Hogan delivered reasons for judgment, in which she confirmed that the definition of "marriage" was "the union of a man and a woman to the exclusion of all others voluntarily entered into for life" as set out in s 5(1) of the *Marriage Act*. Pursuant to Pt VA of that Act, foreign marriages that are recognised as valid under the local law where the marriage took place are recognised as valid in Australia (s 88C(1)).

Justice Hogan concluded, however, that the definition of "marriage" in s 5(1) meant that a marriage solemnised in a foreign country must be monogamous for it to be recognised as valid in Australia, and therefore polygamous marriages were not recognisable in Australia. As the Iranian marriage of Mr and Mrs Ghazel was "potentially polygamous", it was not recognised as valid in Australia.

The Appeal

Mrs Ghazel appealed to the Full Court of the Family Court. The Attorney-General for the Commonwealth was invited by the Full Court to intervene, and he did so.

In Mrs Ghazel's written and oral submissions, she contended that the case was a test case with wide ramifications. If Justice Hogan was correct, all married couples moving to Australia whose marriages were celebrated in countries where the local law permitted polygamous marriages, upon changing domicile to Australia became "un-married".

The Commonwealth's position was that "a potentially polygamous marriage", which would have been recognised under Pt VA before the *Marriage Amendment Act 2004* ("the 2004

amendments"), continued to be recognised. However, the Commonwealth accepted there was strength in the arguments against this recognition.

The Commonwealth's case started from the position as it was prior to the 2004 amendments. The provisions of Pt VA included a "default recognition rule". Section 88C provides that Pt VA applies to foreign marriages, where the marriage was recognised as valid under the relevant foreign law at the time it was solemnised, or is so recognised at the time at which the validity of the marriage falls to be determined. Foreign marriages which are within s 88C(1) are recognised as valid in Australia pursuant to s 88D(1), and that primary rule applies unless one of the exceptions in s 88D(2)-(5) applies. The exceptions include that the parties were in a "prohibited relationship" or the consent of either of the parties was not a real consent.

A "potentially polygamous marriage" is not expressly included in the exceptions to the primary rule of recognition although it might be thought, as canvassed by the Commonwealth, that the exception contained in s 88D(2)(a), that one of the parties to the marriage was at the time of the marriage married to another person, included a "potentially polygamous marriage". However, the Commonwealth argued that this exception, which is described as "a first in time rule", only precludes recognition of the second marriage, not the first "potentially polygamous marriage".

The question before the Full Court was whether the 2004 amendments changed this position. In relation to the wording of s 88B(4) - which was inserted by the 2004 amendments - the Commonwealth relied on the words "to avoid doubt" in the new definition of "marriage". The Commonwealth posed the question as to what was the "doubt" which was being addressed. At that time, "marriage" included "a potentially polygamous marriage". The doubt which was being addressed by Parliament was whether "marriage" extended to unions between a man and a man or a woman and a woman. This interpretation was supported by the extrinsic Parliamentary materials. The Explanatory Memorandum, the second reading speech and the Parliamentary debates were entirely focused on the issue of same-sex marriages, and none made reference to polygamous marriage.

The Commonwealth also relied upon the fact that the 2004 amendments did not alter s 88A, which provides that the object of Pt VA is to give effect to *The Hague Convention on the Celebration and Recognition of the Validity of Marriages*. The 2004 amendments did, however, remove the possibility of foreign same-sex marriages being recognised under the *Marriage Act*. If the 2004 amendments were intended to alter the position with respect to polygamous and potentially polygamous marriages, the Commonwealth argued that the intention would have been very clear in the text of the amending legislation and in the various extrinsic Parliamentary materials, but no such intention was manifested.

The Full Court of the Family Court accepted the arguments of the Commonwealth and made the declaration as to validity sought by the wife.

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