

**JURISDICTION** : FAMILY COURT OF WESTERN AUSTRALIA

**ACT** : FAMILY LAW ACT 1975

**LOCATION** : PERTH

**CITATION** : RICK and KING [2010] FCWA 130

**CORAM** : CROOKS J

**HEARD** : 29 NOVEMBER 2010

**DELIVERED** : 20 DECEMBER 2010

**FILE NO/S** : PTW 2411 of 2010

**BETWEEN** : Mr Rick  
Applicant Husband

AND

Ms King  
Respondent Wife

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*Catchwords:*

Declaration of Nullity

*Legislation:*

*Family Law Act 1975 (Cth) s 51*

*Marriage Act 1961 (Cth) s 23*

*Category:* Not Reportable

**Representation:***Counsel:*

Applicant	:	Self Represented Litigant
Respondent	:	Self Represented Litigant

*Solicitors:*

Applicant	:
Respondent	:

**Case(s) referred to in judgment(s):**

Hosking and Hosking (1995) FLC 92-579  
Osman and Mourrali (1990) FLC 92-111  
Zacharia & Paradisio [2008] FamCA 688

**WORDS IN SQUARE BRACKETS REPLACE WORDS USED IN THE ORIGINAL JUDGMENT - PARTIES' NAMES AND IDENTIFYING DETAILS HAVE BEEN CHANGED**

1 [Mr Rick] ("the husband") in his application filed 8 June 2010 seeks  
a Declaration of Nullity of the marriage between himself and [Ms King] ("the wife")  
in 2007 at Perth.

**Background**

2 The husband is 58 years of age and was born in Australia. The wife is 31 years  
of age and was born in Thailand.

3 On 6 May 2010 the wife filed an Application for Divorce when she was present  
in Australia on a tourist visa.

4 On 8 June 2010 the husband filed a response to the divorce application in which  
he sought to have the wife's application dismissed.

5 At paragraph 6 of his response the husband set out the following information in  
relation to why the divorce application should be dismissed:

"The Application for Divorce should be dismissed and the Application for  
Annulment should be granted on the grounds the Respondent is  
a diagnosed AIDS patient and has been since 14<sup>th</sup> October 2006. (Married  
[in 2007] at Perth Registry Office.) Had I been made aware of the medical  
status of the Respondent, the marriage would never have take place."

6 At paragraph 24 of his Application for a Decree of Nullity, the husband states  
that he relies on the ground of fraud for the purposes of his application.

7 Although the husband was unable to personally serve the wife with his  
Application, I am satisfied she is aware of the nature of the proceedings and the  
hearing dates allocated on the matter.

8 On 24 August 2010 the wife sent a facsimile to the Court in the following terms:

**"To Whom It May Concern**

I [Ms King] am aware I have court proceedings on Wednesday 25<sup>th</sup> August  
2010 at 10am, as I am currently in Thailand I want to be able to attend, I  
have applied for a holiday visa to come back to Perth WA, I should arrive  
Tuesday 7<sup>th</sup> September 2010."

9 By reason of the wife's facsimile, the husband's application was adjourned to  
22 October 2010.

10 On 20 October 2010 the Court received the following facsimile from the wife:

**“To Whom It May Concern**

I [Ms King] am aware I have family court proceedings on Friday, 22<sup>nd</sup> October 2010 at 10am. I will not be able to attend as I am in Thailand currently waiting for my defacto visa to go through. When I arrive back to Perth Western Australia I will notify the Family Court of my return.”

11 On 22 October 2010 an order was made extending for a further 21 days, the time for the wife to file any response and affidavit she may wish to rely upon in relation to the husband’s application.

12 A copy of this order was forwarded to the wife care of an address in Perth, which I am satisfied has been communicated to the wife.

13 The wife has not filed any response or affidavit in opposition to the husband’s application. She has been given, in my view, every reasonable opportunity to place evidence before the Court and it is appropriate that the husband’s application be determined.

**The law**

14 Section 51 of the *Family Law Act* 1975 provides as follows:

“51 An application under this Act for a decree of nullity of marriage shall be based on the ground that the marriage is void.”

15 The grounds upon which a marriage is void are set out in s 23B of the *Marriage Act* 1961 (Cth) which provides as follows:

“23B(1) A marriage to which this Division applies that takes place after the commencement of s 13 of the *Marriage Amendment Act* 1985 is void where –

- (a) either of the parties is, at the time of the marriage, lawfully married to some other person;
- (b) the parties are within a prohibited relationship;
- (c) by reason of s 48 the marriage is not a valid marriage;
- (d) the consent of either of the parties is not a real consent because –
  - (i) it was obtained by duress or fraud;
  - (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
  - (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony; or
- (e) either of the parties is not of marriageable age.

## Discussion and conclusion

16           The husband asserts the wife deceived him in order to obtain financial benefits and that the marriage was based on fraud.

17           The Family Court has considered the meaning of “fraud” in a number of cases where it has been relied upon as the basis for nullity of a marriage.

18           In *Osman and Mourrali* (1990) FLC 92-111 Nygh J dealt with an Application for Nullity in circumstances where a party alleged that the other parties’ consent was obtained to gain permanent residency of Australia. In dismissing the application, his Honour said at 77,743:

“The question then arises as to what the fraud should relate to. The language of the section is derived from that found originally in sec. 18(1)(d) of the *Matrimonial Causes Act 1959*. That, it has been frequently acknowledged, was not a statute which sought to change in a fundamental way the basis of matrimonial law in this country, as did the *Family Law Act 1975*. Rather, it sought to provide a uniform law at a federal level.

...

That is further supported by the use of the words which are clearly derived from those used by Sir Francis Jeune P. in *Moss v. Moss* (1897) P. 263, rightly or wrongly regarded as being of great authority in 1961. At pp. 268-269 his Lordship said:

‘But when in English Law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation... 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.’”

19           In the marriage of *Hosking and Hosking* (1995) FLC 92-579 Lindenmayer J held:

“... I conclude that the term “fraud”, as it appears in s. 23B(1)(d)(i) of the Marriage Act, has a fairly limited scope. Its concern is with fraud as to the identity of the other party or as to the nature of the ceremony, and not as to the motives of a party in entering into the marriage. Should a court ever be entitled to say that a party's reasons for marriage are so improper that it will declare their marriage void? The answer, in my view, must be a resounding no.

Neither his Application, nor any of the material in his affidavit, however, is directed at the question of whether there was fraud as to the identity of the other party or the ceremony itself. Indeed, the husband's material says

very little about the actual *marriage* ceremony, or the circumstances of it. Accordingly, his application must fail.”

20 In *Zacharia & Paradisio* [2008] FamCA 688 Burr J considered an Application for Nullity of a Marriage in circumstances where the husband had informed the wife that he was dying from terminal cancer and he did not have sufficient money to look after his children. The wife in that case then began to buy items for the husband’s children and to assist him financially with household expenses and medication costs. On the night of their wedding the husband told the wife he was not dying of cancer but rather had Hepatitis C and had been in prison for trafficking drugs. The wife brought her application on the basis that the husband had lied to her about his health condition and sought a Declaration of Nullity of marriage based on “fraud”.

21 After referring to the relevant authorities including those I have earlier noted, Burr J dismissed the husband’s application on the basis that “the wife consented to marrying the person physically present on the wedding day, and consented to what she knew to be a valid marriage ceremony”.

22 There is no question in this case that the husband married the woman he thought he was marrying and the parties went through what they knew to be a valid marriage ceremony in Perth. The fact that the wife may have lied to and deceived the husband by not disclosing her medical condition in order to benefit financially from him, does not establish the necessary ground for nullity of his marriage.

23 For these reasons, I intend to dismiss the husband’s application.

### **Proposed order**

24 The husband’s Application for a Decree of Nullity of Marriage filed on 8 June 2010 be dismissed.

I certify that the preceding [24] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate