

Table of Contents

Preliminary Matters	4
Marriage	4
Nullity	4
Divorce.....	4
FLA, s 48	4
De Facto Relationships	6
s 4AA(1) of the FLA: Meaning of de facto relationship.....	6
In Relation To Property: (s 90SM).....	7
There is FLA Property jurisdiction over de-facto's if: (FLA s 90SB)	7
Range of Family Dispute Resolution Processes	7
Violence - Kelly & Johnson typology	8
Who is a parent?	8
Possible bases for parentage:.....	8
The presumptions of parentage under the FLA are found in ss 69P-69U:	8
(Legal) Parentage important because.....	9
s60H(1) - Children born as a result of artificial conception procedures.....	9
Principles to be applied by the courts: s 43 of the FLA:	10
Jurisdiction	10
1. Property	11
First: consider what are the major assets that a couple will own?	11
First question we need to address is why make property adjustment orders at all?	11
s 78- Declaration of interests in property.....	11
s 79(5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, where, in property settlement proceedings, a court is of the opinion:	12
s 79(4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:	12
s 79(1) In property settlement proceedings, the court may make such order as it considers appropriate:	12
s 79- Alteration of property interests.....	12
75(2): matters to be taken into account also include:.....	13
s 79(6) Where a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:	13
For De Factos— s 90SM	13
SUMMARY: Alteration of property interests.....	13
Just and Equitable Consideration: s 79(2) (and s 90M(3))	14
a) Economic Consequences of relationship breakdown	15
Sources of inequality in standard of living after separation caused by:	15
b) Financial Arrangements on Relationship Breakdown	15
c) Processes for Resolving Disputes	16
1. Informal agreements	16
2. Consent orders (s79 or s90SM)	16
3. Financial agreements (Part VIIIA FLA (s 90A-90Q)/ VIIIB for de factos (s 90UA-90UN)).....	17
GENERAL APPROACH BY COURTS POST STANFORD	19
Relationship Breakdown Is Required For De Facto But Not Matrimonial Property Settlement Orders...20	
Time Limit for Institution Of Property Settlement Proceedings.....	20
PROCEEDINGS MAY BE COMMENCED AFTER THE DEATH OF A PARTY: Ss 79(8) and 90SM(8).....	20
s 106B of the FLA (formerly s 85): transactions to defeat claims	21
Transactions to defeat claims	21
Injunctions	22

Family Law Exam Notes
78255

Injunction cases— Waugh, Mullen & De Bry	23
Financial Disclosure	23
Rule 13.04 Full and frank disclosure	24
Rule 13.01 General duty of disclosure	24
1. Legal & equitable interests in the property of the parties— identification and valuation of the property, liabilities and financial resources of the parties (or either of them)	25
Meaning of Property.....	25
FINANCIAL RESOURCES.....	26
LOSSES AND LIABILITIES.....	26
2. Is it a Just and Equitable Order?	32
3. Identifying and Assessing Contributions	32
Statutory considerations:	32
Past Considerations	33
S79(4) factors: Approach for assessing contributions	36
NO STARTING POINT OF EQUALITY	37
Special Contributions.....	38
Initial contributions to property	38
Additional cases: Initial contribution	39
Post-separation contributions to property	39
Post separation contributions	39
FAMILY VIOLENCE	39
Kennon (1997) Adjustment.	39
• Post-separation contributions are relevant for s 79, so no reason to exclude post-separation fv. Such an approach could well lead to a result which is not ‘just and equitable’	39
4. Additional Factors – Assessing Future Needs	40
Earning Capacity: ss 79(4)(d) and 90SM(4)(d)	40
Spousal Maintenance Matters: ss 79(4)(e) and 90SM(4)(e)	41
Other orders: ss 79(4)(f) and 90SM(4)(f)	41
Child Support: ss 79(4)(g) and 90SM(4)(g)	41
s. 75(2) matters to be so taken into account include:	41
Superannuation	42
Why is super relevant?	42
○ Re-opening of judicial discretion	44
(6) Subsections (4) and (5) do not limit paragraph (1)(d).	45
5. Are Those Orders Just and Equitable in All Circumstances?	45
s 81: Duty of court to end financial relations	46
SETTING ASIDE ORDERS ALTERING PROPERTY INTERESTS: ss 79A and 90SN	46
Miscarriage of justice:	46
2. Child Support	47
• Maintenance claims against step-parents — see pg 81 of LB	47
• Claims for maintenance by children over 18—	47
• Claims for children whose parents do not have the required connection with Australia—	47
• Applications for maintenance other than by way of periodic payments—	47
The revised formula:	47
s 66E Child maintenance order not to be made etc. if application for administrative assessment of child support could be made.....	48
Who may apply for an order for child maintenance?.....	48
FLA— Maintenance claims for adult children- pg 85 LB.....	49
(a) to enable the child to complete his or her education	49
(b) because of a mental or physical disability of the child.	49
End of liability of CSS— see pg 99 of LB.....	49
Two kinds of child support agreements:	52

Family Law Exam Notes

78255

3. Spousal/ De Facto Maintenance	53
Time Restrictions:	53
Court's power to enforce liability: ss 74 (married) and 90SE (df)	53
MAINTENANCE THRESHOLD- s 72 (s 90SF de facto)	54

Preliminary Matters

Marriage

- The *Marriage Legislation Amendment Act 2004* definition of Marriage s5(1):
 - “Marriage, means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”
- (These requirements are also identifiable in s 46(1) and (2) of the MA and in s 43(a) of the FLA)
- Only couples of the opposite gender may marry in Australia
- Solemnisation/procedures of marriage— see pg 14,15,16 of little book

Nullity

FLA s 51 – ground that the marriage is ‘void’ → only a few grounds so hard to get. (s23 MA)

Void marriages are set out in the *Marriage Act 1961* (Cth) ss 22-24. i.e. marriages that are:

- bigamous (if entered into in Australia), → its criminal offence as well.
 - Bigamous if legal in another country is legal and recognised in Australia.
- incestuous,
- invalid under s 48 of the MA (didn't fulfil the formalities or s 45),
- lack of real consent (i.e. because of duress or fraud, mistake as to identity or nature of ceremony, incapable of consent) → fraud *Rick & King (2011)*. Duress *Kreet & Sampir*
- under age
 - See pg 21-28 of little book for more info on the grounds

Divorce

FLA, s 48

- (1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has **broken down irretrievably**.
- (2) ... the ground shall be held to have been established, and the divorce order shall be made, if, and only if, the court is 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
- (3) A divorce order shall not be made if the court is satisfied that there is a **reasonable likelihood of cohabitation being resumed**.

- The courts are not concerned about the reasons for the breakdown of the marriage. The court need only satisfy itself that a separation took place. **It is the date of the filing of the application which is crucial, and it must be at least one year and one day after the separation commenced.**

Meaning of Separation – s 49

1. The parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.
2. The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.

Family Law Exam Notes

78255

- Must be more than mere physical separation- there must be a complete separation from the marriage itself: *In the Marriage of Todd (No 2)* (1976).
- There are 3 requirements/elements of separation: *Pavey and Pavey* (1976)
 - (a) Intention
 - (b) action, and
 - (c) communication (Direct or indirect)

Ground for Divorce

- **S 49(2)** parties can be separate notwithstanding the fact that they **reside in the same residence** and render some household service to the other party
 - Can still live together when separated.
 - the courts appreciate that s **49(2)** of the FLA provides an exception to the 'norm' and to comply with this provision the court must be satisfied that there was some overt separation by the parties: *Fenech and Fenech* (1976).
- **S50** – Parties may **resume cohabitation for one period of up to 3 months** and still count the period of separation prior to that towards the separation
 - if the reconciliation does not work out, and provided it was for less than 3 months, the original date of separation can still be used and the 12 month required separation period is extended by the period of the reconciliation.
 - This provision is in keeping with the spirit of **s 43** of the FLA as it formally promotes reconciliation of marriages while recognising that this does not always work out.
 - *In the Marriage of Todd (No 2)* (1976) Watson J: 'casual acts of sexual intercourse do not constitute an interruption of separation. An agreement to resume cohabitation, which is not carried out, is insufficient. Just as intention (or acceptance) and action thereon are ingredients in the element of separation, so intention (or acquiescence) and action thereon are necessary ingredients in the termination of separation.'
 - *Clarke and Clarke* (1986): held that even reconciliation between the parties (i.e. restoration of friendly relations) does not of itself constitute a resumption of cohabitation.
- **S44(1B)** for marriages of **less than two years' duration**, the parties must undertake counselling before the divorce will be granted. Need a certificate except if obtain leave of court.
 - **s 44(1C)** if there are 'special circumstances' for the divorce application to proceed

FLA, s 55A – divorce order where kids

1. A divorce order in relation to a marriage does not take effect unless the court has, by order, declared that it is satisfied:
 - (a) *all children are over 18*; or
 - (b) *where children under 18*:
 - **proper arrangements** in all the circumstances have been made for the care, welfare and development of those children; or
 - there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made.
2. Where, in proceedings for a divorce order in relation to a marriage, the court doubts whether the arrangements made for the care, welfare and development of a child of the marriage are proper in all the circumstances, the court may adjourn the proceedings until a report has been obtained from a family consultant regarding those arrangements.

- Won't make court final if kids are under 18.
- To stop situations like *Maunder* → court refused to make divorce final. Similar to *Nevaro*
- filed in federal court \$865 not in fam court.

Further info on divorce/divorce proceedings see **pg 34-36** of little book

De Facto Relationships

(text at p.91/ materials at p.50-51)

s 4AA(1) of the FLA: Meaning of de facto relationship

1. A person is in a **de facto relationship** with another person if:
 - (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and
 - (c) having regard to **all the circumstances of their relationship**, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

ss 4AA(2)-(5): *Working out if persons have a relationship as a couple*

2. Those circumstances may include any or all of the following:
 - (a) the **duration** of the relationship;
 - (b) the **nature and extent** of their **common residence**;
 - (c) whether a **sexual relationship** exists;
 - (d) the degree of **financial dependence or interdependence**, and any **arrangements for financial support**, between them;
 - (e) the **ownership, use and acquisition** of their **property**;
 - (f) the degree of mutual **commitment** to a shared life;
 - (g) whether the relationship is or was **registered** under a prescribed law of a State or Territory as a prescribed kind of relationship;
 - (h) the care and support of **children**;
 - (i) the **reputation** and public aspects of the relationship.
3. No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.
4. A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
5. For the purposes of this Act:
 - a. a de facto relationship can exist between **2 persons of different sexes** and between 2 persons of the **same sex**; and
 - b. a de facto relationship can exist even if **one of the persons is legally married** to someone else or in another de facto relationship—
 - see **D v McA**: which makes it clear that a person may be in a DF r/s notwithstanding that they are married to another or engaging in a sexual or other close r/s with another.

- In deciding whether a DF r/s meets the relevant definition, the courts are not exercising a discretionary power, but are required to consider a multitude of circumstances in order to make a factual determination on a **case-by-case basis**: see **Moby and Schulter** (2010); **Jonah v White** (2012); and **Ricci and Jones** [2011].
- **Onus is on the applicant to show the de facto relationship existed: Taisha & Page and Anor** [2012] FamCA 385
 - If the existence of the de facto relationship is contested, then the court cannot exercise other powers in relation to financial matters until the question of the relationship is determined. The de facto relationship establishes the jurisdiction.

Family Law Exam Notes

78255

- Problems arise as to the **length and quality** of the cohabitation required for formation purposes.
 - Generally speaking— a DF r/s only arises when the parties live in a genuine and permanent domestic relationship. Unless a minimum period is prescribed for statutory relief, a DF r/s may arise after a short period of cohabitation; see **Tobin v Executor of Hardy's Estate (No 2)** (1992).
- For statutory relief the minimum period is **2 years** under the FLA and the relevant State Acts.

In Relation To Property: (s 90SM)

- While the court can order property orders under all the State and Territory statutes, limited spousal maintenance rights are available in NSW— **A minimum two-year relationship must exist before a court can entertain an action for property (and/or where applicable spousal maintenance order(s)).**

There is FLA Property jurisdiction over de-facto's if: (FLA s 90SB)

- Relationship of 2 years, or
- Child, or
- Significant contribution **and** serious injustice if declaration/order not made; or
- If registered under a prescribed scheme

s 90SB— *When this Division applies--length of relationship etc.*

A court may make an order under **section 90SE, 90SG or 90SM**, or a declaration under **section 90SL**, in relation to a de facto relationship only if the court is satisfied:

- (a) that the period, or the total of the periods, of the de facto relationship is at least 2 years; or
- (b) that there is a child of the de facto relationship; or
- (c) that:
 - (i) the party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); and
 - (ii) a failure to make the order or declaration would result in serious injustice to the applicant; or
- (d) that the relationship is or was registered under a prescribed law of a State or Territory.

s 90SK— *Geographical requirement*

(1) A court may make a declaration under **section 90SL**, or an order under **section 90SM**, in relation to a de facto relationship only if the court is satisfied:

- (a) that either or both of parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made (the **application time**); and
- (b) that either:
 - (i) both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or
 - (ii) the applicant for the declaration or order made substantial contributions in relation to the de facto relationship, of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);

in one or more States or Territories that are participating jurisdictions at the application time; or that the alternative condition in subsection (1A) is met.

(1A) The alternative condition is that the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.

Range of Family Dispute Resolution Processes

- counselling,

Family Law Exam Notes

78255

- attending Family Relationship Centres;
 - attending with family consultants
- negotiation (including 'round table, conferences' and collaborative law)
- mediation (and family dispute resolution)
- conciliation
- case appraisal
- legal aid conference → need to be reasonable.
- arbitration (currently financial matters only)
- litigation:
 - traditional adversarial approach
 - less adversarial trial process (LAT)
 - Magellan Program

Violence - Kelly & Johnson typology

- Coercive controlling violence
- Violent resistance
 - Actions in self-defence, sometimes lethal, not always a response to immediate threat
- Situational couple violence
 - More likely to be both men and women or 'mutual', conflict related, lower intensity, less likely to escalate over time
- Separation instigated violence
 - At point of separation but not on-going

Are there some cases where mediation is never appropriate?

- Mental health
 - Drug or alcohol
-

Who is a parent?

Possible bases for parentage:

- Biological - Birth mother and marriage (or relationship) to birth mother.
- Genetic connection to child - Parents through assisted reproductive technologies (gamete donation: egg, sperm – genetically related to none, one or both)
- Surrogacy (genetic surrogacy, gestational surrogacy)
- Social parent/Family Function
- Adoptive parents
- Step parents
- Foster parents
- Psychological parent (perceptions of the child)

The presumptions of parentage under the FLA are found in ss 69P-69U:

- **Marriage (s 69P)**: there is a presumption of parentage if a child is born during the marriage or within a maximum of 44 weeks after separation or death;
- **Non-marital cohabitation (s 69Q)**: there is a presumption of paternity in favour of the male partner where a child is born to the female partner during a r/s which existed for a period between 20-44 weeks before the child's birth;
- **Registration of birth (s 69R)**: there is a presumption of parentage arising from registration of birth under State or Territory Legislation;
- **Court findings (s 69S)**: there is a presumption of parentage arising from findings of courts, including prescribed foreign courts; and
- **Acknowledgement (s 69T)**: there is a presumption of paternity arising from acknowledgements in writing by man of his paternity

Family Law Exam Notes

78255

Presumption Rebutted

- s 69U(1) - presumption can be rebutted by 'proof on the balance of probabilities': see *G v H (1994)*

Current position is that IN THE ABSENCE OF LEGISLATION TO THE CONTRARY, it is the child's biological or gestational parents who are also the legal parents

(Legal) Parentage important because

- Parents have shared parental responsibility even without court orders - s61C
- Court must presume that shared PR of parents in best interests of child - s61DA
- IF shared PR *then* court must consider equal time or substantial and significant time with parents- s65DAA
- Benefit to child of relationship with parents is a primary consideration in s60CC (whereas consideration of other relationships is an additional or secondary consideration)
- Only parents can enter into parenting plan which displaces earlier court orders – ss 63C/ 64D
- Only parents liable for child support
- Range of other rights and obligations under huge range of state and federal laws

More on FLA parentage

- s 4 parent means parent of adopted child
- s69S finding of a court
- s60H parentage under ART provisions → assisted reproduction

All of which are irrebuttable, i.e. DNA showing someone is not genetic parent will not alter legal parentage (see s69W orders for DNA testing)

s60H(1) - Children born as a result of artificial conception procedures

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the **other intended parent**); and
- (b) either:
 - i. the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
 - ii. under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:
- (c) the child is the child of the woman and of the other intended parent; and
- (d) if a person other than the woman and the other intended parent provided genetic material--the child is not the child of that person.

- **Then child is child of both people under the Act whether or not child genetically connected to either.**
- Any other person who contributed genetic material is not a parent.
- Consent is presumed but can be rebutted.
 - This definition not just FLA – reflected in Child Support & range of other federal laws.
- *Aldridge v Keating* → determined the co-mother was not legal parent because not in de-facto relationship at time. At time of treatment they were not de-facto.
- *Groth v Banks* – single women who went under IVF. Said 60H doesn't apply... therefore natural parents will be the legal link.

Principles to be applied by the courts: s 43 of the FLA:

- (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
 - (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
 - (c) the need to protect the rights of children and to promote their welfare;
 - (ca) the need to ensure protection from family violence; and
 - (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

Jurisdiction

State Magistrates Court

- Jurisdiction –
 - s 39 FLA – Limited jurisdiction in relation to property
 - If property is over \$20,000, the court can only hear the matter with the consent of both parties.
 - s 46 FLA – Required to transfer matters over >\$20,000 to the Family Court
 - s 69J & N FLA – Child maintenance
 - Only where both parties agree on the content of the order
 - OR both parties agree to have the court hear and determine the matter
- Does not have jurisdiction over
 - Nullity
 - Declarations of validity of marriage
 - Divorce

Federal Circuit Court (formally Federal Magistrates Court)

- Migration and family law matters are the main issues dealt with
- Judges (not magistrates or justices)
- No restrictions on financial value of disputes
- Deals with the substantial amount of family law matters
- Established to be the work horse of Family Law matters
- Similar jurisdiction to Family Court
- Jurisdiction –
 - s 39(1A) – Jurisdiction over divorce
 - s 39(1A) – Jurisdiction over property
 - s 69H(4) – Jurisdiction over children
- Does not have jurisdiction over
 - Nullity
 - Declarations of validity of marriage
 - Adoption

1. Property

Relevant Parts of the FLA

- Part VIII – Property, spousal maintenance and maintenance agreements
- Part VIIIAA – orders and injunctions binding third parties
- Part VIIIA – Financial Agreements
- Part VIIIB – Financial matters relating to de facto relationships
- Part VIIIB – Superannuation interests

First: consider what are the major assets that a couple will own?

Middle Class Families:

- Residential Property
- Superannuation
- Income earning capacity
- Small Business

High asset families may also include

- business assets,
- shares, and investment or
- holiday properties.

Did you remember Super AND earning capacity? The latter may be the most valuable asset for any individual depending on their time of life.

First question we need to address is why make property adjustment orders at all?

1. Because no orders will lead to poverty for women and children, with sole mothers the most vulnerable to poverty, closely followed by older women with or without kids.
2. Recall - Poverty identified with negative consequence to kids, exceeded only by conflict.

Women from higher asset marriages received lower proportions - over all.

- This appears to be because all women of all asset groups tended to receive approx 60-70% of basic assets such as home, furniture, cars, banks account (but only about 20% of non-basic assets). However, for higher asset couples, a higher proportion of their wealth is in non-basic assets – investments, super and life insurance. Perhaps just not valuing how important those assets are – could be the solicitors too.

s 78- Declaration of interests in property

- (1) In proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may declare the title or rights, if any, that a party has in respect of the property.
- (2) Where a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.

- There is a similar provision for **de facto couples**: FLA s 90SL.
- Little effect in practice as the power of the court under s 79 (and 90SM) of the FLA is so wide. An eligible party does not need to seek a declaration before asking the court for an appropriate property order.
- **In the Marriage of Hickey (2003)** the Full Court held: that s 79 also provides the court with the power to make a declaration in relation to property, particularly having regard to the provisions of s 80. The court noted that parties often include a declaration as part of what it called a 'catch-all' order, for example where parties retain any property they currently possess.