WEEK ONE: The concept of family and the law

Definition of Family in Family Law Context

- **UN definition** – persons within a private institution or household who are related as husband and wife or as parent and never-married children by blood or adoption.
- **Function based definition** – family as security, producing and raising children, emotional support, financial support, sexual relationship.
- **Idealised definition** – depends on matters of culture, sexual preference (impossible to agree on this definition)

- **Fitzpatrick v Sterling Housing Association [2000]**
  - Same sex couples were a family and so surviving partner could take over the lease under the Rent Act
  - Lord Slynn – Family life was characterised by a ‘degree of mutual interdependence, of the sharing of lives, of caring and love, or commitment and support.’ It was not a ‘transient superficial relationship’
  - Need for an active sexual relationship or the potential for one, as this was important to distinguish between family and acquaintances.

- Implications for what is a family for social security and de factos

- **California Supreme Court (2008)**
  - State now recognises that an individual’s capacity to establish a loving and long term committed relationship with another person and responsibly to care for an raise children does not depend upon the individual’s sexual orientation.
  - Basic civil right for all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples’

- **Minister of Home Affairs v Fourie (Constitutional Court of South Africa) (2005)**
  - Our intimate, family relationships are complex, often incoherent, and continually changing. These relationships and the ways in which we express them are manifestations of our substantive individualities at any given time, but because both our identities and our relationships are always works in progress and are bound up with social and structural factors, they have social and structural meaning as well as emotional and moral meaning.

Week two: The legal framework of marriage in australia

Historical Development of Australian Family Law

**History of Family Law**

- **Private matter – village society – informal system of ‘marriage’ and divorce**
- **1857 Divorce and Matrimonial Causes** Act – took divorce out of the hands of the ecclesiastical courts and created a new Court for Divorce and Matrimonial Causes – husband could rely on the wife’s adultery if ‘aggravating circumstances.’ Law reinforced the role of maintaining lines of inheritance, production of legitimate heir as central to marriage
- **1956** – Royal Commission and Marriage and Divorce (Eng) 9 members recommended complete breakdown as an additional ground, 9 against and one member recommended ‘irretrievable breakdown’ as a ground.
- **1959 Matrimonial Causes Act 1959 (Cth)** in operation in 1961 – brought divorce law into Commonwealth sphere – aggregated all grounds of divorce then in the various states – continued to be dealt with by the state courts.
- **1961 Marriage Act (Cth)** – in operation 1963 – but not any substantial change to content of law (apart from ex-nuptial children now made legitimate by subsequent marriage of their parents)

- **1975 Family Law Act (Cth)** – No fault divorce – one ground for dissolution – irretrievable breakdown – evidenced by 12 months separation – no need for a mutual decision.

- Family Court of Australia – reduced formality, many parties self-represented, counter staff give advice, counselling and welfare staff

**Nature of Dispute Resolution**

- Aim is to reconcile where possible
- S 60I – generally must get certificate that family dispute resolution has been attempted before proceedings can be commenced for an order in relation to children
- Family Relationship Centres – Page 53
- Family Dispute Resolution – Page 55
- Child-inclusive mediation – Page 62-3

**Jurisdictional and Constitutional issues**

- Two heads of power in the Australian Constitution primarily concerned with family law
  - Sub-ss 51(xxi) – concerning marriage
  - Sub-ss 51(xxii) – concerning divorce and matrimonial causes and in relation thereto parental rights, custody and the guardianship of infants
- Division between State responsibility for child protection matters and adoption and the Federal jurisdiction under the Family Law Act that effectively deals with private child-related disputes within family law (where children live with their parents when they separate)

**Scope of the Commonwealth Powers**

**The marriage power**

- **Attorney-General (Vic) v Commonwealth (1962)** – held that s 94 of the Marriage Act 1961 (then related to legitimation and bigamy) related to the protection of marriage and that Part VII was a power in respect to marriage which included the power to pass laws on the status of children born to people who marry.

- **Commonwealth v Australian Capital Territory [2013]** – determine whether same-sex marriage law in ACT was inconsistent with the Marriage Act 1961 and the Family Law Act 1975 – it was.

**The Matrimonial Causes power**

- **Russell v Russell; Farrelly v Farrelly (1976)** – matrimonial cause includes all suits or actions arising between spouses because of the matrimonial relationship.

- **Family Law Act 1975** made all forms of ancillary relief independent – no possible prior to FLA (property settlement can occur before divorce)

- Challenges: **Russell v Russell; Farrelly v Farrelly (1976)**
  - Majority of High Court held that the Commonwealth could not direct a State Court to sit in closed court (because this went to a matter of taking a Court as it is)
  - Majority also held that the provision against robing was valid (because this was regarded as a mere matter of practice and procedure)
  - Farrelly – Mason J ratio said the provisions) that do not require principal relief to be instituted) were saved by the marriage power, but were drawn too widely as they were unlimited as to parties. Held that the proceedings had to be ‘between the parties who marriage gave rise to those rights and duties
1988 – Referral of legislative power from the States to the Commonwealth in relation to children. This allowed parliament to legislate pursuant to 51 (xxii) and is a referral in respect of three matters: custody, guardianship and access; child maintenance and child-related expenses.

- **Stanford v Stanford [2012]** – held that an order for the division of property between a husband and wife after the death of the wife was a valid exercise of the power. Husband and wife had been involuntarily separated by the wife’s dementia causing her to reside in residential care.

**Referral of Powers**

- Section 51 (xxxvii) allows referral of powers from States to the Commonwealth – open to a state to refer any of its powers.
- **Commonwealth Powers (Family Law – Children) Act 1986** – gave Commonwealth jurisdiction to include ex-nuptial children within the ambit of the Family Law Act 1975 in relation to issues of custody and guardianship but NOT in relation to welfare, adoption or juvenile justice.
- **Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)** – referral of powers for de factos to seek relief from the court in regards to property settlements and torts issues.