

FAMILY LAW

TOPIC 1: CONCEPTS IN FAMILY LAW

FAMILY LAW BASICS:

CHANGING LANDSCAPE:

Family Law Act 1975 (Cth).

- Established no-fault divorce – there is one sole ground for granting a divorce. An irretrievable breakdown of the marriage.
 - Evidence of your separation for 12 months.

Major reviews 1995 and 2006.

- Changes to division of De facto property occurred in 2009.
 - States referred their power over de facto couples to the Cth.
 - Division of de facto couple's property is essentially the same as the division of property following the breakdown of a marriage.
- 3 reviews late 2009:
 - Evaluation of the 2006 family law reforms – aifs.
- Amendments in response to the reviews made in 2012 – family violence more prominent.
 - Focused on the protection of children from family violence.

FAMILY LAW CONCEPTS:

MARRIAGE:

Features of a marriage:

- Voluntary;
- Between a man and a women; and
- Generally both parties over 18 (exception: one party can be 16 with the consent of the parents – if parents don't consent, then the court).

Family court of Australia will hear:

- Applications in relation to the validity of marriage (eg *Re Kevin*); and
- Applications for nullity (eg on the ground of bigamy).

DIVORCE:

Features of divorce:

- Only applies to married couples;
- Must be separated for 12 months and confirm that marriage has irretrievably broken down.

+ Can you still live under the same roof but be separated? YES.

+ Can apply for divorce before or after children and/or property issues resolved? YES.

- Divorce is a separate legal issue to children and property – it is made on a separate application.

+ All applications heard in the Federal Circuit Court.

+ Upon application divorce becomes final 4 weeks from the date of hearing.

DOMESTIC RELATIONSHIP (DE FACTO):

+ Features of a domestic relationship (de facto couple):

- Voluntary;
- Anytime;
- Generally parties need to be over 18 (note Australian Bureau of Statistics says over 15 – think of criminal law implications); and
- Between either man/woman or same sex couples.

+ Need to be together for 2 years or have a child to be classified as a de facto couple.

DEFINITIONS & FUNCTIONS OF A FAMILY:

DEFINING A FAMILY:

+ Dictionary definitions:

- Cambridge:
 - 'A group of people who are related to each other, such as mother, a father, and their children'.
- Macquarie:
 - 'Parents and their children, whether dwelling together or not; one's children collectively; any group of persons closely related by blood, as parents, children, uncles, aunts, and cousins; and all those persons descended from a common progenitor'.

+ Common theme is related by blood, and if not related then married.

✚ **Re Attorney-General of Canada and Mossop (1993) (Canadian case):**

- **FACTS:** Exclusion clause provided for 4 days paid bereavement leave upon the loss of a 'family member of the immediate family' of the employee. 'Spouse, including common law spouse resident with the employee'. 'Common law spouse' – 'a person of the opposite sex [who] lives and intends to continue to live with that person as if that person were his/her spouse'. Long-term homosexual relationship (partners father died). Leave was refused on the basis it lacked necessary connection of 'family status' to the dead father of his partner.
- **HELD:** 'Family status' was defined narrowly and leave was rightly refused.

✚ **Fitzpatrick v Sterling Housing Association Ltd:**

- **FACTS:** F and T 1976 began living together in 'long-term monogamous sexual relationship' in 1976. F applied take over tenancy once T passed. To take over tenancy, F had to show either 'spouse' or, a member of the 'family' of his partner. Issue was whether F constituted a member of family.
- **HELD:** Two homosexual men living together could be a family. Agreed appellant and his partner had been involved in a longstanding, close, loving, faithful and monogamous homosexual relationship. Not always necessary to have ties by blood or marriage to satisfy definition. *Hallmarks* – sharing of lives, caring and love, commitment and support and ongoing. Extended definition of 'family' as a social entity rather than one relying on a strictly legal definition under the *Rent Act*.

FUNCTIONS OF A FAMILY:

- ✚ Defining a modern family – Tasks and activities carried out by the members of a family individually, or by the family unit as a whole.
- 'Vehicle of stability' is central to the definition of a modern family.

- ✚ Australian Institute Family Studies defines a stable family as:

'...One which supports the well-being of its individual members, which stays together for a sustained period of time, and which contribute positively to the wider society of which it forms a part'.

TOPIC 2: FAMILY LAW IN A FEDERATION

HISTORICAL INTRODUCTION & JURISDICTIONAL DEVELOPMENTS:

OUR FAMILY SYSTEM PRIOR TO 1975:

✚ *Matrimonial Causes Act 1959* (Cth):

- Federal government exercised its jurisdiction over marriage and divorce through the enactment of the *Matrimonial Causes Act 1959* ('Barwick Act').
 - Introduced uniform divorce laws (prior to this Act the states governed their own laws relating to marriage and divorce – largely reflected English law).
 - Provided the only principal relief – divorce or declaration of nullity.
 - First time individuals were able to get divorce by consent: complete marriage breakdown, separated for 5 years & no prospect reuniting. Alternatively, couples were able to get divorced by proving fault: 14 separate grounds (adultery etc).

✚ Whitlam Government 1972:

- Reform of substantive law.
- *Family Law Act 1975* (Cth).
- Support marriage and family life – reserve family as much as we can.
- Creation of federal court – the Family Court of Australia.
- Abolition of matrimonial fault – s 48(1) irretrievable breakdown, s 48(2) live separately for 12 months before filing.
 - ie, no longer needed to prove the other party was at fault to get a divorce. All you need to prove was there is an irretrievable breakdown in the marriage and you have been separated for 12 months.

AUSTRALIAN CONSTITUTION – HEADS OF POWER:

✚ S 51 gives the Cth power to make laws with respect to certain areas.

✚ **S 51** – 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxi.) Marriage;

(xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants’.

- ✚ Matrimonial causes are essentially aspects/issues that arise as a result (or from) of a marriage or relationship (eg financial issues that result from a marriage).
 - Cth does not have unlimited power to make laws regarding parental rights and custody/guardianship of infants – can only do so so long as it is in connection to the subject matter dealing with divorce and matrimonial causes.
 - Infants – any person aged 21 or under (however Family Court will rarely make orders relating to anybody over 18 – will only do so in exceptional circumstances).

- ✚ High Court is the Constitutional interpreter – given power to interpret constitution by s 71.
 - Established principle of constitutional interpretation: words in the Constitution be given their meaning at the time of enactment (originalism) (ie HC interprets words with what they meant at the time they were drafted).
 - Thus interpretation is often static and not reflective of society today).
 - Accordingly, look to meaning of ‘marriage’ in early 1900’s.
 - Eg meaning of marriage during the 1900’s was at that time, ‘the union of a man and woman to the exclusion of all others, voluntarily entered into for life’.
 - Ie marriage is a formal, monogamous, heterosexual union for life.
 - This is in accordance with the definition of marriage in the English case of *Hyde v Hyde and Woodmansee* (1866)
 - The definition of marriage in *Hyde v Hyde and Woodmansee* (1866) is the current legal meaning of ‘marriage’ in Australia today.
 - Cth is hence restricted.
 - This is evident from the statutory definition of this term in **s 43(a) FLA**, and in **s 46(1) Marriage Act 1961** (Cth).

- ✚ Problem with restricting the term ‘marriage’ in s 51(xxi) to the definition in *Hyde v Hyde and Woodmansee* is that it prevents the Parliament from legislating in respect of 3 types of domestic unions which are common in Australia:
 - Aboriginal customary marriage;
 - De facto relationships; and
 - Homosexual relationships.

- ✚ **The Commonwealth of Australia v The Australian Capital Territory** [2013] – ACT tried to pass a same sex marriage equality bill. Cth not happy and tried to have it thrown out. In determining whether a state could in fact legislate over a same sex relationship, the HC had to revisit the marriage power contained in the CC (s 51(xxi)).

- **ISSUE:** Does the marriage power in the CC mean ‘man & women’, or does it mean any type of union?
- **HELD:** S 51(xxi) covers any type of union.
 - The power in s 51(xxi) CC is not confined to the narrow definition contained in the Marriage Act 1961 (Cth).
 - Thus, it means ‘marriage’ in s 51(xxi) includes a marriage between persons of the same sex.
 - The HC found that the Cth Parliament has power under the Australian Constitution to legislate with respect to same sex marriage, and that under the Constitution and federal law as it now stands, whether same sex marriage should be provided for by law is a matter for the federal Parliament.
 - CLARIFIED – “*Marriage Act* does not now provide for the formation or recognition of marriage between same sex couples. The *Marriage Act* provides that a marriage can be solemnised in Australia only between a man and a woman and that a union solemnised in a foreign country between a same sex couple must not be recognised as a marriage in Australia. That Act is a comprehensive and exhaustive statement of the law of marriage” (at 55).
 - Therefore, the HCA held that the *Marriage Equality (Same Sex) Act* 2013 (ACT) cannot operate concurrently with the federal *Marriage Act* 1961 (Cth).
 - Ultimately confirmed that the marriage power (s 51 (xxi)) is available only to the Cth Government.

MARRIAGE AS DEFINED IN LEGISLATION:

***Marriage Act* 1961 (Cth) – s 5(1) Interpretation:**

‘Means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.

***Marriage Act* 1961 (Cth) – s 46(1) Certain authorised celebrants to explain nature of marriage relationship:**

‘I am duly authorized by law to solemnize marriages according to law’.

‘Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter’.

‘Marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.’