

FAMILY COURT OF AUSTRALIA

JSING & KONG

[2016] FamCA 288

FAMILY LAW – NULLITY – Applicant for declaration – where respondent still married at time of subject marriage – declaration made.

FAMILY LAW – PRACTICE AND PROCEDURE – Whether the respondent husband should be referred to the Commonwealth Attorney-General following a declaration of nullity on the grounds of bigamy – where referral appropriate.

Marriage Act 1961 (Cth) ss 23B(1), 94

Hiu & Ling [2010] FamCA 743

APPLICANT:	Ms Jsing
RESPONDENT:	Mr Kong
FILE NUMBER:	PAC 3690 of 2015
DATE DELIVERED:	26 April 2016
PLACE DELIVERED:	Parramatta
PLACE HEARD:	Parramatta
JUDGMENT OF:	Foster J
HEARING DATE:	18 April 2016

REPRESENTATION

SOLICITOR FOR THE APPLICANT: Kyu & Young Lawyers

RESPONDENT – LITIGANT IN PERSON:

ORDERS

- (1) A declaration be made that the marriage between the applicant and the respondent conducted at Suburb B, New South Wales in 2014 is a nullity.
- (2) That the Registrar forward the documents referred to in the last paragraph of these Reasons for Judgment to the Commonwealth Director of Public Prosecutions.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Jsing & Kong* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT PARRAMATTA

FILE NUMBER: PAC 3690 of 2015

Ms Jsing
Applicant

And

Mr Kong
Respondent

REASONS FOR JUDGMENT

Context

1. The applicant wife in the present proceedings seeks a declaration that the marriage between her and the respondent husband conducted in 2014 is a nullity. The respondent husband, who appeared in person, does not oppose the making of the declaration.

Background

2. The applicant wife is 34 years of age. The respondent husband is 36 years of age.
3. The applicant and respondent ceased cohabitation several days after the marriage when the respondent left their then residence. The applicant was unaware as to the respondent's whereabouts until after these proceedings commenced.
4. There are no children of their marriage.
5. In 2006 the respondent married Ms C in a ceremony at the Sydney D Church in Suburb E NSW (Exh C). The marriage was thereafter registered in the following month. The respondent and his first wife were divorced on 13 September 2014 pursuant to their joint Application for Divorce (Exh D).
6. The applicant and respondent were married prior to this date in 2014 by a marriage celebrant at F Street, Suburb B NSW (Exh B).
7. The respondent represented at the time of this subsequent marriage that he has "never been validly married"
8. The respondent asserts that he was unaware that his previous marriage "had been registered" until his previous wife asked him to sign a joint Application

for Divorce. That assertion seems hollow when the respondent's first marriage was celebrated in a church.

Discussion

9. Section 23B(1) of the *Marriage Act 1961* (Cth) ("the Marriage Act") provides that, inter-alia, a marriage is void where "either of the parties is, at the time of the marriage, lawfully married to some other person".
10. It is clear that at the time the respondent participated in the marriage ceremony with the applicant in 2014 he was lawfully married to another person.
11. The applicant is entitled to the relief that she seeks and a declaration will be made that the marriage between the applicant and the respondent conducted at Suburb B, New South Wales in 2014 is a nullity.

Another issue

12. Section 94 of the Marriage Act provides for the offence of bigamy. The penalty for such an offence is imprisonment for five years.
13. It is noted that on the marriage certificate relating to the marriage in 2014 the respondent is described as "never validly married". That assertion on the evidence before the Court is blatantly false and appears to have been made simply to facilitate his marriage to the present applicant.
14. As a consequence it is incumbent upon the Court to consider whether the papers in these proceedings should be referred to the Commonwealth Attorney General so as to give consideration as to whether the respondent should be charged with the offence referred to.
15. The considerations touching upon whether to refer the papers were considered by Mushin J in *Hiu & Ling* [2010] FamCA 743 where his Honour said:

REFERRAL OF PAPERS TO THE ATTORNEY-GENERAL

The offence of bigamy.

The Marriage Act provides:

94(1) A person who is married shall not go through a form of ceremony of marriage with any person.

(1A) For the purposes of an offence against subsection (1), strict liability applies to the physical element of circumstance, that the person was married when the form of ceremony took place.

The penalty for an offence under subsection 94(1) quoted above is imprisonment for five years.

Counsel for the respondent conceded that his client had committed the

offence of bigamy created by the legislation quoted in the previous paragraph.

Referral of papers - common law authority

In *T and T* (1984) FLC 91-588, the Full Court held (at p 79,746):

...In our opinion there can be no doubt (leaving aside any statutory prohibition) that where the evidence or other material discloses breaches of Commonwealth laws a judge ... exercising jurisdiction under the *Family Law Act 1975* is entitled to bring these breaches to the notice of the Commonwealth Attorney-General.

In *In the Marriage of P and P* (1985) FLC 91-605, Lindenmayer J found

that one of the parties to the proceedings had committed one or more offences relating to tax evasion which is a crime against the Commonwealth. His Honour held (at p 79,925):

... I am of the opinion that this Court, as a federal court exercising the judicial power of the Commonwealth, has a duty to protect the revenue of the Crown in right of the Commonwealth. That duty extends to requiring this Court to take such steps as it is able to take to ensure that the revenue laws of the Commonwealth are not defrauded or evaded by litigants or others who come before it.

In *Malpass and Mayson* [2000] FamCA 1253; (2000) FLC 93-061, the Full Court held (at p 87,996):

31. Despite these authorities we do not think that it necessarily follows that the Court is always under a duty to report the fact of commission of possible offences to relevant authorities including revenue authorities, although it clearly has the power to do so. Questions of degree must be relevant. There are many cases where minor irregularities are revealed in relation to taxation, social security and other issues. We think it unreasonable for the Court to burden itself with a duty to report all of these matters. Different considerations may apply in relation to more blatant and substantial irregularities. We leave the determination of this issue to be determined in a case where the point arises directly.

In *Georginas v Kostrati* (1988) 49 SASR 371, in the Full Court of the Supreme Court of South Australia, Von Doussa J held (at p 376):

...Where a tax fraud or evasion is disclosed in evidence it is the court's duty to draw the evidence to the attention of the executive branch of government for such action as may be appropriate.

Accordingly, I conclude that not only am I am entitled to refer the papers in this matter to the appropriate authorities for consideration of whether to prosecute the respondent for bigamy but I have a duty to do so. While I do not have a duty to refer the papers in every case, the question of whether I do refer the papers in this matter is to be decided on its own facts and regard should be had to the seriousness of the potential offence.

16. The respondent's conduct was, at best, reckless in the extreme and, at worst, a complete and wilful disregard of his obligations at the time of his remarriage to ensure that he was legally able to enter into the ceremony. The matters discussed above clearly indicate that the respondent was well aware that he was legally married at the time of his second marriage notwithstanding his explanation to the contrary. His explanation is inherently incredible.
17. Whilst it is noted that the Court has a discretion as to whether the papers should be referred to the appropriate authorities, in these circumstances the Court considers it appropriate that the papers be referred and that the question as to whether the respondent is to be prosecuted be dealt with by the relevant authorities and the Registrar is requested to do so.
18. It is directed that the following documents be referred to the appropriate authorities for consideration:
 - a) Initiating Application filed 27 July 2015;
 - b) A copy of these Reasons for Judgment.

I certify that the preceding eighteen (18) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Foster delivered on 26 April 2016.

Legal Associate:

Date: 26 April 2016