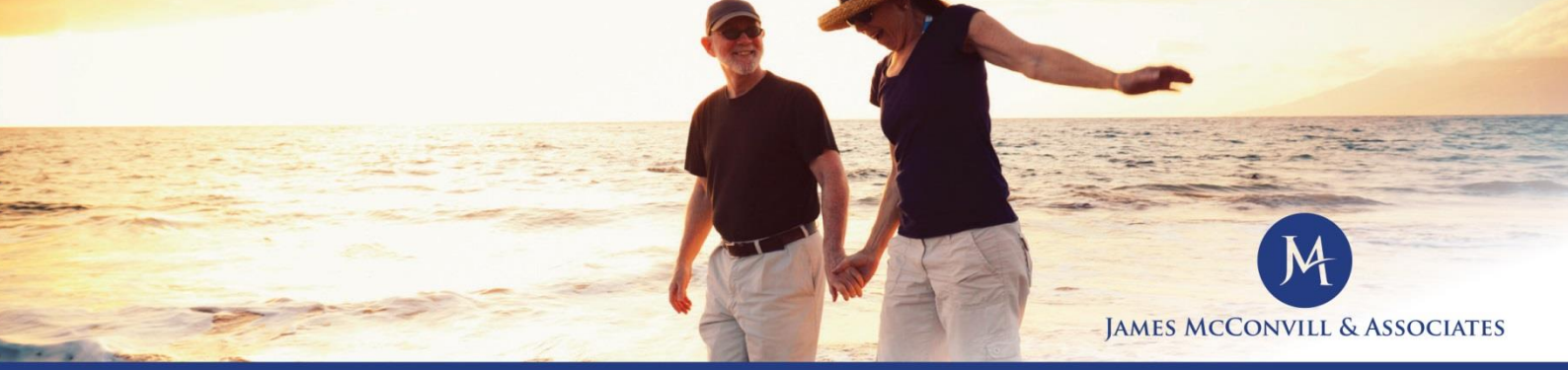


JAMES MCCONVILL & ASSOCIATES

Family Court Considers the Recognition of 'Potentially Polygamous Marriages' in Australia

Court finds that marriage under foreign law recognising polygamous marriages valid in Australia

INTRODUCTION

In the case of *Ghazel & Ghazel and Anor* [2016] FamCAFC 31 (4 March 2016) the Court considered, on the wife's appeal, whether or not the *Marriage Amendment Act 2004* (Cth) prevents the recognition of potentially polygamous marriages in Australia under Part VA of the *Marriage Act 1961*(Cth) (the "Act").

BACKGROUND

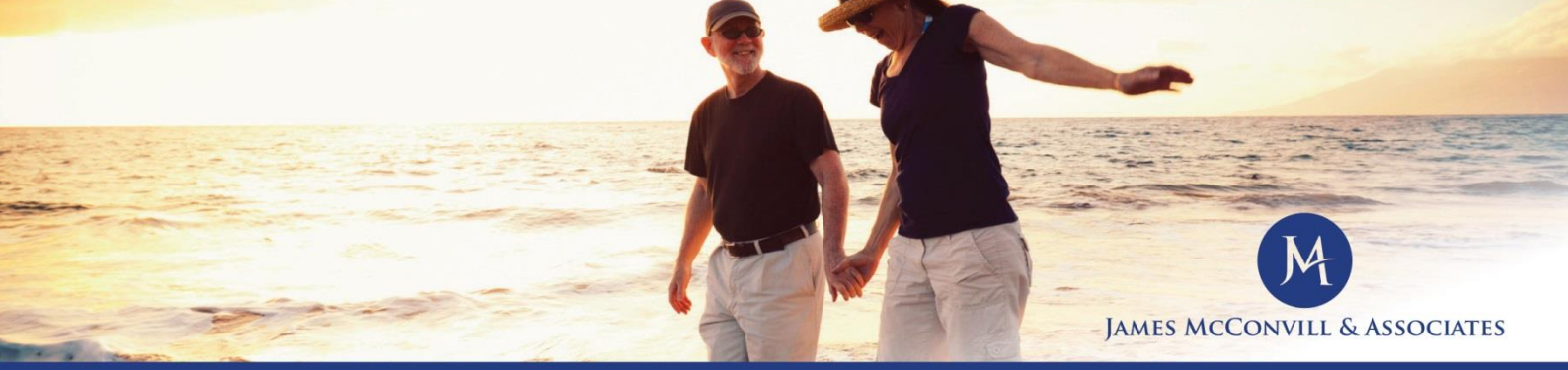
Mr Ghazel was born in Iran, and Mrs Ghazel in England. The couple married in Iran in mid-1981. Important to this case was the relevant Iranian marriage laws. These laws allowed Mr Ghazel, subject to certain conditions, to take up to three additional wives. This unique feature created a monogamous marriage between Mr and Mrs Ghazel with what the Court identified as qualities of a "potentially polygamous marriage". After the marriage ceremony, the couple moved to England in late 1981 where they registered their Iranian marriage at the Iranian embassy in May 1984. The couple had two children born of the marriage and migrated to Australia, with all four members of the family becoming Australian citizens in 2007. In 2008, the couple filed for a joint application for divorce, with the application only referring to their marriage in England, and not Iran. After the English application was made, there was uncertainty as to whether the couple reconciled their differences and continued to cohabitate.

POST-DIVORCE

In 2011, Mr Ghazel allegedly married a woman in Iran and another woman in Australia in 2012. In 2013, Mrs Ghazel initiated proceedings in Iran to inquire about how Mr Ghazel was able to marry without Mrs Ghazel's consent. Here, Mrs Ghazel's consent was still relevant because the couple's Iranian marriage was still valid. On November 2014, Mrs Ghazel filed in the Family Court of Australia for an application seeking an order that the marriage between herself and Mr Ghazel be "declared valid in accordance with s. 88D of the Act".

ISSUES

The central issue of this case was whether a potentially polygamous marriage (as opposed to an actually polygamous marriage) could be recognised as valid under Part VA of the Act. In order to make this determination the Court had to consider the 2004 amendments to the Act.



CONSIDERATIONS

The Commonwealth had to first prove that the 2004 amendments to the Act did not operate to deny the recognition of potentially polygamous marriages. They also had to prove that these marriages would have been recognised under the provisions of Part VA of the Act prior to the amendment in 2004. In proving these two points, the Commonwealth had to consider the common law, public policy and international law in relation to the recognition of foreign marriages

PRIOR TO THE 2004 AMENDMENT

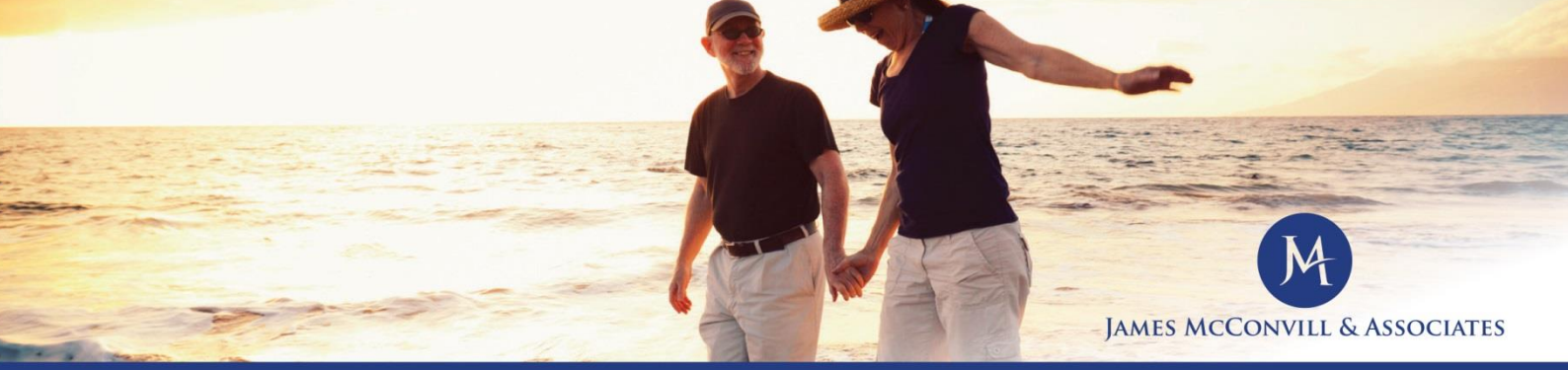
The Court determined that Part VA of the Act, prior to 2004 revealed a "Default Recognition Rule". Section 88C provides that if a foreign marriage was valid under the law of the place of celebration at the time of marriage, it will then be recognised in Australia pursuant to s. 88D(1). This principle is known as the default recognition rule and it must apply, unless one of the exceptions contained in section 88D(2)-(5) applies.

EXCEPTIONS TO THE "DEFAULT RECOGNITION RULE"

- **Section 88C**- provides that Part VA of the Act applies to foreign marriages which are solemnised both before and after commencement of the Part, where the marriage was recognised as valid under the relevant foreign law. The marriage becomes valid at the time it was solemnised, or is so recognised at the time which the validity of the marriage falls to be determined.
- **Section 88D**- Marriages pursuant to section 88C shall be recognised in Australia as valid subject to certain exceptions, being:
    - That at the time of the marriage, one of the parties was a party to the marriage with some other person and that marriage would be recognised in Australia (s. 88D(2)(a));
    - At the time of the marriage, one or both of the parties was not of marriageable age ("marriageable age" is defined within the Act) (s. 88D(2)(b) and 88D(3));
    - That the parties are within a prohibited relationship ("prohibited relationship" is defined within the Act) (s. 88D(2)(c)); or
    - That consent of either of the parties was not real consent ("real consent" is defined within the Act) (s. 88D(2)(d)).

"FIRST IN TIME RULE"

The Solicitor-General expanded on the Default Recognition Rule, in relation to s.88D(2)(a). An explanation of this section was given, that this section would only preclude the recognition of a second marriage in time. The Court concurred that for public policy reasons, where a marriage is valid under *lex loci celebrationis*, it is insufficient to deny the first marriage based on the fact that it has the potential to become polygamous.



ADDITIONAL SUPPORT

The Court considered the implications of the Hague Convention on the recognition of marriages including the Marriage Amendment Bill 1985, which introduced Part VA into the Act. In accordance with the Convention and Explanatory Reports, the Court was satisfied that potentially polygamous marriages valid under the law of the place of celebration, must be recognised by all signatory parties to the Convention. Furthermore, in the Explanatory Memorandum in relation to the Marriage Amendment Bill 1985, there was no suggestion that potentially polygamous marriages are not to be recognised in Australia.

CONCLUSION BEFORE 2004

The Courts concluded that prior to the 2004 amendments to the Act, a potentially polygamous marriage could be recognised as valid in Australia. The validity of that marriage would only be recognised if it was valid in its place of celebration and not within the scope of the exceptions in s. 88D(2)-(5).

POST 2004 AMENDMENT

The Court looked at the substance of Part VA in the 2004 amendments. The Court's focus was towards the wording of s 88B(4), which was inserted to avoid doubt in the new definition of marriage in s. 5(1). Section 5(1) reads, that "marriage means the union of a man and woman to the exclusion of all others, voluntarily entered into for life".

The Court determined, based upon the law prior to 2004 and the Explanatory Memorandum to the 2004 Marriage Amendment Bill, that there was no doubt that marriage included potentially polygamous marriages. Rather, the amendment was addressing was whether or not marriages extended to unions between homosexual relationships. The 2004 amendments did not make any alterations to s.88A, which provides that the object of Part VA is to give effect to the Hague Convention on the recognition of marriages. It is clear from the 2004 amendments that Parliament did not contemplate that the amendment would affect any marriages other than homosexual marriages. Here, the Court determined that it must refrain from making any constructions that would have broader implications than what was intended. Supporting the Court's decision, the wording in s.5(1) says, "as to the exclusion of all others", which clearly does not rule out the possibility of potentially polygamous marriages.

CONCLUSION

The Court decided in Mrs Ghazel's favour that potentially polygamous marriages can still be recognised as valid under Part VA of the Act notwithstanding the 2004 amendments. The Court allowed the appeal against Honorable Justice Hogan and declared Mrs Ghazel's Iranian marriage as valid in Australia. The declaration was made on the basis that potentially polygamous marriages will be recognised in Australia, unless one of the exceptions in s. 88D(2)-(5) of the Act applies. The Court concluded that Mrs Ghazel's situation fell outside the scope of the abovementioned expectations and therefore her marriage was determined to be valid.