

LAW4607 EXAM NOTES

FAMILY LAW ACT AND THE FAMILY COURT

- WA has its Family Court, but Australian Family Court still relevant
 - FCA mirrors FLA
- Family Law Act 1975 (Cth) = Only applies in WA in relation to married people, and their children
- **Family Court Act 1997 (WA)** = Use in relation to de-factos, and their children
 - WA has not yet referred its State legislative powers in respect of defacto relationships to the Cth

JURISDICTION OF THE COURTS

MATRIMONIAL CAUSE

- Essentially any action between spouses pertaining to their matrimonial relationship
- s 4 FLA – definition of ‘matrimonial cause’
 - Proceedings between the parties to a marriage, or by the parties to a marriage, for:
 - A divorce order in relation to the marriage; or
 - A decree of nullity of the marriage
 - Proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage
 - Proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them being proceedings:
 - Arising out of the marital relationship
 - In relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties
- s 39(4) FLA - Required nexus for a matrimonial cause
 - Proceedings in relation to a ‘matrimonial cause’ (other than proceedings for a divorce order) may be instituted under the FLA if:
 - s 39(4)(a) FLA - In relation to proceedings between the parties to a marriage of a kind referred to in paragraph (b) of that definition - Either party to the marriage must be:
 - An Australian citizen
 - Ordinarily resident in Australia; or
 - Present in Australia, at the relevant date
 - s 39(4)(b) FLA - In any other case – Any party to the proceedings must be:
 - An Australian Citizen
 - Ordinarily resident in Australia; or
 - Present in Australia, at the relevant dated

MARRIAGE

NULLITY OF MARRIAGE

- s 5(1) Marriage Act 1961 =

Void Marriage

- s 23B(1) Marriage Act 1961 – Grounds upon which a marriage is void, will be void where:
 - Either of the parties is lawfully married to some other person - 23B(1)(a) Marriage Act;
 - Parties are in a prohibited relationship – s 23B(1)(a) Marriage Act;
 - Pursuant to s 48 the marriage is not valid;
 - No consent, because it was obtained by:
 - Fraud
 - Mistaken identity
 - Mentally incapable
 - Not of marriageable age – s 23B(1)(e) Marriage Act
- Forms of relief
 - Decree of Nullity of Marriage – s 51 FLA
 - Declaration re invalidity of marriage – s 113 FLA

FORMALITIES OF MARRIAGE

- S 5(1) Marriage Act 1961
 - “The union of a man and a woman to the exclusion of all others, voluntarily entered into for life”
 - 4 elements:
 - A voluntary union
 - For life
 - Of a man and a woman
 - Not a requirement pursuant to s 23B(1) of the Marriage Act
 - HOWEVER, s 5 Marriage Act defines marriage as ‘union of man and a woman’
 - To the exclusion of all others
- Must be solemnized/in presence of an authorised celebrant
- Celebrant must receive 1-18 months notice in writing
- Each party must produce birth certificate (and evidence of divorce or death of spouse is relevant)
- Where Civil Celebrant used – words prescribed by s 45(2) must be used
- 2 witnesses over 18 years of age
- Non-compliance
 - May not invalidate the marriage, but may constitute a criminal offence

DIVORCE

- Marriage can end by:
 - Death of a party; or
 - Divorce
- s 4(1) FLA – Definition of ‘divorce’
 - ‘Termination of a marriage otherwise than by the death of a party to the marriage’
- s 4(1) FLA – Definition of ‘matrimonial cause’
 - Proceedings between the parties to a marriage, or by the parties to a marriage, for:
 - A divorce order in relation to the marriage; or
 - A decree of nullity of the marriage

Jurisdiction – s 39(3) FLA

- Proceedings can be instituted under this act, if at the date of the application is filed, either party to the marriage:
 - is an Australian citizen
 - is domiciled in Australia, or
 - is ordinarily resident in Australia, and has been so resident for 1 year immediately preceding that date

Grounds for divorce – s 48 FLA

- Marriage has broken down irretrievably – s 48(1) FLA
- How to satisfy the grounds? – s 48(2) FLA
 - Court satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order

Separation

- s 49 FLA – Separation
 - When cohabitation has come to an end
 - Can still be deemed separated and that you lived separately and apart even if you reside in same house
- Elements of Separation
 - Intention
 - Of at least 1 party to sever matrimonial relationship
 - Action
 - Upon intention to separate
 - Communication
 - Of intention to separate
- Court not concerned about cause of separation – s 49(1) FLA
- s 50(1) FLA - Resumption of Cohabitation
 - Can resume cohabitation for 3 months without restarting the required 12 month separation period
 - BUT, the period of cohabitation won't be included as part of the period living apart
 - Conditions of resumption of cohabitation
 - No more than once
 - Must come to an end within 3 months to qualify
 - Must be followed by a further period of cohabitation which totals a minimum of 12 months
 - The final period of separation must continue up to the date of filing the application

Further Requirements for Divorce

- Parties married less than 2 years - s 44(1B) FLA
 - Need to undertake counselling first
- Welfare of Children – s 55(1) and s 55A(1) FLA
 - Court must be satisfied that proper arrangements have been made for children under 18
 - Will only dispense with this requirement where spouse caring for children cannot be found

Divorce Order

- If satisfied that grounds of divorce under s 48(1) and (2) met and subject to provision concerning the reasonable likelihood of resumption of cohabitation in s 48(3) a divorce order will be made

Rescission of Divorce Order

- 2 circumstances in which Court can rescind a divorce order:
 - s 57 – If parties reconcile before order takes effect
 - s 58 – Miscarriage of justice = A fraud, perjury or suppression of evidence