

**IN THE FAMILY DIVISION OF THE HIGH COURT
ORIGINAL JURISDICTION**

CASE NUMBER:	10/SUV/0159
BETWEEN:	DOMINIC
AND:	PITANSHU
Appearances:	Mr. S. Shah for the Applicants.
Date/Place of judgment:	Tuesday, 25th January, 2011 at Suva.
Judgment of:	The Hon. Justice Anjala Wati.
Coram:	
Category:	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are purely coincidental.</i>
Anonymised Case Citation:	DOMINIC v. PITANSHU - Fiji Family High Court Case Number: 10/SU V/0159.

JUDGMENT OF THE COURT

Catchwords

AMRK71L STATUS PROCEEDINGS - APPLICATION FOR AN ORDER FOR NULLITY - application by wife on the ground that she did not provide her real consent to the marriage because her consent was obtained under duress by her mother and through fraud by the husband who had lied to her mother that he would take her overseas-application allowed with no order as to costs.

Legislation

Family Law Act No. 18 of 2003.

Cases/Texts Referred To

Scott (falsely called Sebright) v. Sebright (1886) 12 P. D. 2.

Cooper (falsely called Crane) v. Crane [1891] P. 369.

Szechter (orse. Karsov) v. Szechter [1971] P. 286.

Re Meyer [1971] P. 298.

Hirani v. Hirani (1982) 4 Fam. L. R. (Eng.). 232.

In the Marriage of S (1980) 42 F.L.R. 94.

In the Marriage of Teves and Campomayor (1994) 122 F. L. R. 172.

Silver (orse. Kraft) v. Silver [1955] 1 W.L. R. 728.

Puttick v. Attorney-General [1980] Fam. 1.

R. v. Cahill [1978] 2 N. S. W. L. R. 453.

Sullivan v. Sullivan (falsely called Oldacre) (1818) 2 Hag. Con. 238.

Moss v. Moss (orse. Archer) [1897] P. 263.

In the Marriage of Deniz (1977) 31 F. L.R. 114.

In the Marriage of Otway [1987] F.L.C. 91-807.

In the Marriage of Soukmani (1989) 96 F. L. R. 388.

In the Marriage of Osman and Mourrali (1989) 96 F. L. R. 362.

Najjar v. Hoitlayce (1991) 104 F. L. R. 403.

In the Marriage of Hosking (1994) 121 F. L. R. 196.

Dickey, A, "Family Law" 4th Edition (2002) Lawbook Co. Sydney.

The Application

- This is an application by the parties jointly to have the marriage solemnised in Suva in 2009 nullified on the grounds that the marriage was not solemnised properly because the wife did not provide her real consent to the marriage as the same was obtained under duress and by fraud.

The Law

- Section 32 (1) of the Family Law Act No. 18 of 2003 states that a party can apply for an order for nullity of the marriage on the grounds that the marriage is void. There are certain grounds under which a marriage can be held to be void. In this case two particular grounds are alleged. They are alleged to be pursuant to the first and second limb of section 32 (2) (d) (i). I will have to state the law in respect of the grounds alleged.

- The first limb of section 32 (2) (d) (i) of the Family Law Act No. 18 of 2003 states that a marriage is void if the consent of either party to the marriage is not a real consent because it was obtained by duress.
- Duress has been defined as follows:-
 - State of mental incompetence, whether through natural weakness of intellect or from fear (whether reasonably held or not) that a party is unable to resist pressure improperly brought to bear: (Scott (falsely called Sebright) v, Sebright (1886) 12 P.D. 21.)
 - o A person's mind is so perturbed by terror that he or she does not understand what he/she was doing or alternatively if he/she understood what he/she was doing then their powers of volition had been so paralysed that he/ she succumbed to another's will: (Cooper (falsely called Crane) v. Crane (1891) P. 369.)
 - If there is a threat of immediate danger to life, limb or liberty: (Szechter (or. Karsov) v. Szechter (1971) P. 286.)
 - If there is a threat of immediate danger to life, limb (including serious danger to physical or mental health), or liberty: (Re Meyer (1971) P. 298 at pp. 306 and 307.)
 - If the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual: (Hirani v. Hirani (1982) 4. Fam. L.R. (Eng.). 232.)
 - If one is caught in a psychological prison of family loyalty, parental concern, sibling responsibility, religious commitment and a culture that demands filial obedience. If these matters operate and a party has no consenting will then there is duress: (In the Marriage of S (1980) 42 F.L.R 94.)
 - Duress does not necessary need to involve a direct threat of physical violence as long as there is sufficient oppression from whatever source, acting upon a party to vitiate the reality of their consent. It must be duress at the time of the marriage ceremony and not duress at some time earlier unless the effect of this continues to overbear the will of a party to a marriage ceremony at the time of the ceremony itself: (In the Marriage of Teves and Campomayor (1994) 122 F. L. R172)
- The second limb of Section 32 (2) (d) (i) of the Family Law Act No. 18 of 2003 states that a marriage that takes place after the commencement of the Act is void if the consent of either party is not a real consent because it was obtained by fraud.

- What constitutes fraud is defined by the various cases.
- Sir William Scott said in Sullivan v. Sullivan (falsely called Oldacre) (1818) 2 Hag. Con. 238 at 248; 161 E.R. 728 at 731-732:-

" I say the strongest case you could establish of the most deliberate plot leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this court to release [a suitor] from chains which, though forged by others, he had riveted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent, however procured, is his own act."

- Sir Francis Jeune P in the case of Moss V. Moss (orse. Archer) [1897] P. 263 said:-

"I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent."

- Justice Frederico in In the Marriage of Deniz (1977) 31 F. L.R. 114 held that the old cases on fraud and nullity were no longer relevant to Australian law, and he expressed the view that the act had introduced entirely new concepts which were no longer derived from ecclesiastical principles. He said that the legislature must have intended the term "fraud" to have a wider meaning than that recognised in the old cases, otherwise it would be a mere surplusage given the separate provisions on mistake as to the identity of the other party or as to the nature of the ceremony performed and mental incapacity to understand the nature and effect of the ceremony. Unfortunately Justice Frederico did not offer any satisfactory explanation of what this term fraud meant save to say that "the fraud relied on must be one which goes to the root of the marriage contract."
- The facts in In the Marriage of Deniz involved a young girl from Lebanese family in Australia who was induced by a Turkish visitor to Australia to marry him, ostensibly out of love though in fact simply to enable him to gain permission to reside permanently in Australia. The man left the girl soon after the marriage ceremony, to her utter distress, which

resulted in her having a nervous breakdown and attempting suicide. The judge in this case had no hesitation in holding the marriage to be void on the ground of fraud in that the girl's consent to the marriage had been induced by a trick and apparently also because the conduct of the man amounted to a total rejection of the institution of marriage and what it stands for, with the result that there was a total failure of consideration.

- The proposition that fraud can cover fraudulent misrepresentation was expressly rejected by Justice McCall in the subsequent case of In the Marriage of Otway J1987] F.L.C. 91-807. Justice McCall expressed the view that the term fraud should be given its established meaning as indicated by the older cases. On the object of the nullity provisions of the Marriage Act, he said:

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

- Subsequent cases at first instance have left no doubt that the interpretation of 'fraud' in In the Marriage of Otway is to be preferred to that in In the Marriage of Deniz (supra). Some of them are In the Marriage of Soukmani (1989) 96 F. L. R. 388; In the Marriage of Osman and Mourrali (1989) 96 F. L. R. 362; Najjarin v. Houlayce (1991) 104 F. L. R. 403; and In the Marriage of Hosking (1994) 121 F. L. R. 196.

The Evidence

- The wife gave the following evidence:-
 - ❖ Her husband got information about her and approached her mother to get married.
 - ❖ One day he came to meet her mum. She was at home but did not know that the husband would come to meet her. This was approximately a week before the legal marriage.
 - ❖ Her mum called her where the husband was and the mum then said to her that he was the boy with whom she was supposed to get married. When she saw the boy

she did not appreciate him or like him at all. He looked very dangerous and had tattoos all over his body. She went to her room. The husband was still with the mother.

- ❖ Her mother came to the room and she explained to her mum that she did not want to get married. The mother insisted that she had to get married and that she had no choice. The mother also said that if she did not get married, she was to leave the home and stay with her father. Her parents are separated and the mother said to her that her father has left her and the home and she could join him if she decided to go against the mothers' wishes.
 - ❖ Despite the mothers' threat, she still refused. The mother started crying and threatened that she would cause some harm to herself.
 - ❖ Her father is separated and the mother said that it would be good for her future if she got married and was independent.
 - ❖ The husband had convinced the mother that he would take her to overseas. Since her father was not there and the mother was supporting her, and she was insisting for the marriage to take place, she got married to keep the mother happy and avoid the problems. Her mother took her to the Registry to get married. Two witnesses from the husband's side being his friends came to witness the marriage.
 - ❖ She is in her teens and she wants to study. After getting married, she remained depressed everyday and was crying as well. Her life was miserable and she could not manage her depression. Her mother could not bear her depression.
 - ❖ After marriage the husband would call her and argue with her. He would get drunk and swear at her. She fought with the husband everyday. The mum saw the saga and she realised that she made a mistake by marrying her to the man.
 - ❖ She decided to put an end to her misery by filing the application for nullity. She filed the application. The husband also signed the application. She did not meet or talk to the husband after filing the application. There is no chance that she will ever live with the husband.
- The applicants' mother also gave evidence. She said as follows:-
 - ❖ The applicant Mr Dominic had called and said that he wanted to get married to her child . She asked the boy to come home. He came with one of his friends. He

discussed marriage. He said that he wanted to get married to her daughter and after marriage he would take her overseas. He also told her that he saw her daughter in Nausori and had taken her home phone number from someone.

- ❖ She was already in difficulty. Her husband has separated and for the past ten months he did not even come and visit them. She thought that the marriage would be a blessing in disguise because the daughter would manage her life at least and make her future by going to overseas.
- ❖ Her daughter did not want to get married and she insisted for her to get married because without her father she had so many problems at home. There was no future and support for the daughter. She took her to the marriage Registry for her to get married. She then went and signed the certificate.
- ❖ She found out after the legal marriage that he was not the boy she expected. He was like a thug with tattoos and rubber band all over his hands. She then realised that she had pushed her daughter in trouble. She felt responsible as the daughter had never wanted to get married in the first place. She wants her daughter out of this marriage.

The Determination

- The applicant wife was in her teens at the time of marriage and under the care of her mother. She had no support from her father who had abandoned the family and even stopped seeing them some ten months before the marriage.
- The mother was inundated with problems to manage herself and the daughter alone. As a single parent, she was managing the daughter alone and obviously she was very concerned for her future. When this proposal for marriage came, she thought that there was some light at the end of the tunnel and she then despite her daughters wishes insisted that she get married so that she could go overseas. The daughter resisted but she was shown the consequences of refusal. She was told to leave the home to stay with the father. She cried and the mother also tried to get the consent by emotionally blackmailing the daughter by saying that she would harm herself.
- In my judgment although there was no threat to life limb or liberty, there was oppression from the mother to get married and make her future. With the oppression were the family

problems that the daughter was facing. She had just attained the age of 18 and she was under full care and control of her mother. With all the words from her mother and her problems, the daughter got oppressed and decided to get married. She got married and provided her consent which was obtained through oppression from her mother and her problems.

- I am of the judgment that the daughters consent was not real. She continuously suffered the marriage and got into a state of depression. She cried and had fights with the husband. When she could not handle the situation any more, she and the mother both decided to end the marriage.
- The mother in fact got greedy when the son in law said that she would take her daughter overseas, but, which mother in the circumstances would not be so greedy? To make her daughters future, she forced and blackmailed her. The daughter was vulnerable and immature. She succumbed to her mother's will to keep peace and her mother's dignity.
- This marriage has to be nullified on the grounds of duress.

The Final Orders

- The application for an order for nullity of marriage is allowed.
- The marriage solemnised in 2009 is declared to be absolutely null and void.
- There shall be no order for costs.

Judge
25.01.2011

To:

ANJALA WATI

1. *Mr. S. Shall for the Applicants.*
2. *File Number: 10/Sni/0159.*