

## Topic 3.1 – Marriage

### Topic 3 Overview

#### PART 1 – international influence

- A. UNIVERSAL DECLARATION OF HUMAN RIGHTS
- B. UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS

#### PART 2 – MARRIAGE IN AUSTRALIA

- A. DEFINITION OF MARRIAGE IN AUSTRALIA

***Marriage Amendment (Definition and Religious Freedoms) Bill 2017***

#### PART 3 – ELEMENTS OF THE DEFINITION OF MARRIAGE

- A. ELEMENTS – VOLUNTARY UNION
- B. ELEMENTS – FOR LIFE
- C. ELEMENTS – OF TWO PEOPLE
- D. ELEMENTS - TO THE EXCLUSION OF ALL OTHERS
- E. MARRIAGEABLE AGE
- F. RECOGNITION OF FOREIGN MARRIAGES

#### PART 4 – FORMALITIES AND EXCEPTIONS

- A. FORMALITIES FOR A VALID MARRIAGE
  - B. VALIDITY OF MARRIAGE DESPITE LACK OF CORRECT FORM
  - C. *Relationships act 2008* (vic)
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### PART 1 – international influence

#### A. Universal Declaration of Human Rights

##### Article 16 – Right to Marriage and Family

1. “Men and woman **of full age**, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as at time of marriage, during marriage and at its dissolution” .
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
  - Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

Explaining section: Full age is over 18, needs to have full intent of intending spouses.

## PART 2 – MARRIAGE IN AUSTRALIA

### a. Definition of Marriage in Australia

- Previously:
  - Relied on Common Law definition of marriage
  - Common Law:
    - “I conceive that marriage ... may ... be defined as the voluntary union for life of one man and one **woman**, to the exclusion of all others”
    - CL definition established in: **(Hyde v Hyde and Woodmansee (1866) LR 1 P&D 130 per Wilde JO (later Lord Penzance) at 133).**
- Legislation introduced:
  - **Marriage Legislation Amendment Act 2004 (Cth):**
    - “The purpose of the Marriage Legislation Amendment Bill 2004 (‘the Bill’) is to give effect to the Government’s commitment to protect the institution of marriage by ensuring that marriage means a union of a man and a woman and that same sex relationships cannot be equated with marriage.”
    - “The amendments.. will make it absolutely clear that Australia will not recognise same sex marriages entered into under the laws of another country, whatever country that may be.”

Explaining section: Prior to 2004 there was no definition in Legislation, we relied on marriage at CL definition.

- The Amendment Bill Act:
  - Provided a definition in Legislation of Marriage
  - Expressly excluded any same sex marriages which occurred overseas, even if by law overseas.

#### **Marriage Act 1961 (Cth) - s 5(1) Interpretation**

- ‘Means the union of **2 people** to the exclusion of all others, voluntarily entered into for life’.

#### Explaining section:

- This definition entered into Marriage Act in 2015
- Removed the mention of “Man and women” → to 2 people

#### **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.

## PART 3 – ELEMENTS OF THE DEFINITION OF MARRIAGE

### a. 4 Elements of a Marriage

- 4 Elements come from CL case: *Hyde v Hyde and Woodmansee* (1866)

#### ELEMENT 1. Voluntary Union

##### Voluntary

- Consent at the time of marriage (fundamental requirement)
  - Voluntary agreement
  - At the time of the marriage ceremony
- *Section 23B(1) Marriage Act* – deals with concept of consent.
  - Consent is not real consent when it is obtained by:
    - Duress or fraud or
    - Where one party is mistaken as to identity of ceremony performed or
    - Mental incapacity or
    - If one party is not of marriageable age.
  - If any of the above situations occur = Consent can be invalidated and marriage declared void.
  - Explaining section:
    - S 23B(1), tells us when consent will be invalid

##### Union

- *Hyde v Hyde*: common law idea that on marriage, spouses become one person at law.
- Previously – physical sexual union had to take place (pre-1975 ground)
- FLA – removed non-consummation as a ground
- Today – ceremony purporting to comply with Marriage Act

#### ELEMENT 2. 'For Life'

- Questionable component of marriage
- *Hyde v Hyde*: even though matrimonial relief available
- Concept for life is not realistic
  - For 49% of Australian
  - Illustrative intentions and emotional values
  - Divorce today:
    - Given modern divorce law, marriage might now more accurately be described as a contract terminable on twelve month notice.
- Today, for life means until one dies or requirement for divorce are satisfied.
- **No legal requirement** for marriage to be for life to be valid
  - Although it is an element, there is no legal requirement for it to be for life

### ELEMENT 3. 'Of 2 people'

Marriage Amendment Bill has omitted 'a man and a women' and submitted with '2 people':

- Introduced non-gendered language so that the requirements of the Act apply equally to all marriages (7 Dec 2017)

<p><b>Corbett v Corbett (1971)</b> (Pages 56-57)</p> <p>Person correctly identify at birth as on gender will be identified at marriage as that gender, not what they have changed to.</p>
<p><b>FACTS:</b></p> <ul style="list-style-type: none"> <li>- Respondent wife registered male at birth.</li> <li>- 1960: underwent sex-change operation – live adult life female.</li> <li>- 1963: applicant and respondent married.</li> <li>- Not consummated - Application for declaration of nullity filed.</li> </ul> <p><b>HELD:</b></p> <ul style="list-style-type: none"> <li>- Justice Ormond preferred to rely on biological criteria <b>only</b>.</li> <li>- Ormond found that as a matter of fact the respondent was a post-operative male-to-female transsexual BUT the sex-change operation was <b>legally irrelevant</b> - obviously could not effect the original male chromosomal pattern.</li> <li>- In adopting a BIOLOGICAL APPROACH to the question of sex Ormond held that "a person correctly identified at birth as being of one sex <b>could not</b>, for the purposes of marriage, <b>be recognised as a member of the opposite sex, despite surgical intervention.</b>" → Granted decree of nullity.</li> </ul>

### ELEMENT 4. 'To the exclusion of all others'

- It is not possible to have more than 1 legal spouse at a time
- Monogamous (included in CL and statutory definition)
- **S. 6 FLA** – *For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia shall be deemed to be a marriage.*

### b. Other legal required (other than elements)

#### Other requirement 1. Marriageable age

- **S 11 FLA**: outlines marriageable age
  - o 18 years old
  - o Prior to August 1991, Male could have been 18 and female could have been 16 → NOT ANYMORE.
- **S 23(1)(e) FLA**: Marriage is void if not of marriageable age.
- **S 12(1) FLA**: Exception
  - o One party can be 16 years old and other party can be 18 years old to marry, BUT must apply for an "order to marry".
    - Note: under NO circumstances can both parties be under marriageable age, one or both parties must be over marriageable age.
      - But the party under marriageable age cannot be under 16 years old.
- **S 13(1) FLA**: marriage of minor must be solemnised without consent of parent/guardian.
- **S 15 FLA**: Court order can dispense parental consent
- **S 16 FLA**: Court can override parental objection

## c. Recognition of Foreign Marriages

### Part VA - Recognition of Foreign Marriages

- International marriages will be considered valid IF:
  1. The marriage was valid and legal in the country you were marriage in
    - Conform with THEIR requirements ect
  2. That the marriage would be considered valid in Australia, as if it were performed here in Australia.
    - Don't fall within any exceptions of s 88D FLA

#### 1. VALID LOCAL LAW

- Must be valid under local law – formalities conform with local law.
- Proof of validity?
  - Marriage certificate issued by competent authority in foreign country is prima facie evidence in Australia of the occurrence and validity of the marriage in that country. → best way to prove marriage
  - Statutory declaration: another way to prove marriage

#### 2. VALID AUSTRALIAN LAW

- Must be recognised as valid under Australian law if the marriage had taken place in Australia.
- Even if valid under local law – **s. 88D FLA** contains list of exceptions.  
A foreign marriage will not be recognised as valid in Australia if:
  - Or 88EA: same sex → removed now
- Practical effect – no recognition; no divorce.

## PART 4 – FORMALITIES AND EXCEPTIONS

### a. formalities for a valid marriage

Current formalities for a valid Australian marriage governed by provisions in Pt IV of the MA.

#### **Section 41**

- A marriage must be solemnised by, or in the presence of, an **authorised celebrant**;
  - o (s. 5(1) a minister of religion or a marriage celebrant)

#### **Section 42(1)(a)**

- Written notice of the intended marriage must be given to the intended authorised celebrant not less than one month and not more than 18 months before the date of the marriage.
- BUT ministers of religion may require longer notice and additional requirements: **s 47(b)**.

**a. formalities for a valid marriage, continued...**

**Section 42(1)(b)**

- Each party must produce to the intended celebrant an official birth certificate or if impracticable, a statutory declaration providing such details.

**Section 42(1)(c)**

- Each party must make a declaration to intended celebrant (in the prescribed form) as to that party's conjugal status and the party's belief that there is no legal impediment to the marriage taking place.

**s 42(10)** – Where the declaration states divorced or widowed, the authorised celebrant cannot solemnise the marriage until evidence is produced of the divorce or death of party's spouse.

**SECTION 43** – Ceremony may be celebrated at an time, on any day, and in any part of Australia.

**SECTION 44** - A marriage shall not be solemnised unless at least 2 persons who are, or appear to the person solemnizing the marriage to be, over the age of 18 years are present as witnesses.

- Explaining section: witnesses don't necessarily need to be 18.

## Topic 4 – Part 1

### Divorce

#### OVERVIEW

##### **PART 1 – REQUIREMENTS FOR A DIVORCE UNDER THE fla**

- A. ELIGIBILITY TO COMMENCE PROCEEDINGS FOR A DIVORCE order
- b. S 48 - 'Divorce'
- c. S 48(2) - 'SEPARATION'
- D. S 48(2) – DO YOU NEED COMMUNICATION OF 'SEPARATION'?
- E. SEPARATION UNDER ONE ROOF
- F. RESUMPTION OF COHABITATION DURING SEPARATION

##### **PART 4 – ADDITIONAL CIRCUMSTANCES**

- A. MARRIAGE COUNSELLING
- B. CHILDREN UNDER 18

##### **PART 3 – DIVORCE ORDER**

- A. DIVORCE ORDER TAKING EFFECT
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#### **PART 1 – REQUIREMENTS FOR A DIVORCE UNDER THE FLA**

##### **a. ELIGIBILITY to commence proceedings for a divorce order**

##### **Section 39(3) FLA: Who can commence divorce proceedings?**

Either party to the marriage MUST BE;

- (a) is an Australian citizen; **or**
- (b) is domiciled in Australia; **or**
- (c) is ordinarily in Australia and has been so resident for 1 year immediately preceding that date.

##### **Forum non conveniens:**

- This means the courts and judges have the **Discretionary power** if they believe they are not the appropriate forum to hear the matter.
  - EG: If it is better for the case to be heard in another country.
  - However, ITS VERY RARE, that a court will give up their power.
- Not common – meet jurisdictional requirements.

- See cases on pages 113 – 115

**SECTION 48 – Divorce → IMPORTANT SECTION**

- (1) Marriage must be **irretrievable breakdown**  
- Don't use these words in assignment
- (2) Parties MUST be **separated and lived separately and apart continuously for at least 12 months** immediately preceding the filing of the application. \*\*
  - What is separation?
  - What does "continuously mean"?
- (3) Divorce must not be made **if reasonable likelihood of resuming cohabitation.**

**ASSIGNMENT:** don't mention this section in LOA, only discuss in the foot notes (show the marker you know where the law comes from).

**SECTION 48 (2) – in more detail...****WHAT DOES SEPARATION MEAN? – s 48(2)**

- Not necessarily physical separation
  - **Marriage of Todd** – "separation means more than physical separation – it involves the breakdown of the marital relationship...**must be intention and severance** (doesn't have to be physical severance)."
    - Separation means MORE than physical separation
    - Must also have the INTENTION to separate
  - **Marriage of Falk** – parties may have 'separated' despite there being no physical departure by them from the matrimonial home that they previously occupied. "It is accepted that separation really means a departure from a state of things rather than from a particular place".
    - Don't always need PHYSICAL separation (but easily to establish if have)
    - Can be living under the same roof and satisfy s 48(2)
- ^ **ASSIGNMENT:** note these in assignment IF relevant (in footnotes)
- Breakdown of matrimonial relationship – must!!

**1. What does the court look for to prove breakdown of marriage?**

- **Campbell and Cade [2012]** p. 116 – 17
  - Parties were living under the same roof (which can still be okay), but in this circumstance the parties could NOT show they lived separately and apart
  - Divorce application dismissed
- **SECTION 48 (2) – in more detail [continued]...**



## 1. What does the court look for to prove breakdown of marriage? Continued...

- **General approach** - before and after test.
- **Marriage of Todd (1976)**
  - “what comprises the marital relationship for each couple will vary”.
  - Consider:
    - Are they intimate with each other?
    - Do they hold hands in public?
  - Contrast the relationship:
    - Contrast the marriage before and after
      - EG:
        - They used to share a bed, now one party sleep in the bed and another sleeps on the couch.
  - Burden – not necessary complete.

^ **ASSIGNMENT**: May need to ask client to confirm some of these details to ensure the marriage is considered “broken-down” (separated finance/ stopped calling person – PROVE ect).

- EG: to ensure your application is successful I need further information to prove your marriage was broken-down....

## 2. s 48(2) - Do you need communication of ‘separation’?

**Section 48(2)** – (*Marriage of Todd*) separation can only occur where:

1. an intention to separate (that is, to break the matrimonial relationship or *consortium vitae*);
  2. action upon that intention; and
  3. communication of that intention to the other party (can be spoken or unspoken)
- **Marriage of Falk (1977)** confirms:
    - The intention to separate must be communicated.
    - **Many ways communicating** - spoken or unspoken.
    - **Easy** – both parties withdraw.
    - **Problem** – intention one party only and need to establish date of separation.
    - *Marriage of Lane* (No 1) (p. 121) - not completely withdrawn nor did he
    - communicate his intention.

## Topic 4 – Part 2 – Nullity

### PART 1 – INTRODUCTION

- A. Nullity – prior to FLA
- B. Jurisdiction

### PART 2 – Section 23B: GROUNDS ON WHICH MARRIAGES ARE VOID

- A. 23B(1) GROUNDS FOR NULLITY
  - 23B(1)(a) BIGAMY
  - 23B(1)(b) PROHIBITED RELATIONSHIPS
  - 23B(1)(c) MARRIAGE IS NOT VALID UNDER S. 48
  - 23B(1)(d) CONSENT NOT REAL CONSENT
  - 23B(1)(e) MARRIAGEABLE AGE

### PART 3 – CONSEQUENCES

- A. STATUS OF PARTIES
  - B. REMARRIAGE
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### PART 1. INTRODUCTION

#### A. Nullity – prior to FLA

- **Matrimonial Causes Act** – states 2 grounds to be able to consider marriage as a nullity...
  1. **VOID:**
    - Arguing no marriage at all, and there never was
    - decree if obtained would confirm that there never was a marriage.
  2. **VOIDABLE:**
    - Arguing that there WAS a valid marriage until nullity decree (but there was a fatal flaw)
    - once pronounced never a marriage.
    - One of the follow REASONS/GROUNDS must be established to declare the marriage voidable:
      - impotence, mental defectiveness, venereal disease, bigamy, wife (prior to ceremony) pregnant to someone else.
- **Position in Australia now...**

**NOTE:** Voidable marriage abolished by FLA – only remedy now DIVORCE.

  - Still have decree of nullity (declaration of invalid marriage) – if void.
  - *Ross Smith v Ross Smith* [1963] AC 280 at 314 (p. 78 – 79).

- **4<sup>th</sup> Ground – Lack of real consent**

**s23B(1)(d) Marriage Act:** the consent of either of the parties was not a real consent because:

- (i) **FRAUD / DURESS**
- (ii) **Mistake as to identity**
- (iii) **Mistake as to ceremony**

**(i) FRAUD / DURESS**

**s23B(1)(d)(i) Marriage Act:** it was obtained by duress or fraud;

**Duress**

- Duress is where you instil fear in someone to make you marry them
  - EG: if you don't do this and marry me, this will happen to you.
- **Scott v Sebright (1886)** p. 89: husband threatened to shoot her if she did not marry him. The marriage was held to be a nullity, as she was in a mental state (forced into such state) where she could not resist the coercion and threats.
- **Marriage of S (1980)** p. 90.: Girl in Egypt was in an arranged marriage, due to strong pressure by her parents. There was no evidence of physical violence, however there was a lot of mental parental coercion. This mental pressure by her parents effected her so much it could not be held that she made the decision freely. **→ case proved it is all about the actual pressure on the persons mind, need to look at the persons state of mind when saying "I do", is the person freely and voluntarily saying I do, or are they threatened to do so.**
- **Marriage of Teves III v Campomayor, A (1995)** p. 92-3: wife argued, yes she consented but she was forced into the marriage. Court held that the evidence she provided was NOT credible. The courts also had concern with the date of the last alleged violence against her and the consent at the marriage ceremony – thus the court could not find that at the time of giving consent she was not freely giving the consent. **→ case held that the consent was actual her's, courts discretion could not hold that her consent was not real – again highlighting the importance of a person state of mind at the time of consent.**
- **Nagri & Chapal [2012] FamCA 464** (p. 98): Husband did not was to go ahead with the wedding, only did so due to a sense of loyalty to his family as it was an arranged marriage. Also the man was financially dependent on his husband and that made it harder as he arranged the marriage. The marriage was deemed a nullity due to the husbands state of mind at the time of consent, was not freely given **→ case highlighted how much discretion the court/judge really has, as it all comes down to what a judge sees a person state of mind "at time of marriage"**

# Topic 5 – Introduction to Children and Property

## Part 1 (week 5)

### 1. Overview: Children Matters

- **Family Law Act 1975** applies to:
  - all **children under the age of 18**
  - regardless of how they have been born or
  - to whom they were born to (i.e. IVF babies, defacto couple out of wedlock couple)
  - HAS A BROAD APPLICATION TO NEARLY ALL CHILDREN
 (refer to **ss.60f, h, ha & hb** when we cover children).

#### Application

- An application for a parenting order or any other matter to do with children **can be made anytime after separation** (divorce is not a pre-requisite).
- The pre-requisite is family dispute resolution
  - **Need to obtain a s. 60i certificate** (some exceptions).
  - **EXPLAIN IN LETTER RE ASSIGNMENT 2**: The certificate means that parties have genuinely tried to resolve the dispute outside of court, once the parties have attended FDR then they can complete this certificate and apply

#### Part 7 FLA

- **Part 7 of the Family Law Act 1975**: deals with all children matters
- Under part 7 certain applications can be made ( i.e. the below...)

#### Applications can be made in relation to the following issues:

- **Who the child lives with;**
- **Who the child spends time with and communicates with;**
- **Who is a parent? – Re Patrick;**
- **Parental responsibility – sole or equal;**
  - Law presumed parents have equal responsibility over a child, BUT
  - One parent can request for sole parental custody of the child
  - When could this happen?
    - When the other parent has not been around or
    - Other parent is not safe

**PART 3 – PARENTING ORDERS** - more info**A. Who may apply for a parenting order?****SECTION 65C FLA**

A parenting order in relation to a child may be applied for by:

- (a) either or both of the child's parents; or
- (b) the child; or
- (ba) a grandparent of the child ; or
- (c) any other person concerned with the care, welfare or development of the child

➔ Anyone has legal standing, so long as there are concerned with the care, welfare and development of a child.

- However, general it is a sole application, by one parent.

**B. Who is a parent?**

Partial definition: **s4 FLA**

- This section covers biological parents

Presumptions of parentage:

1. arising from marriage: **s 69P FLA** (see also s. 60F).

- If a women give birth to a child whilst married, the presumption is that the husband is the father
- **s. 60F FLA**: in this situation, the child will be deemed a “child of the marriage”

2. arising from cohabitation: **s. 69QFLA** (see also s. 60HA).

- If women gives birth to a child whilst cohabitating with another person, this person is seen to be the other parent
- **s. 60HA**: in this situation, the child will be deemed a “child of a defacto relationship”

3. arising from registration of birth: **s. 69R FLA**

Presumptions are rebuttable: **s. 69U.**

- Parentage testing (DNA testing): **ss 69V - ZA.**

**s. 60H** - Children born as a result of artificial conception procedures.

- Not a sperm doner, it has to be the person who intended to be parent.

# Topic 5 – CHILDREN

## Part 2 (week 7)

### TOPIC OVERVIEW

#### PART 1 – PARENTAL RESPONSIBILITY

- A. The concept – parental RESPONSIBILITY
- b. the presumption – equal shared parental responsibility
- c. CONCEPT v PRESUMPTION – the difference
- d. parental RESPONSIBILITY - summary courts APPROACH

#### PART 2 – THE APPROACH – BEST INTERESTS

- A. parental MATTERS – guiding principle (best interests)
- b. primary considerations
- c. additional considerations

#### PART 3 – BEST INTERESTS

- A. Variation & contravention
- B. Parens patriae
- C. Approaching a children's issue in family law
- D. Hague Convention

### PART 1 – PARENTAL RESPONSIBILITY

#### A. The concept – parental RESPONSIBILITY

DEFAULT - where no parenting orders

**s. 61C (1) FLA** - Each parent has parental responsibility of a child who is not 18 (subject to court orders). This responsibility is vested at birth and remains despite any changes to the parents relationship (i.e. they get re-married ect).

- **s. 61D:** Makes it clear that although court order may/can alter the default position relating to parental responsibilities, it does not mean that ALL court orders will automatically alter parental responsibility. MUST look at the specific order and consider how that particular order alters the responsibilities of the child.

WHAT IS Parental Responsibility?

- Not specified under the FLA – see common law.
- **s. 61DA(1)** - “In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”
- Continues despite changes relationship.

Parenting responsibilities be **modified, conferred and/or displace?**

- Filing plan, **s. 61C(1).**
- Parenting Order, **s. 61C(3).**
  - A parenting order **confers** parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

Note **s. 61D(2)** – a parenting order **does not take away or diminish** any aspect of a persons parental responsibility for the child except to the extent (if any):

- expressly provided for in the order; or
- necessary to give effect to the order.

CASE LAW RE ‘PARENTAL RESPONSIBILITY’

As a child’s maturity increases their capacity to make their own decision increases and therefore Parental Responsibility starts to dwindle.

**Dept. of Health and Community Services (nt) v JWB and SMB (Marion’s Case) 1992 HC** - p 175

Marion is now 14 years old. As well as being intellectually disabled, Marion is also severely deaf, has epilepsy and what were described as an ataxic gait and behavioural problems. Her parents, residents of the Northern Territory, had applied to the Family Court of Australia for an order authorising the removal of her uterus (a hysterectomy) and ovaries (an ovariectomy). Both these operations involve major surgery, and either would result in Marion becoming permanently infertile.

Marion’s disabilities were so severe that she was unable to understand the nature or implications of the operation her parents were seeking on her behalf, and presumably would never reach that level of comprehension.

2/1 majority (Nicholson CJ dissenting) the Full Court of the Family Court held parents were able to authorise sterilisation without a court order – but to be on the safe side should still seek orders.

Appeal initiated by Secretary of the NT Department of Health and Community Services to the HC. The joint majority judgement (Mason CJ, and Dawson, Gaudron and Toohey JJ) considered a number of aspects of assault, consent to medical treatment, parental responsibilities and duties and the particular nature of sterilisation. They held that the parents could not lawfully authorise a sterilisation procedure to be carried out on their daughter without a court order.

CASE LAW RE 'PARENTAL RESPONSIBILITY', continued...***Gillick v West Norfolk and Wisbech Area Health Authority [1985]*** - "Gillick competence"

- Number of cases refer to the Gillick competence.

## Summary...

- This case looked at whether this child (minor) has the capacity to make their own decisions relating to medical treatments or procedures, and give informed consent.
- A child was deemed to have "Gillick competence" if they are able to make their own decisions when they reach a sufficient level of understanding regarding what is being proposed. Once a child has reached this level of competence, a parent will lose their level of parental responsibility if the child is deemed mature and having a high enough level of mental competence to make their own decision.

## Details...

In 1982 Mrs Victoria Gillick took her local health authority (West Norfolk and Wisbech Area Health Authority) and the Department of Health and Social Security to court in an attempt to stop doctors from giving contraceptive advice or treatment to under 16-year-olds without parental consent.

The case went to the High Court in 1984 where Mr Justice Woolf dismissed Mrs Gillick's claims. The Court of Appeal reversed this decision, but in 1985 it went to the House of Lords and the Law Lords (Lord Scarman, Lord Fraser and Lord Bridge) ruled in favour of the original judgement delivered by Mr Justice Woolf:

"...whether or not a child is capable of giving the necessary consent will depend on the child's maturity and understanding and the nature of the consent required. The child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, **so the consent, if given, can be properly and fairly described as true consent.**"

**b. the presumption – equal shared parental responsibility****s. 61DA!!** - Presumption of equal shared parental responsibility when making parenting orders

- No presumption that each parents will spend **equal time** with the child
- Responsibility and time are two separate issues

OBLIGATIONS TO CONSULT?

Different consultation requirements for day to day issues & major long-term issues.

**s. 65DAC** - Effect of parenting order that provides for shared parental responsibility

- if 2 or more persons share PR and the exercise of PR involves making decision re major long-term then must be made jointly;

compared to...

**s. 65DAE** – Even if parents do share parental responsibility, they **DO NOT NEED TO CONSULT** on issues that are not major long-term issues.



Major long term issues – 5 major LT issues

*Major long-term issues*, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- (a) the child's education (both current and future); and
- (b) the child's religious and cultural upbringing; and
- (c) the child's health; and
- (d) the child's name; and
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

- *Major LT issues are **Not limited** to the above 5 issues*
  - But these are the main issues consider
- *Day to Day not defined.*
  - *Indication in s. 64DAE - (doesn't rule out possibility being major issue).*
- *Scope for overlap.*
- *Remember no obligation consult day-to-day. Can require consult re day to day issue.*

To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a *major long-term issue* in relation to the child. However, the decision will involve a *major long-term issue* if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent.

### c. CONCEPT v PRESUMPTION – the difference

#### CASE

#### **Goode and Goode (2006)**

The Full Court confirmed that there is a difference between **parental responsibility and equal shared parental responsibility**:

“[T]here is a difference between parental responsibility which exists as a result of s 61C and an order for shared parental responsibility, which has the effect set out in s 65DAC ... Once the Court has made an order allocating parental responsibility between two or more people, including an order for equal shared parental responsibility, the major decisions for the long-term care and welfare of children must be made jointly, unless the Court otherwise provides.”

Full Court took the view that when the presumption of equal shared parental responsibility is applied, the first thing court must do is consider the practicality of the child spending equal time with each of the parents under s.65DAA.

- Need to look at presumption **even when no orders** sought for ESPR(s61DA) – **status quo no longer applicable** – need to consider the s60CC considerations when deciding to maintain status quo.

## PART 2 – THE APPROACH – BEST INTERESTS

Whenever making a parenting order, need to always consider “the best interest of the child”

### A. parental MATTERS – guiding principle (best interests)

What guides us when we are seeking parenting orders?

- **Part 7:** Court has obligation to consider ‘welfare’ and ‘best interests’ of child.
- The word welfare is to be given a wide meaning and may cover: the comfort, health, moral, intellectual, economic and physical wellbeing of a child.
- ‘Best Interests’ is to be decided in light of the particular facts and circumstances of a matter. Must be a clear benefit to child (long term).

*Review cases in the book on pages 180 – 184 to see how Judges apply the legislation.*

### b. primary considerations – when determining what is in the best interests of a child...

**s. 60CA** – Child's best interests paramount consideration in making a parenting order.

**s. 60CC** - How a court determines what is in a child's best interests.

*\*Must know these issues and address in all matters that are put before you in relation to whom a child lives with or spends time with.*

### PRIMARY CONSIDERATIONS

*The below are 2 primary consideration the could WILL consider when determining “what is in the best interest of a child”...*

(a) the **benefit to the child of having a meaningful relationship with both of the child's parents;** and

(b) the **need to protect the child from physical or psychological harm** from being subjected to, or exposed to, abuse, neglect or family violence. → CHILD SAFETY

(2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

- Must look at SAFETY 1<sup>st</sup>

*Primary considerations in detail...*

2(b) the need to protect the child from physical or psychological harm ...

- s. 4 FLA (p 186) - definition of abuse and;
- s. 4AB(1) (p 186) definition of family violence.

**How does this need to protect arise?**

- *time*– “while there is no evidence of actual violence inflicted upon the children, I am satisfied on the balance of probabilities on the evidence before me that there is an unacceptable risk that these children will be exposed to violent behaviour on the part of Mr H if they remain residing with the wife. I propose to order that the children... reside with the husband.”
- *M & M* – proper approach re allegations sexual abuse. No need to determine truth.
- (See cases on violence pages 188 – 210).
- *Cases where there are serious abuse allegations* will be heard in the Magellan list of the FCA.

2(a) the benefit of a meaningful relationship ...

- Concept of meaningful relationship? *Mazorski v Albright* p 211 – 214.
  - Brown J concluded ‘a meaningful relationship ... is one which is important, significant & valuable to child.

**1. Views of the child****60CC(3)(a) FLA – Views of the child**

**→ IN ASSIGNMENT GO TO THE ACTUAL SECTION ONLINE –**  
**Only talk about factors which are relevant to the assignment**

- Now expressed as views not wishes.
- ‘Proper and realistic’ weight should be attached to the expressed views of the child: *Marriage of Harrison and Woollard*
  - (will depend among other things on the strength, duration and basis for the views and the child’s level of maturity and appreciation for the matters at issue).
- Age/maturity important.
- Children are not required to express their views – s. 60CE.
  - Cannot force children to express their views as per this section.
- Judges may choose to meet children in person:
  - *Painter and Morley* but note this is rare.
  - In this case the parties had been litigating for 8 years. The children came into the court room with only the family consultant, counsel for the Independent Children’s Lawyer and Judge Benjamin, it was recorded.

## PART 3 – BEST INTERESTS

### A. Variation & contravention

#### VARIATION – Can you vary an order by the court? YES

- Can be varied parenting plan or can apply for variation of parenting order.
- Difficulty - child needs stability but best interests need to be maintained in face of changing circumstances.
- **Rice and Asplund** – p 254. **VERY IMPORTANT CASE**
  - If got back to court you will need to prove a substantial change in circumstances since you last litigated and this makes the old order no longer in the best interest of the child

#### CONTRAVENTION

- Consent or court orders.
- **s. 70NAC** - Meaning of contravention.
- Parent alleging contravention may bring application before court.
- **s. 70NAE** - Meaning of reasonable excuse for contravening an order.
- If respondent no reasonable excuse then court has wide powers re sanctions.

### B. Parens patriae – the welfare jurisdiction of the Family Court

- ‘parent of the nation’.
- Legal doctrine.
- Common law grants inherent power and authority of the state to protect persons who are legally unable to act on their own behalf.
- Now found in **s. 67ZC** – “In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children”.
- Generally regarding:
  - **medical treatment on behalf of child.**
  - **Child to undergo hormone treatment – docs will want a court order**
- FCA has jurisdiction to authorise certain medical procedures where child incapable of giving consent.
- Authorisation where significant risk making wrong decision (as to capacity) or consequence of a wrong decision are grave.

Is minor capable to give consent?

- Yes they are capable, under the gillic competence, the child will need to be of a sufficient intelligence and maturity to fully understand the consequences of the proposed procedure.

**C. Approaching a children's issue in family law****1. Objects of the Act – s. 60B****2. Always remember it is about the best interests of the child – s. 60CA****3. Children have rights – determined by s. 60CC****4. Parents have responsibilities – s. 61B and s. 61C****5. First step – refer parties to Family Dispute Resolution (FDR) – s 60I**

The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a *Part VII order*) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

Recommend parenting plans - s 63C (meaning). Remember your obligation – s. 63DA

Discuss parenting orders – s 64B

If parents have a parenting order and later develop a parenting plan – the plan prevails – s. 64D

**6. Is there an exception to parties attending FDR - s. 60I(9)**

- Applying for Orders by consent (all agree);
- Responding to an Initiating Application made by another party;
- Court is satisfied there are reasonable grounds – there is child abuse; risk of child abuse; has been family violence; risk of family violence;
- Or all of the following are satisfied:
  - Application made in relation to a particular issue;
  - Order relating to the issue was made within the last 12 months;
  - Contravention application;
  - Person has behaved in a way that shows a serious disregard for obligations under the order; or
  - Urgent circumstance; or
  - One of more of the parties cannot participate effectively in FDR

# Topic 9 – PROPERTY

## Part 1 (week 9)

### Approaching this topic...

1. **Settlement of property disputes**
  2. **Overview of de facto property division**
    - Same process as for de facto relationship, as to a married couple EXCEPT
    - Firstly just need to prove there was in fact a defacto relationship
  3. **Overview of marital property division**
  4. **What is property?**
  5. **Overview to how to approach the assessment of property**
- I will focus on the marital provisions – it is the same formula**
- 

### 1. Settlement of property disputes

#### 1.1 What ways can your client resolve a property dispute?

- **Mutual informal agreement.**
  - Does not need to be in writing
  - The parties are generally able to discuss this with each other
- **Consent order.** Family Law Rules 2004 r 10.15 – must be just and equitable.
  - The parties can reach an agreement themselves but the parties want something enforceable, so would get a “consent order”
- **Binding financial agreements (BFA)**
  - **MARRIED** Pt VIIIA – s 90B prior to marriage; s 90C during marriage; s 90D following separation;
  - **DefactoRelationship** – Pt VIIIAB – s 90UB; s 90C; s 90UD.
  - With BFA’s formalities must be complied with (refer to p 374- 5 & 558 - 9).
  - Statement - A BFA ousts the jurisdiction of the family law court to make an order under the property settlement or spousal maintenance provisions of the Family Law Act about the financial matters to which the agreement applies.
  - Advice.
    - Just and equitable.
    - Currently lots of scope for a court to set aside agreements.
- **Parkes and Parkes [2014]** p 377.

# PROPERTY DIVISION

## CASE: How courts make decisions re dividing property

- Steps outlining the process of dividing property...
- This process is not mandatory to follow, but it is constantly adopted by the courts

### High Court Case - Stanford

#### Step 1. Is it just and equitable to consider whether the alteration of the parties interests in their property is just and equitable?

- It is considered just and equitable for the courts to get involved and make a property division when;
  - There has been a marriage break down;
  - The property is held by the parties
  - The parties have initiated an application
- Generally, when the marriage has broken down (voluntarily break down of the marriage) and there is property, and an application has been initiated, it would be seen as just and equitable for the courts to conduct a property division, thus this first question would be satisfied on these grounds

#### Step 2. Identify and value the property

##### What are the assets, liabilities and financial resources of the parties?

- Use diff colored highlighters to identify;
  - Assets:
  - Liabilities: any debts, car loans, mortgages
  - Financial resources: something reasonable o expect in near future
- This step identified the property pool which is available to be divided

#### Step 2. Identify and value the property, continued...

##### NOTE:

- The extent and value of the property of the parties will usually be considered at the date of the hearing: **Omacini and Omacini (2005)**
- All property of the parties must be considered: **Carter & Carter (1981)**
- No distinction between 'business' or 'matrimonial property' or other categories: **Lee Steere and Lee Steere (1985)** farming properties same as other property.

The Property Pool**Non-superannuation****Assets:***House:*            \$650,000*Mazda:*            \$7,000*Merc:*             \$65,000*Jewellery*        \$5,000*Credit:**Total:*   \$727,000***Pool:*** \$270,000**Liabilities:***Mortgage:*       \$400,000*Loan:*    \$35,000

\$22,000

\$457,000



# Topic 10 – SPOUSAL MAINTENANCE

**NOTE:** spousal maintenance is SEPARATE to property

## 1. What is Spousal Maintenance?

- Under the **Family Law Act** you have an obligation to support your ex-spouse financially, if required to do so.
- Power for the court to make Spousal Maintenance orders:
  - **s. 74 Family Law Act**: SM orders re married couples
  - **s. 90SE(1) Family Law Act**: SM order re defacto couples

The court may 'make such order as it considers proper for the provision of maintenance in accordance with this Part → **very discretionary powers by court**

The word maintenance is a term of broad scope.

- Most obvious – provision of money in order to buy food and clothing, pay mortgage / rent and otherwise to obtain whatever is necessary to live a **normal life**.
- Legal definition is also given of 'money payable by order of a court for the support of a spouse or of children under the age of 18 years.'
- Payable by order of court – unless agreement.

**\*Alimony → DO NOT USE TO WORD ALIMONY!!!**

- Spousal maintenance is the Australian version of this
- Spousal maintenance is NOT as common in Australia

### Courts consider the meaning of "spousal maintenance" ...

The meaning of the term has been considered in case law. *Important points about the definition of maintenance include:*

**1. It is broadly defined.** The FC in **Branchflower and Branchflower (1980) FLC** said:

"When maintenance is considered as a broad concept it is clear that it includes not only the means or income of the person concerned but also the purposes for which those means are required, such as food, shelter and clothing... Such a wide definition of maintenance would include the provision of accommodation."

**2. It is not restricted to spouses who are separated.** **Nygh J in Eliades and Eliades (1981)** awarded spousal maintenance to the wife although the parties were not separated. He ordered that the husband pay her \$80 per week being:

"the figure which it was agreed she would need at the moment for the purpose of household expenses.... The purpose, in other words, of this order is that the wife in future will have the control of the food and household budget and to that extent the husband will be relieved of the need to purchase foodstuffs such as meat, fruit, etc. which he has been buying, including the milk bill. At the same time I expect the wife to provide, out of the household moneys entrusted to her, adequately for the husband."

## Topic 11 – Family Violence

### Statistics

- 1/4 are subjected to family violence
- 3 women are hospitalised each week due to a traumatic brain injury
- Children are present in 1/3
- Aboriginal women are 35 time more likely to be hospitalised due to family violence incidents

### Australian bureau of statistic - RECORDED CRIME – VICTIMS, AUSTRALIA 2015

#### DOMESTIC VIOLENCE RELATED SEXUAL ASSAULT:

- The number of victims of Family and Domestic Violence (FDV)-related Sexual assault increased by 7% in Australia between 2014 and 2015.
- Females comprised 85% of all victims of FDV-related sexual assault, with those aged 0-19 years making up more than half of these victims (59% or 3,730 victims).

### 1. Violence & Abuse within the family

**Definition:** One partner uses violent and abusive behaviours toward the other (and perhaps also children) in order to control or dominate.

**Note:** There is enough to be a threat, which instils fear in other partner for this to be consider family violence

- **EG:** “if going to throw this glass at you”, even if the glass is not thrown but the threat was there, this would amount to family violence under the definition.

**Nicholson CJ:** By one immediate or extended family member which causes harm to another member to an extent which creates apprehension or fear for that member’s personal wellbeing or safety.

### 2. Family Violence Protection Act 2008 (Vic)

**Note:** each state has their own legislation dealing with family violence

#### **s. 4AB Family law act – Outlines Family violence → at Federal level**

#### **s. 5(1) Family Violence Protection Act 2008 (Vic) – Meaning of family violence**

**(1)** For the purposes of this Act, *family violence* is—

**(a)** Behaviour by a person towards a family member (FM) of that person if that behaviour—

- (i) is physically or sexually abusive; OR
- (ii) is emotionally or psychologically abusive; OR
- (iii) is economically abusive; OR
- (iv) is threatening; OR
- (v) is coercive; OR
- (vi) controls or dominates the FM and causes that FM to feel fear for the safety or wellbeing of that FM or another person; (subjective test)

**(b)** Causes a child to hear or witness or otherwise be exposed to the effects of, behaviour referred to in paragraph a.