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Legal Recognition of Family Relationships

Introduction

- Extent to which diversity recognized and respected by laws
- Focus on legal recognition of adult relationships (not parentage)
 - Changing family forms
 - Family ideology
 - Indigenous families
 - Recognizing adult partnerships
 - De facto
 - Non couple
 - Marriage, nullity & divorce

Diverse Family forms over time

- Families: ¾ are family households 2011
 - More couple families have dependent children (44%) than not (40%)
 - 81% one parent families headed by women
- Marriage still predominant: 81% couple families
 - Older at first marriage – (31 men/29 women: 2008)
 - More civil than religious marriages
 - Decrease in remarriage – down by 50%, still 1:3 marriages
- Cohabitation increase: de facto: 15% couples
 - Prelude to most (78%) marriages
- Same sex: more disclose as and/or live as couple
- Divorce increase – 33% marriages; 60% 10y +
- Fertility and family size decline
 - TFR 1.88 babies 2011
- Lone person households (23%)
- Ethnically diverse families (16% LOTE)

Family Values

- Collectivist – relational
 - Culturally & faith minority families: sameness or difference?
 - Indigenous families: 'reciprocity, shared experiences, coexistence, cooperation and social memory' T 76
- Individualistic values and family
- How much law respond / respect?
 - 1992 ALRC recommendation T 77 'take account of person's cultural experience, values & attitudes where not discriminatory and not jeopardies rights of others'
 - Private ordering/ADR – values applied?

Family Ideology

Family in Law

- Law historically recognised families through status of marriage - legitimate
- Functional family T77
 - Legal recognition of non married families where there is interdependence and commitment, regardless of formal status (marriage)
 - Law & policy should reflect and assist actual families, not 'channel' behaviour through normative messages
 - 'Messy, varied, emotional, aggravating, necessary' T78

Underlying Familial Ideology

- Nuclear family norms? Genetic relatedness exclude and disadvantage many families
 - Tension between functional recognition of families and the sense of recognised families because of their biological connectedness
 - Concept of parental responsibility limited
- **S43 FLA** T79 'Family is the natural and fundamental group unit of society' – should support that
- Legislative change has led to greater recognition non-nuclear families T83
 - Non-genetic parents assisted reproduction **s60HB(1)**
 - Intended surrogacy parents **s60HB**
 - De facto partners of adoptive parents **s60HA**

Indigenous Extended Families

- Not necessary nuclear in structure or practice:
 - **Re CP 1997** T80: 4 yr child born Tiwi mother, reared by a woman from the Thursday Islands in the Torres Strait, but had lived in Darwin with CP since he was about 6 mths old. When child was 4, his mother, other mothers, his sisters and the Grand Mother, brought an application to the court to have the child live with them
 - Collective care arrangements; concept family & structure differ
 - Communal kin responsibility: 'other mothers'
 - **s60B(3), s60CC(3)(h)** the court must have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture.
 - Right to enjoy Tiwi culture
 - Legislation not accommodate collective care
 - **Donell v Dovey 2010** T82 Torres St father and child's sister
 - Judges should know about indigenous culture
 - Research *Bringing Them Home*: take judicial notice
 - Evidence about culture given by elder
 - **Beck & Anor & Whitby 2012** T83
 - Customary Torres St adoption: no power FLA to enforce
 - Confirm FLA nuclear concept of family as parents

Eternal Biological Family

- View that genetic parents only 'real' parents devalues caring work of functional family

- *Re Patrick 2002 FFC T84*
 - Sperm donor parent who sought time with the child who his sperm had given birth to. Child brought up by two lesbian co-parents. Co-parents originally wanted him involved but later changed their mind.
 - Recognition of diverse family forms, meaning family
 - Informal assisted reproduction: donor not parent
 - Ordered donor contact time: 'fatherly role'
- Legal recognition of three parents? p86

Adult Partnerships

Recognition of Adult Partnerships

- Pre 1980s unmarried partners legally unrecognised
- Since 1980s states & 2009 federal legal recognition of *de facto* relationships: heterosexual and same sex T89
 - FLA s4AA, s2F AIA: not married or related, 'living together as couple on ordinary domestic basis'
 - Interdependence, commitment as criterion
 - Plus residency requirement Family Law
- Is it appropriate to treat same as marrieds?
 - Parkinson T89 thinks not because
 - Varying commitment
 - Financially interdependent?
 - Autonomous, self-sufficient, independent? Choice?
 - Assume marriage-like relationship?
 - Only protect those with children?

De Facto Definition

- s4AA(2) FLA T91, TM 51
 - Not married or related, 'living together as couple on ordinary domestic basis'
 - Indicia of couple
 - Living together at least 2 years (s90B) - may aggregate periods: turns on facts
 - Plus ordinarily resident or substantial contribution s90K
- What has been determined as a defacto relationship?
 - *Jonah v White FFC 2012 TM 54. T 93*
 - **Facts:** 17 yr secret relationship/affair – lived together 2 or 3 nights every few weeks; 2 week holiday & overseas
 - **Issue:** Were they living together as couple? Genuine domestic basis? Nature & extent common residence?
 - **Held:** Was mutual commitment, care & financial support, but Not de facto: was lack of shared life, not lack of common residence TM 56
 - Merger of two lives is the core of de facto relationship
 - Emotional communication insufficient
 - *Moby v Schulte FC 2010 p94; TM 52*
 - **Facts:** relationship 2002-2009; live in same household until 2007; after this, M stay a few time a week with S TM 53

- **Issue:** Was it de facto? Living together?
 - **Held:** Was de facto: Living together need not be full time
- May be separate residences but also de facto relationship, but no Family Court finding where not live together: 'emotional entanglement not equal coupledness' *Keene & Schofield* T95
- Sexual relationship:
 - May have concurrent relationships, married and/or de facto
 - But must also satisfy other criteria
- Shared life/reputation:
 - Lack of this rather than lack of reputation if secret, is determinative
- Registered partnerships/civil unions:
 - Only one factor in FL

Non-Couple Relationship

- Recognise relationships where are not a couple
 - Interdependency: *Domestic Relationship Act (1994) ACT s3(1)* T98
 - Two adults ... one provides personal **or** financial commitment **and** support domestic nature for material benefit of other ... even if not same household
 - Excludes care giving
 - *Relationship Act 2008 (Victoria) ss5*, 35 TM 61
 - Must be registrable caring relationship
 - *Property (Relationships) Act 1984 (NSW) s5* T99
 - Live together, one or both parties provide domestic support **and** personal care
 - Not *FLA* de facto relationship *McMaster v Whyler* T99

Marriage and Divorce

Legal Framework of Marriage

- Symbolic, cultural & religious significance
- Legal consequences derived from *status* of marriage:
 - Structure to identify legal relations of dependence, duties of support, entitlement to property
- *(2004) s5 Marriage Act 1960 (Cth)* union of man and woman voluntarily entered into for life to exclusion all others
 - *Codify Hyde v Hyde and Woodmansee (1886)* ... 'in Christendom'
 - Cultural specificity of marriage – not recognise polygamous, Aboriginal customary marriages – functional approach ALRC?
- *Marriage Act 1960 (Cth) s23B* (& Grounds for Nullity)
- Entering marriage: T101
 - Formalities *s48*
 - documents *s42*
 - witnesses *s44*

- solemnised by authorised celebrant s41
- Certain words where not religious minister s5(3) 'lawful wedded wife/husband; marriage is between man & woman'
- Consent (no duress, fraud, mistake, incapacity) s23B(2)(b)
- Not married or in prohibited relationship s23B(2)(a)
- Over 18 s12

Re Kevin: Man and Woman?

- **Re Kevin** (FFC 2003) 'man and woman' T 102 / TM 62
- **Issue:** Was Kevin, born female, a man at time of marriage? Declaration of validity of marriage by post-operative transgender/transsexual male
- **Held:** yes, combination of
 - *Subjective* psychological (self and others' perception; accepted) and
 - *Objective* physiological factors (post-operative; brain sex);
 - *Not biological* matters or 'essential roles' (cf *Corbett* TM 65)
 - Consistent with Australian & international law & humanity
 - Man/woman determined at time of marriage
 - Man/woman ordinary contemporary meaning
 - Marriage defined terms of companionship

Same Sex Marriage?

- Saw last class *Cth v ACT*, HC concluded Cth has power to authorise marriage same sex equality
- Three attempts to change Marriage Act & Senate & HR inquiries T 105

Nullity

- **Nullity** – there was no marriage in law, but still eligible for legal consequences of marriage
- Still have to divorce if want to remarry
- **Marriage Act s23B(2)** Grounds for Nullity T106: void if
 - (a) Married to another (bigamy; polygamy) T107
 - (b) In prohibited relationship (ancestor/descendant; brother/sister)
 - (c) By reason s48 – formalities (T 101): *Rewal*
 - (d) Consent not real because
 - Duress or fraud: *Marriage of S; Osman; Deniz; Rick & King*; T108
 - *See Below*
 - mistaken identity
 - mentally incapable understanding
 - (e) Is not of marriagable age (18) s12

Nullity: Fraud

- **S23B((d)(i) FRAUD**
 - Either as to identity (not attributes) of other party or nature of ceremony: *Hosking 1994; Osman & Mourrali 1990*

- *Moss T*: 'procures appearance without reality of consent': someone other than person at altar, or something other than marriage
 - *Deniz pT107*, Main reason for marrying immigration status – not consent 'go to root of marriage contract' 14 yr old Lebanese girl induced to marry: case now distinguished – *Marquis 2012 p 108 fn 197*
 - *Rick v King p108*: Not fraud even though the wife did not disclose HIV + fraudulent misrepresentation (mistake) inducing consent is not fraud: knew woman, knew valid marriage
 - *Osman*: Stricter view applied where knew kitab betrothal ceremony was valid marriage in Australia – was fraudulent misrepresentation, not fraud: he wanted to marry to get entry to Australia – ie if aware of identity, and aware is marriage ceremony, cannot claim fraud.

Nullity: Duress

- *s23B((d)(ii))* not real consent because duress: coercion vitiates consent: Earlier British cases strict: threat to 'life, limb, liberty'
 - *Re S 1980*: T 108 strong pressure from parents was oppression - "mental oppression" on the basis of love for family, concern that younger sisters not be able to marry, not require terror or fear; 'victim of family loyalty and concern'; filial obedience; at 16 still a child; personal right to self sovereignty
 - *Hallas & Kefalos 2012 T 109* not duress: will not overcome where mature – here religious leader pressured depressed woman 30s to marry
 - *Cf Nagri & Chapal 109 fn 207* – Young person in their 20s, financially dependent on uncle who pressured into marriage. Held duress
 - *Kreet & Sampir 2011 TM 69* parents deceived young woman (who had formed relationship with Mr U) to travel to India, confiscated passport, threatened violence to woman and family of Mr U unless she marries Mr S: will was physically and mentally overcome: was duress
- *Criminal Code Act 1995 (Cth) s270.7A(1)* definition of forced marriage – because of coercion, threat or deception, party enters marriage without freely and fully consenting T110
- Coercion includes
 - Force
 - Duress
 - Detention
 - Psychological oppression
 - Abuse of power
 - Taking advantage of person's vulnerability

Divorce

Legal Requirements for Divorce

- *s48(1)* – T110 – marriage broken down irretrievably
 - *s48(2)* Evidenced by 12 months' separation (may be under one roof)
 - Destruction of *consortium vitae*: *Pavey; Todd; Price & Underwood T111*
 - Intention to sever and not resume marriage, and act on that

- Contrast state of marriage before and after
- **S39(3) FLA** T110 - domiciled, ordinarily resident, resident 1 yr
- **s55A** T112 divorce not granted unless court satisfied proper arrangements for care & welfare of children *Evans; Maunder; Navarro & Jurado* TM 71
- Over time law's role in relationships has shifted from regulation of *status* of marriage to *consequences* of divorce
 - from rights to responsibilities
 - privatising welfare obligations within the family
 - Focus on parenthood, not marriage, as trigger for responsibility