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FAMILY LAW

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## LEGAL REGULATION OF FAMILIES

### CONSTITUTIONAL AND JURISDICTIONAL ISSUES

- Jurisdiction limited by constitutional heads of power
- S51 (xxi) – marriage – divorce and matrimonial causes, parental rights and custody and guardianship of infants
- Property and kids disputes of unmarried couples were originally excluded
- Referral of powers by state
  - o Between 1986 and 1990 all states except WA referred some of their powers over children to Cth
  - o In 1984 NSW enacted DFRA to provide for property division and maintenance of former de facto. In 1999 renamed PRA and extended to same sex couples and adults in close personal relationships
  - o FMC introduced in 1999

### A - WHO IS YOUR FAMILY AND WHY DO WE CARE?

- S43 FLA – family as the natural and fundamental group unit of the society
- Sharing your life with whether you have a biological connection OR a formalised bond such as marriage
- Family types – families with dependent children, single parents, carers, older couples, only couples, step/blended...

### B - MARRIAGE AND NULLITY

- Marriage – s5 Marriage Act 1961 and Hyde v Hyde and Woodmansee (1866) per Sir James Wilde – *union of a man and woman to the exclusion of all others, voluntarily entered into for life*
- Same sex marriage – recognized in Canada, Sweden, Argentina, Spain, Norway, Netherlands BUT S88EA MA 1961 - expressly states if you marry in foreign country, it is not recognised in Aus – therefore can't dissolve it or nullify it because it is NOT recognised
- Legal consequences
  - o Ability to possess joint property without agreeing to contract
  - o In case of accident/illness of 1 spouse, other is next of kin
  - o In case of separation – courts have wide powers to divide property
  - o If you made a will before marriage, it will be revoked UNLESS it is in contemplation of marriage
- Marriage and transsexuals –
  - o Re Kevin (2001)
    - App went through ceremony of marriage and applied for declaration of its validity. App was opposed by AG on basis that husband (ID at birth as girl) is not a man for purpose of law of marriage
    - Rejected Corbett (sex is assessed and fixed at birth)
    - Chisholm J (trial judge) found *Kevin was a man for purposes of marriage (valid)*
      1. Question whether a person is a man or a woman is to be determined as of date of marriage.
      2. There is no rule stating that person's sex is to be determined at time of birth.
      3. In context of rule that parties to valid marriage must be man and a woman, word "man" has its ordinary current meaning according to Australian usage.
      4. There may be circumstances in which a person at birth had female chromosomes and genitals BUT is nevertheless a man at date of his marriage.
      5. In present case, husband at birth had female chromosomes and genitals, but was a man for purpose of law of marriage at time of his marriage, having regard to all circumstances, inc
        - a) He had always perceived himself as male;
        - b) He was perceived (family, friends, colleagues) as male from birth
        - c) Prior to marriage he went through full process of transsexual re-assignment
        - d) At time of marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues;
        - e) He was accepted as man for social and legal purposes, inc name, and admission to artificial insemination program
        - f) His marriage as man was accepted by his family, friends and work colleagues.

Marriage now	Lord Hardwicke's Act 1753
License – 1 month and a day notice	Banns or license – time delay and public forewarning.
Conducted private/public Conducted by licensed civil celebrant or authorized religious celebrant	Public in church – daylight, doors open Officiated by clergy
Parties >18 yrs	Parties >21 yrs

2 witnesses and register cert with BDM	2 witnesses and recorded on parish register
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- Nullity
  - o Declaration that in law there was no marriage In Marriage of Kapadia (1991)
  - o Parties to void marriage entitled to same relief re: spousal maintenance and alteration of property rights as would be the case if they had been lawfully married s71, 4(2) FLA
  - o Application for decree of nullity of marriage shall be based on ground that marriage is void S51 FLA
  - o Void marriage (recognizable ceremony of marriage but fails legally) v de facto (not recognizable) Lengyel v Rasad (1990)
  - o Marriage is void where MA (Cth) 1961 ss 23, 23B(1)
    - a) either of parties is, at time of marriage, lawfully married to some other person
    - b) parties are within prohibited relationship
    - c) by reason of s 48 marriage is not a valid marriage (formalities not met)
    - d) consent of either of parties is not a real consent because:
      - i. It was obtained by duress or fraud ☒ Rick v King (2011) K filed for divorce after 3 yr marriage. R said her failure to disclose she had aids = fraud and his consent weren't real. He was self rep and was trying to get nullity because he thought he wouldn't have to give her any money. Court held that fraud didn't nullify marriage
      - ii. that party is mistaken as to identity of other party or as to nature of ceremony performed; or
      - iii. that party is mentally incapable of understanding nature and effect of marriage ceremony; or
    - e) either of parties is not of marriageable age;
  - o Failure to comply with formalities renders marriage invalid unless exception applies s48 MA
    - Irregularity of giving notice/declaration – valid
    - Absence of witnesses – valid
    - Unauthorized celebrant – valid if parties believe he was authorized In Marriage of Rewal (1991) – priest 1 not authorized. 2<sup>nd</sup> priest (rings exchanged, doc signed BUT no vows – thought priest 1 already did it) – VOID because parties knew Priest 1 who did vows was unauthorized
  - o Duress
    - Coerced marriage will be declared void
    - Scott (falsely called Sebright) v Sebright (1886): no consent if in such a state of mental incompetence that they are unable to resist pressure improperly brought to bear. Mental incompetence – natural weakness of intellect, fear (even if no reason to be afraid).
    - Cooper (falsely called Crane) v Crane [1891] Man arranged ceremony in church. Deceived woman to go there. Then threaten to suicide if she didn't marry. Woman knew he usually carry revolver. HELD: coercion not sufficient to constitute duress
    - Szechter v Szechter [1971]: coercion must be product of immediate danger to life, limb or liberty.

## C - DIVORCE

- Second half of 20<sup>th</sup> century saw reduction in number of prohibited relationships AND emergence of no fault divorce
- Requirements
  - Being an Aus citizen or resident of NSW for 1 yr (some connection to NSW): s39(3)
  - Irreconcilable differences – marriage has broken down irretrievably: s48(1)
  - Evidenced by 12 months of separation (not necessarily physical) 48(2)(a) can be in same house and separated 49(2)
  - can be separated for 3 months during the 12 and not start again s50
  - May be without the consent of other party.
- Filing application
  - Proceeding may be instituted at date of application.
  - Can be instituted by either or both parties: s44(1A)
  - Parties do not need to be present at proceedings if: s98A
    - Request must be served on Respondent at least 28 days before hearing and there is no children <18.
    - If joint application and no children <18 (a) divorce by post
- Divorce comes into effect:
  - Divorce order takes effect 1 MONTH after Divorce Order: s55
  - Divorce order (with children) s55A takes effect ON the day Order made: s55
  - Period can be reduced: s55(2)
  - Can be rescinded if there is reconciliation: s57 or miscarriage of justice: s58.
  - Cannot remarry until Divorce Order takes effect: s59
- Arrangements for children's welfare
  - S55A rarely used to refuse divorce BUT it has happened in Marriage of Evans (1990) – *divorce was refused because amount of child support which husband agreed to pay was below the level which he would have been required to pay by court*
  - In Marriage of Maunder (1999)
    - Married couple with 2 children lived in Brunei. After separation, W moved back to Aus with children. H was paying \$750/month for child maintenance. Couple had \$15K of joint savings. H filed for divorce: children lived with W and saw children 2/yr.
    - Hearing: Divorce granted DESPITE Ct not satisfied of s55A because divorce order shouldn't be held as ransom whilst other issues still debated
    - Appeal – Purpose of s55A is to protect children – balance right of parents v best circumstances for children. In this case none of the following tipped scales in favor of h (a) short period of marriage, 2 year separation, distance of residencies, clear indication marriage was broken, no hope of reconciliation, H voluntary payments of maintenance, apps for maintenance/property settlement

### **Section 55A FLA**

- (1) Divorce order in relation to a marriage does not take effect unless court has, by order, declared that it is satisfied:
  - (a) there are no children of marriage who have not attained 18 years of age; or
  - (b) that only children of marriage who have not attained 18 years of age are children specified in the order and that:
    - (i) proper arrangements in all circumstances have been made for their care, welfare and development; or
    - (ii) there are circumstances by reason of which the divorce order should take effect even though court is not satisfied that such arrangements have been made
- (2) Where, in proceedings for divorce order in relation to a marriage, court doubts whether arrangements made for care, welfare and development of a child of marriage are proper in all the circumstances, court may adjourn proceedings until a report has been obtained from a family consultant regarding those arrangements.
- (3) For purposes of this section, a child (inc ex-nuptial child of husband or wife, child adopted by either of them or child who is not a child of either of them) is a child of marriage if child was treated by husband and wife as child of their family at relevant time.
- (4) For purposes of ss (3), the relevant time is time immediately before time when husband and wife separated or, if they have separated on more than one occasion, time immediately before time when they last separated before institution of proceedings in which divorce order was made.

- Requirement of separation

- May be so EVEN IF still reside in same residence or render household service to each other: s49(2)
- Physical separation not necessary or sufficient.
  - Couples may live physically separately for various reasons e.g. hospital, abroad: Price and Underwood [2008]
  - Means “a departure from a state of things rather than from a particular place” In Marriage of Falk [1977]
  - Means “more than physical separation – it involves destruction of marital relationship”: In Marriage of Todd (No 2) [1976], now “breakdown of...” In Marriage of Pavey [1976]
- If court decides 12 months haven’t elapsed between separation and filing, party seeking divorce must file again [X] can’t just amend to later date, even if 12 months passed by time of hearing In Marriage of Whiteoak [1980]
- In Marriage of Pavey (1976)
  - H/W lived together for 30 yrs when W discovered H was having an affair. H slept in lounge and W in matrimonial bed with lock. H forced himself into bed and raped W. H then slept in matrimonial bed and W sleep in lounge. W got \$30/wk maintenance Ct order. They led separate social lives. W sometimes cooked for H (convenience) but ate separately. W did H’s washing/ironing. Didn’t speak and only communicate through their adult sons.
- Hearing divorce denied – period of separation FAIL.
- Appeal: divorce given [X] W got Ct order for maintenance [X] evidence that H failed in his duty to W (mutual society and protection) [X] ***contrast state of relationship before and after alleged separation BUT be clear r’ship ended and explain WHY you continue to share residence***
- In Marriage of Falk (1977) – *each case turns on its own facts in deciding whether parties have separated – Here, W was performing some household services for H, he continued to give her housekeeping money, met other outgoings and both still lived together – None of this indicated their relationship was continuing*
- In Marriage of Caretti (1977)

- Italian marriage deteriorated – H agreed to pay W to move out of matrimonial home. W didn't move out BUT bought prop in her own name. H threatened proceedings but never went ahead. Parties reside in same house. H and W slept in same bed for past 18 months back to back, no physical contact, no discussion. H moved into spare room But moved back – cold and want to force W to move out.
- Held – *not separated even though marriage was irreconcilable – considered culture (Italian community)*

**Section s48 FLA**

- (1) App. for divorce order in relation to marriage shall be based on ground that marriage has broken down irretrievably
- (2) Subject to ss (3), in a proceeding instituted by such application, ground shall be held to have been established, and divorce order shall be made, if, and only if, court is satisfied that parties separated and thereafter lived separately and apart for continuous period of not less than 12 months immediately preceding date of filing of application for divorce order.
- (3) A divorce order shall not be made if court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

## D - DE FACTO RELATIONSHIPS

- History
  - 1980s: many Resulting/CT re DF couples – Baumgartner v Baumgartner (1987) – CT became more flexible device through which disputes of ownership property could be resolved
  - De Facto Relationships Act 1984 – overcome deficiencies of trust law – provided statutory regime for property division and maintenance of former partners
  - Renamed Property (Relationships) Act 1984 – extended to homosexuals and non-couple relationships
  - Family Law Amendment (De Facto Financial Matters And Other Measures) Act 2008 – extended existing provisions re 3<sup>rd</sup> party provisions and super to DF couples
    - Parties must be ordinarily resident in jurisdiction when proceedings start: s90RG, SD, SK, UA.
    - Parties must be in DF relationship as defined in s4AA FLA
    - Relationship or circumstances of case must satisfy threshold of s90SB – r'ship of 2 yrs OR child OR substantial contribution by app OR reg. r'ship
- Definition
  - s3 De Facto Relationship Act 1984 (NSW) – *relationship of living or having lived together as husband and wife on bona fide basis although not married to each other*
  - s4 Property (Relationships) Act 1984 – between 2 adult persons who live together as couple AND who are not married to one another or related by family
  - s4AA Family Law Act 1975 (Cth) – de facto defined
    - person is in a de facto relationship with another person if they are not legally married to each other AND they are not related by family AND having regard to all circumstances of their relationship, they have relationship as a couple living together on a genuine domestic basis
    - factors - Those circumstances may include
      - duration of the relationship;
      - nature and extent of their common residence;
      - whether a sexual relationship exists;
      - degree of financial dependence or interdependence, and any arrangements for financial support
      - ownership, use and acquisition of their property;
      - degree of mutual commitment to a shared life;
      - whether relationship is or was registered under prescribed law of a State or Territory as a prescribed kind of relationship
      - care and support of children
      - reputation and public aspects of the relationship
    - For the purposes of this Act:
      - de facto relationship can exist between 2 persons of different sexes and same sex; and
      - de facto relationship can exist even if 1 persons is legally married to someone else or in another de facto relationship
- Living together as a couple
  - Moby v Schultzer (2010)
    - Facts - App asserts that DF r'ship existed between herself and Resp. between 2002 and approx. October 2009. Resp. asserts that no DF r'ship existed at any time.
    - Couple – 2 people, whether of same or opposite sex
    - Living together – doesn't import concept of proportion of time AND that couples live together on FT basis.
    - Whether parties are in DF r'ship is to be determined on a case by case basis BUT circumstances may inc
      - duration, nature and extent of any common residence;
      - any sexual relationship;
      - financial matters including ownership, use and acquisition of property;
      - degree of mutual commitment to a shared life;
      - whether the relationship is registered under a prescribed law of a State or Territory;
      - care and support of children; and
      - reputation and public aspects of relationship
  - Jonah v White (2011)
    - Facts - woman had 17 year affair with married man. During affair, man gave his mistress allowance of up to \$2,500 month. R'ship involved sexual relations and sizeable amount of time together. Man kept it a secret from his wife and 3 children.
    - Held – Murphy J [✓] DF r'ship can exist between a married person and a mistress even if they spend small part of week living together BUT In this case, there was not DF r'ship
      - Each party kept and maintained a household distinct from the other [✓] resp. inc maintenance of family relationships, including support of children;
      - evidence does not reveal any r'ship between app. and resp. children



- r'ship was secret and time spent wash together, as distinct from time spent socialising as a couple;
- Despite regular monthly payments parties maintained no joint bank account; engaged in no joint investments together; and acquired property in their own individual names;
- Parties rarely mixed with each other's friends [X] App witnesses - Ms R said she never met resp. but spoke to him on phone. Ms H said her dealings with resp. were "very limited". Ms W said she met resp. "only once"
- There was virtually no involvement by resp. in app. life in Brisbane (where she lived between about 1996 and 2006), and no involvement by resp. in app. life in S where she resided since 2006 (he only visited S on 3 occasions)
- There was very little time spent by app. And resp. with app. Family
- George v Hibberson (1987)
  - Facts - P and D started living together in March 1976 and had 2 children. In May 1985 D and 2 children left house and went to stay with D brother. D alleged although parties lived in separate homes from May 1985 r'ship was not terminated until Feb 1986 when P made it clear he did not want D back. During this period parties considered reconciliation.
  - Issue - whether relationship ceased before 1 July 1985 (Act doesn't apply)
  - Held - DF ended by July
    - No suggestion D was only going away temporarily.
    - By July, leased own flat and started Ct proceedings [X] no communication of returning.
    - On separation, termination of DF r'ship [X] communication intention to end DF and parties acting to indicate intention to end DF
- Dwyer v Kaljo (1987)
  - Facts - in Feb 1979 P and D started living together. Had sexual relations until Feb 1984. Lived together until Oct 1985. During time together, P did shopping, acted as D secretary, organized dinner parties and looked after D teenage son who came to live with them.
  - Issue - whether DF r'ship ended in mid 1984.
  - Held - no - DF r'ship continued until mid/late 1985
    - presenting to the world a relationship in the nature of husband and wife
    - this does not require that the relationship be perfect at all times
- Threshold req.
  - Just because they live together, it does NOT mean they are in DF r'ship

#### **Section 90SB FLA**

Court may make order under s 90SE, 90SG or 90SM, or declaration under s 90SL, in relation to DF r'ship only if court is satisfied:

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