

❖ **Warby and Warby**

- **Facts:** Wife and father purchased property as TIC in 1982; both contributed to purchase price (registered proprietors). Mortgage under the house.
- H and W lived together in the property; married in 1989. Father paid off mortgage in 3 years. In 1998, divorced.
- W argued that she entered into agreement with father to repay father for amount discharged;
- H argued it was W and H who entered into agreement with father (therefore H would have interest in property). H made contributions in gardening, labour and pooled resources.
- Issue: Can the father [not party to marriage] join proceedings due to accrued jurisdiction? If father joined, courts would need to apply PLA not FLA.
- **Held:** Family court is not restricted to FLA; it may exercise accrued jurisdiction to determine the non-federal aspects e.g. PLA, common law and equity.
- Must look at the factual circumstances to determine whether family court can exercise its accrued jurisdiction.
- **Test: Must have a justiciable controversy which is based upon a common sub-stratum of facts.**
 - o i.e. common facts running through e.g. house, mortgage was discharged. This can help determine who has interest in the property.
- Other factors:
 - o **What the parties have done**
 - o The **relationships** between or among them
 - o The laws which attach **rights or liabilities to their conduct** and relationships
 - o Whether the claims are part of a **single justiciable controversy** and in determining that question whether **the claims are 'attached' and not 'severable' or 'disparate'** and
 - o Whether the **claims are non-severable** from a matrimonial cause and arise out of a common sub-stratum of facts
 - o Whether the **court has power to grant appropriate remedies** in respect of the 'attached' claims

Examples of no accrued jurisdiction:

- If there is a third-party interest (e.g. constructive trust claim) → no accrued jurisdiction; OR
- Dispute is between a married couple and W's parents and property is registered in parent's name; couple enter into agreement with parents to purchase property. Parents apply to SC for declaration → no accrued jurisdiction; not a family law matter and left to SC.

2.2 Family Law Processes – Family Dispute Resolution

What is FDR?

- **s 10F** Family Dispute Resolution is a process (other than a judicial process):
 - o (a) in which a **family dispute resolution practitioner** helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
 - o (b) in which the **practitioner is independent** of all of the parties involved in the process
- Must be an accredited FDR Practitioner

Advantages of Non-Adversarial Processes

- Time, financial costs, emotional cost, polarisation, cross examination, keeps relationships intact

5 stages – Typical Family Law Matter

1. Contemplating separation
2. Pre-action stage → obtained legal advice
3. Resolution stage → proceedings commenced
4. Determination stage → decisions made
5. Supervision and enforcement → after decisions

NB. FLA mandates that parties must go through FDR before instituting proceedings.

Dispute resolution processes outside the court system

- Satellite system: Dispute resolution centres
 - The purpose of these centres is to settle matters outside courts
- Walk away
 - Parties can work out something between themselves
- Negotiation-Bilateral / round table conference
- **Facilitative Mediation**
 - Mediator is independent; no solution suggested. Parties who reach their own solutions are more likely to abide by them
- **Collaborative law:**
 - All parties must *commit* to the process to reach a solution
 - '4 way meetings' relating to parties' interests rather than legal entitlements
 - Agreement not to pursue litigation (cannot threaten litigation); if proceedings commenced, lawyers can no longer act
 - If proceedings are not settled, the lawyers drop out and parties find new lawyers

Higher Levels of Conflict

- Evaluative/advisory **mediation** → boundaries/range suggested
 - Mediator will advise on the success in courts
- Child focused/inclusive mediation
- Case appraisal **independent 3rd party provided** with info and they provide an opinion of likely outcome-complex cases
- **Legal aid conference/roundtable dispute management** → if party deemed unreasonable, they may not receive further funding
 - Where huge money is involved; legal aid matters are very complex
 - Problem: legal aid funding is derived from public funds; hence the introduction of roundtable conferences
- **Arbitration** (property matters only) → involves complex accounting disputes
 - Court ordered
 - Private

Pre-action procedures

- Rules 1.05: Before starting a case, each prospective party...must comply with the pre-action procedures...including attempting to resolve the dispute **using dispute resolution methods**

- Sch 1 Part 1 (Financial cases); Part 2 (Children): Each prospective party...is required to make a **genuine effort** to resolve the dispute before starting a case by:
 - Participating in **dispute resolution**...
 - Exchanging a *notice of intention* to claim and explore options for settlement by correspondence; and
 - Exchange of letters includes what each party has, what they want
 - Complying, as far as practicable, with the *duty of disclosure*
 - Parties must be open and honest
 - NB. definition of 'genuine effort' is ambiguous

Children's matters – Compulsory attendance s 60I(7)

(7) ...a court exercising jurisdiction under this Act **must not hear** an application for a Part VII order in relation to a child *unless* the applicant files in the court a **certificate given to the applicant by a family dispute resolution practitioner** under subsection (8). The certificate must be filed with the application for the Part VII order.

5 kinds of certificates s 60I(8)

- **Not attend**
 - Other person's failure to attend (or withdraws)
 - FDR inappropriate [Reg 25(2)]
- **Attended**
 - Made a **genuine effort**
 - Unclear what the threshold is
 - **Not appropriate to continue** [Reg 25]
 - While FDR takes place, practitioner discovers violence.

Family law (FDR Practitioners) Regulations 25(2)

- A *FDR practitioner must be satisfied*
 - Assessment conducted (DOORS screening tool) before starting FDR
 - Screening to detect family violence because open table discussion is unlikely to occur (power imbalance thus FDR inappropriate)
 - FDR is appropriate
- Must consider
 - History of family violence among the parties
 - The likely safety of the parties
 - Equality of bargaining power
 - Risk of child abuse
 - Emotional, psychological and physical health of the parties
 - Any other matter

Exceptions s 60I(9) No certificate necessary (also s 60J)

Where the court is satisfied that there are reasonable grounds to believe there has been:

- An **abuse of a child** or there would be a **risk to a child if there is a delay**
 - **Family violence** or there is a **risk of family violence or child abuse**
- i.e. if these things are evident, parties do not need certificate to initiate proceedings.

Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011

- Expanded definition of family violence, child abuse
- 'Advisors' include lawyers, counsellors, family consultants
 - Priority to protect children from harm

Definition of Family Violence s 4AB FLA

- (1) **Family violence** means *violent, threatening or other behaviour* by a person that **coerces or controls** a member of the person's family, or **causes the family member to be fearful**
- (2) Examples include (but not limited to):
- An **assault**; or
 - Sexual assault** or other sexually abusive behaviour; or
 - Stalking**; or
 - Repeated **derogatory taunts**; or
 - Intentionally **damaging or destroying property**; or
 - Intentionally causing **death or injury to an animal**; or
 - Unreasonably denying** the family member the **financial autonomy** that he or she would otherwise have had; or
 - Unreasonably **withholding financial support** needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
 - Preventing** the family member from making or **keeping connections with his or her family, friends or culture**; or
 - Unlawfully depriving** the family member, or any member of the family member's family, of his or her **liberty**
- (3) **[Child exposed]** If the child sees or hears family violence or otherwise experiences the effects of family violence
- (4) Examples include (but not limited to) the child:
- Overhearing threats of death or personal injury** by a member of the child's family towards another member of the child's family; or
 - Seeing or hearing an assault** of a member of the child's family by another member of the child's family; or
 - Comforting or providing assistance** to a member of the child's family who has been assaulted by another member of the child's family; or
 - Cleaning up a site** after a member of the child's family has **intentionally damaged property** of another member of the child's family; or
 - Being **present when police or ambulance officers** attend an incident involving the assault of a member of the child's family by another member of the child's family

Definition of 'abuse' s 4(1)

'abuse' in relation to a child, means:

- An **assault**, including a **sexual assault**, of the child; or
- A person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- Causing the child to suffer **serious psychological harm**, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) **Serious neglect** of the child

NB. subjective test

Dispute resolution processes inside the court system

Litigation (is on foot)

- There are various provisions promoting FDR
- Property
 - Case Assessment Conference (r 12.03) → beginning of proceedings
 - Conciliation Conference: property proceedings only (s 79(9); r 12.07)
- Children
 - LAT (least adversarial trial)
 - Magellan (physical or sexual abuse)

Family consultant functions s 11A

- Assist and advise people involved in the proceedings
- Assist and advise courts and give evidence in relation to proceedings
- Help litigants to resolve disputes
- Report to the court under ss 55A and 62G
 - Report acts as important evidence
 - S 62G is the main detailed report; obtained after interviewing parents and child to determine best arrangement for child
- Advise court about appropriate family counsellors, FDR practitioners and courses, and programs and services to which the court can refer the parties
- **Admissibility of communications (s 11C) → Yes if informed; OR requires abuse/risk of abuse if not informed –**
 - (1) Evidence of anything said, or an admission to family consultant is **admissible** in proceedings under the Act
 - (2) Subsection (1) does not apply if admission had **not been informed** of the effect of subsection (1)
 - (3) Despite *not* being informed, it will be admissible if:
 - (a) it is an admission by an adult that indicates **a child has been abused or is at risk of abuse**; or
 - (b) disclosure by a child that indicates child abuse or risk of abuse
 - UNLESS there is **sufficient evidence** of admission or disclosure obtained from other sources
 - i.e. whatever family tells consultant will not be confidential and can be used in court

Confidentiality FDR s 10H

FDR will be confidential to allow open and honest discussion to resolve matters promptly, rather than risk using the communication in courts.

- (1) FDR practitioner must not disclose a communication made to practitioner while conducting FDR i.e. confidential **unless**:
- (2) Compliance with law
 - (3) **Consent** to disclosure
 - (4) **Reasonably necessary** (s 10H(4))
 - To **protect a child or person** (whether physical or psychological) (a); or