

Love gone cold – What does it mean for a marriage to be voidable and When does it happen?

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I. Introduction

“Newly-wed man lied to court about not sleeping with wife to save money on divorce proceedings” – this was the headline of a local news article where a man, Daryl, claimed that his marriage was voidable and should be annulled since his wife refused to consummate it.¹ One who is unaware of the law on voidable marriages may find this perplexing. Can Daryl make this claim and does the law even care about such an intimate issue between a couple?

Indeed, the law views a couple’s sexual incompatibility as “a serious defect” in the marriage such that the marriage can be avoided on this basis alone.² Thus, Daryl can indeed try to annul his marriage through the concept of voidable marriages.

This article first defines voidable marriages including how it differs from divorce. Then, it explores two of six grounds of voidable marriages under section 106 of the Women’s Charter³ which are based on non-consummation. Lastly, it will address a possible bar to making this claim.

II. What is a Voidable Marriage?

A voidable marriage is a marriage considered valid until one spouse proves that it is invalid.⁴ A valid marriage is recognised by the law while an invalid marriage is not. Once a spouse successfully proves that the marriage is voidable, the court will order that it be annulled.⁵ This means that the marriage will be regarded as having existed only until the court judgement is handed out.

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¹ The Straits Times Website <<https://www.straitstimes.com/singapore/newly-wed-man-lied-to-court-he-had-not-slept-with-wife-to-save-money-on-divorce>> (accessed 18 October 2021).

² Debbie S.L. Ong, “Time Restriction On Divorce In Singapore” (2003) Sing JLS 418 at p 437.

³ Women’s Charter (Cap 353, 2009 Rev Ed) (“WC”) at s 106.

⁴ *Tan Ah Thee and another (administrators of the estate of Tan Kiam Poh (alias Tan Gna Chua), deceased) v Lim Soo Foong* [2009] 3 SLR(R) 957 at [22].

⁵ *Ibid.*

A. *Is annulling a voidable marriage the same as divorce?*

The effects of a voidable marriage and divorce appear similar as they both legally separate a married couple. However, there are also conceptual differences that produce practical differences. This article illustrates three important points of comparison.

Firstly, you may be concerned about your child's legitimate status as it can affect their rights in intestate succession.⁶ Fortunately, children of voidable marriages, like divorce, are considered legitimate children of that marriage⁷ because the marriage existed at the point of childbirth. Thus, your child's legitimate status will remain.

Secondly, you may be concerned about your social status after an annulment. An annulment changes a marriage from valid to invalid⁸ whereas divorce terminates a valid marriage. This means that a couple is not labelled as "divorcees" when they undergo an annulment, unlike divorce. Thus, they need not face the social stigma commonly attached to divorce.⁹

Thirdly, an annulment process usually requires less time and costs as compared to divorce proceedings. The former takes around five months to complete,¹⁰ while the latter may take up to years if it is acrimonious. This may be important for those who want a quick separation but have a tighter budget.

III. **Annulment due to Non-consummation**

Next, this article explains the grounds for a voidable marriage claim related to non-consummation. Consummation is defined as "ordinary and complete sexual intercourse".¹¹ This must include an erection and intromission, colloquially known as penetration.¹²

⁶ Legitimacy Act (Cap 162, 1985 Rev Ed) at s 10.

⁷ Singapore Legal Advice Website < <https://singaporelegaladvice.com/what-is-the-difference-between-void-and-voidable-marriages/> > (accessed 6 November 2021).

⁸ See the first paragraph under section II for the definition of validity of marriage.

⁹ *Tang Yuen Fong v Poh Wee Lee Jerry* [1995] 2 SLR(R) 573 ("*Tang*") at [6].

¹⁰ Singapore Legal Advice Website < <https://singaporelegaladvice.com/law-articles/how-to-annul-a-marriage/> > (accessed on 17 October 2021).

¹¹ *L v L* [1956] MLJ 145 ("*L v L*").

¹² *Ibid.*

Under section 106, a marriage is voidable if it has not been consummated due to:

- (a) the incapacity of either party to consummate it;¹³ or
- (b) the wilful refusal of the defendant to consummate it.¹⁴

Preliminarily, both grounds require proof of non-consummation and evidence of the reasons for non-consummation (*ie*, incapacity or wilful refusal). Medical evidence, although not mandatory,¹⁵ may bolster one's claim that the marriage has not be consummated. For example, if there is evidence that the wife is a virgin, this would mean that the parties had not consummated the marriage.¹⁶ One may apply to the Registrar to determine whether Medical Inspectors should be appointed to examine the parties.¹⁷

A. Incapacity of either party to consummate

Firstly, a marriage is voidable if either party is incapable of consummating it. Here, the spouse making the claim can rely on his own or his partner's incapacity to invalidate the marriage.

A spouse's incapacity can be physical but can also include "psychological repugnance".¹⁸ This incapacity should be permanent¹⁹ but need only be proven in relation to the spouse.²⁰ Thus, it is irrelevant whether he/she can perform sexual intercourse with others.²¹

In *L v L*, the husband was found to be anatomically normal but his attempts to consummate the marriage failed as he could not effect intromission. As imperfect sexual intercourse cannot establish consummation,²² the court found that he was incapable of consummating his marriage. Thus, the marriage was voidable.

¹³ WC, *supra* n 3, at s 106(a).

¹⁴ *Id*, at s 106(b).

¹⁵ *LSJ v LKK* [1992] SGHC 168 ("*LSJ*") at [11].

¹⁶ *L v L*, *supra* n 11.

¹⁷ Family Justice Rules (S 813/2014) r 78.

¹⁸ Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 3rd Ed, 2018) ("*Elements of Family Law in Singapore*") at para [2.077].

¹⁹ *Halsbury's Laws of Singapore Family Law Vol 11* at [130.121].

²⁰ *Ibid*.

²¹ *Harthan v Harthan* [1949] P 115 at p 117.

²² *L v L*, *supra* n 11, following *R v R* [1952] 1 All ER 1194 at p 1197.

B. Wilful refusal of the defendant

Secondly, a marriage is also voidable if a defendant wilfully refuses to consummate it. This means that the spouse, A, seeking to annul the marriage on this voidable ground must prove the wilful refusal of his/her spouse, B, and not of himself/herself. Previous cases illustrate that this claim can generally be split into two categories:

- (a) when A's requests to consummate have been ignored; and
- (b) when B fails to perform a condition precedent.²³

(1) Requests to consummate ignored

Firstly, A can attempt to show that B has ignored requests to consummate the marriage despite the former's advances. In *LSJ*, the married couple lived apart for an indefinite duration. Although the wife initiated spending nights alone together multiple times, the husband refused all physical contact with her, stating that he was physically and mentally tired.²⁴ The court found the husband's excuses to be shallow and found the marriage voidable.²⁵

Practically, our courts do not specify a minimum number of refusals required to satisfy this requirement. However, a key takeaway is that you should produce evidence of your attempts to consummate, accompanied by your spouse's repeated refusal. As explained later, an annulment is not a free pass to legally separate a married couple.²⁶

(2) Condition precedent not met

Secondly, one may succeed under a "condition precedent" argument. Suppose A and B had an agreement to consummate the marriage once B performed a specific condition. B's refusal to perform this condition precedent can mean that he/she has wilfully refused to consummate the marriage.

²³ *Elements of Family Law in Singapore*, *supra* n 18, at [2.086].

²⁴ *LSJ*, *supra* n 15, at [3].

²⁵ *Id.*, at [4].

²⁶ See section D below.

This was the case in *Kwong Sin Hua v Lau Lee Yen* (“**Kwong**”),²⁷ where the couple agreed that they would only consummate the marriage after their Chinese customary ceremony.²⁸ However, the wife (*ie*, B in the scenario above), refused to follow through with the ceremony.²⁹ Thus, the marriage could not be consummated as agreed. The court equated the wife’s failure to fulfil the agreement to her wilful refusal to consummate the marriage.³⁰

C. All particulars must be proven

At this juncture, you may think of annulment as an easier alternative to divorce so long as both spouses cooperate to prove non-consummation. However, our courts are aware that rendering a marriage voidable is not just a matter between spouses. It must also consider the state’s interest of upholding the sanctity of marriages.³¹

In *Tang Yuen Fong v Poh Wee Lee Jerry* (“**Tang**”), the couple had a similar agreement to that in *Kwong*.³² However, there was no discussion on the ceremony arrangements or where they would cohabit and consummate the marriage.³³ The wife claimed that the husband had wilfully refused to consummate the marriage but did not produce any supporting evidence. The court inferred that the parties had converted a divorce case into one of an annulment as the latter was quicker and bore no stigma.³⁴

The court stated that it must not act as a “rubber stamp” and grant the petition just because it is sought.³⁵ For example, if you bring a claim under section 106(b), you must still show full particulars that there was no fault on your part, while your spouse refused to consummate without valid reason.³⁶ One cannot expect the court to simply allow the claim just because both parties consented to it. Ultimately the court must ensure that parties do not use section 106 to circumvent the requirement of filing for divorce.³⁷

²⁷ *Kwong Sin Hua v Lau Lee Yen* [1993] 1 SLR(R) 90 (“**Kwong**”).

²⁸ *Id.*, at [3].

²⁹ *Ibid.*

³⁰ *Id.*, at [38].

³¹ *Tang*, *supra* n 9, at [8].

³² *Kwong*, *supra* n 27, at [2].

³³ *Ibid.*

³⁴ *Id.*, at [6].

³⁵ *Id.*, at [8].

³⁶ *Id.*, at [11] and [13].

³⁷ *Tang*, *supra* n 31.

D. Potential Bar

Lastly, one must ensure that the claim for a voidable marriage is not barred under section 107(1).³⁸ Suppose A knows that the marriage can be avoided under section 106. Section 107(1) bars A from doing so if:

- (a) A's conduct leads his spouse, B, to believe that he would not annul the marriage;
and
- (b) it would be unjust to B to grant an annulment.³⁹

In *D v D*,⁴⁰ the husband knew that he could annul the marriage as his wife's physical incapacity had prevented them from consummating it. However, his conduct of agreeing to adopt two children made his wife believe that he would not seek annulment.⁴¹ This would satisfy section 107(1)(a).

For section 107(1)(b), the court will look at how A's conduct in section 107(1)(a) affects B. For example, if B's rights to child custody are unaffected by the annulment, the court may not find it unjust to grant it.⁴²

IV. Conclusion

This article illustrates how one can claim for a voidable marriage on the grounds of non-consummation. Notably, one should be mindful of the differences between a voidable marriage and divorce. An annulment is not simply an easier alternative to divorce. One must still show concrete evidence to successfully annul a marriage.

³⁸ WC, *supra* n 3, at s 107.

³⁹ *Id.*, at s 107(1).

⁴⁰ *D v D* [1979] Fam 70.

⁴¹ *Id.*, at 78.

⁴² *Ibid.*