

## CONTENTS

<b>JURISDICTION .....</b>	<b>5</b>
FAMILY .....	5
COMMONWEALTH POWER.....	5
<i>Family Law Act 1975</i> .....	5
<i>Appeals</i> .....	5
<b>MARRIAGE.....</b>	<b>6</b>
<i>Requirements of marriage</i> .....	6
<i>Formalities</i> .....	6
<i>Foreign marriages</i> .....	7
<b>NULLITY .....</b>	<b>8</b>
<i>Bigamy</i> .....	8
<i>Prohibited marriages</i> .....	8
<i>Consent</i> .....	8
<b>DIVORCE.....</b>	<b>9</b>
<i>Separation</i> .....	9
<i>Resumption of cohabitation</i> .....	9
<i>Timing</i> .....	9
<i>Short marriages</i> .....	10
<i>Arrangements for children</i> .....	10
<b>DE FACTO.....</b>	<b>11</b>
<i>Property matters</i> .....	11
<i>Other factors</i> .....	11
<b>DISPUTE RESOLUTION.....</b>	<b>12</b>
<i>Objects</i> .....	12
<i>When is it not required?</i> .....	12
<i>Certificate</i> .....	13
<i>Other ways to resolve dispute after proceedings have commenced</i> .....	13
<b>INITIATING AN APPLICATION .....</b>	<b>14</b>
FCC AND FCA .....	14
PROCEEDINGS.....	14
AFFIDAVITS.....	14
FULL AND FRANK DISCLOSURE .....	14
<i>Disclosure required</i> .....	14
<i>Production of documents</i> .....	15
EX PARTE ORDERS .....	15
<i>Procedure</i> .....	15
<i>Time for listing</i> .....	16
<i>After the hearing</i> .....	16
<b>CHILDREN AND PARENTING .....</b>	<b>17</b>
THE TEST.....	18
WHO IS A PARENT?.....	18
<i>Presumptions of parentage</i> .....	18
<i>Artificial Reproductive technology (ART)</i> .....	18
<i>Donor</i> .....	18
<i>Surrogacy</i> .....	19
PARENTING ORDERS.....	19
<i>Who can apply for a parenting order?</i> .....	19

<i>Specifics of parenting order</i> .....	20
<i>Parenting plans</i> .....	20
PARENTAL RESPONSIBILITY.....	20
<i>Substantial and significant time</i> .....	21
<i>Reasonable practicability</i> .....	21
<i>Making decisions</i> .....	21
BEST INTERESTS .....	21
INDEPENDENT CHILDREN’S LAWYER (ICL) .....	23
<i>When an ICL is appointed</i> .....	23
CONTRAVENTION OF PARENTING ORDERS .....	23
<b>CHILD ABDUCTION AND RELOCATION .....</b>	<b>24</b>
<i>Location order</i> .....	24
<i>Recovery order</i> .....	24
RELOCATION ORDERS.....	24
<i>Process</i> .....	24
<i>Delayed relocation</i> .....	25
<i>Principles</i> .....	25
INTERNATIONAL RELOCATION .....	25
<i>Considering international relocation</i> .....	25
<i>If there are concerns about removal of the child</i> .....	26
<i>Return of child under the Hague convention</i> .....	26
CHANGING A CHILD’S NAME .....	27
<b>FAMILY VIOLENCE AND CHILD ABUSE .....</b>	<b>28</b>
VICTORIAN JURISDICTION.....	28
<i>Terminology</i> .....	28
<i>Police powers</i> .....	29
<i>Safety notice</i> .....	29
<i>Intervention Orders</i> .....	29
<i>Revocation of IVO</i> .....	30
COMMONWEALTH JURISDICTION .....	30
<i>Injunctions</i> .....	30
COMPARISON OF STATE AND FEDERAL.....	30
BEST PRACTICE PRINCIPLES.....	31
CHILD ABUSE .....	31
<b>DIVISION OF PROPERTY.....</b>	<b>32</b>
<i>The test</i> .....	32
<i>Principles</i> .....	32
<i>Threshold to trigger s79 applications</i> .....	32
<i>Death of a party</i> .....	33
<i>Time limits</i> .....	33
STEP 1 – IDENTIFY PROPERTY POOL .....	33
<i>Declarations</i> .....	33
<i>Requirement for disclosure</i> .....	33
<i>Identifying property</i> .....	34
<i>Valuation of property</i> .....	34
STEP 2 – IDENTIFY CONTRIBUTIONS .....	34
<i>Weighing contributions</i> .....	35
<i>Fourth category rejected</i> .....	35
STEP 3 – MAKING ADJUSTMENTS.....	35
<i>Other factors</i> .....	35
<i>Approaches to property division</i> .....	35
STEP 4 – JUST AND EQUITABLE .....	36

ORDERS TO BE MADE.....	36
<i>Appeal</i> .....	36
DEBTS.....	36
ADDBACKS.....	36
<i>Test for whether it will be added back</i> .....	37
<i>Categories of addbacks</i> .....	37
SUPERANNUATION.....	37
<i>Process</i> .....	38
<i>Splitting and flagging super</i> .....	38
<i>Making orders</i> .....	38
TRUSTS.....	38
BANKRUPTCY.....	38
THIRD PARTIES.....	39
BINDING FINANCIAL AGREEMENTS (BFAs).....	39
<i>Validity</i> .....	39
PROPERTY INJUNCTIONS.....	40
<i>Exclusive occupation injunction</i> .....	40
<i>Restraint on dealing with property</i> .....	40
<b>SPOUSAL MAINTENANCE.....</b>	<b>42</b>
<i>Threshold to trigger</i> .....	42
<i>Time limits</i> .....	42
<i>Factors to consider</i> .....	42
TYPES OF MAINTENANCE ORDERS.....	43
<i>Urgent maintenance</i> .....	43
<i>Orders by consent</i> .....	43
CHANGING SPOUSAL MAINTENANCE ORDERS.....	44
<i>Variation of order</i> .....	44
<i>Cessation of order</i> .....	44

FV = family violence

Mge = marriage

Sp maint = spousal maintenance

Red text = legislative provisions

Yellow highlighted text = illustrative cases

All legislative provisions refer to the *Family Law Act 1975* (Cth) unless otherwise specified.

## Nullity

Annulment means the marriage is void *ab initio*.

Applications are made pursuant to s44 FLA, declaration made by the Court pursuant to s51.

**S23B Marriage Act** - Reasons for nullity of marriage:

- Either party already married
- Prohibited relationship
- Lack of formalities under s48
- Lacking consent
- Either party not of marriageable age

### Bigamy

If one party is lawfully married to another person – **Weekes and Weekes**.

- **Barriga** - Does not matter if both thought the marriage had come to an end due to divorce or death.

### Prohibited marriages

Will be void if:

- Fixed term marriage
- Polygamous marriage
- Marriage under duress
- Until the amendment, same sex marriage was not permitted
  - Common law definition was dominant – **Hyde v Hyde and Woodmansee**.
  - **Re Kevin** – Changed common law position on the meaning of male and female. A person's sex at birth not necessarily their sex currently.

### Consent

Marriage is void if no consent:

- Duress or coercion
  - **In the mge of S**.
  - Must be relevant to entering into the ceremony. History of family violence does not mean the marriage was under duress.
- Fraud – **s23B**
  - **In the mge of Hosking**.
- Mistake – as to identity of party or nature of ceremony
  - **In the mge of Najjarin** – Woman agreed to marriage as long as Islamic ceremony was performed but it was not.
  - Must be a 'fundamental' mistake.
- Mental incapacity – to understand nature and effect of marriage
  - **Oliver** – Can include incapacity due to drugs and alcohol but would have to be extreme.

## Divorce

**S48(1) FLA** - The only ground for divorce is 'irretrievable breakdown' of marriage

- Irretrievable breakdown means it is beyond reconciliation.
- **S48(2)** - This ground will be established if the parties have lived separately and apart for a **continuous** period of 12 months.
- **S48(3)** – The Court **cannot** make an order for divorce if there is a reasonable likelihood of reconciliation and cohabitation being resumed.
- **S104** – Foreign divorces are recognised – **mge of Dornom**
  - Court can decide which jurisdiction is most appropriate to hear the application in – **Ferrier-Watson v McElrath** – wife was able to initiate property proceedings in Fiji even though divorce was done in Australia.

### Separation

Separation is more than physical separation – it is the **destruction of marital relationship**.

- Where one or both parties form the intention to separate and act on it – **mge of Pavey**.
- **S49(1)** – Parties may be held to have separated even if cohabitation was brought to an end by the action or conduct of only one of the parties.
- An intention to separate can be inferred by conduct – **mge of Falk**.
- **S49(2)** – Separation under the same roof is possible – **mge of Hodges**.
  - Requires **proof**.
  - Requires an **intention** to sever the marital relationship and **communication** of that intention to the other party.
  - Sleeping arrangements are important – **mge of Watkins** – Slept in same room but in separate beds constitutes separation.
  - Lack of intimacy is important – **mge of Caretti** – parties said they were separated but slept in the same bed.
  - Outside parties' perception of the relationship is important – **mge of French**.

### Resumption of cohabitation

Parties are afforded one opportunity to reconcile that does not impact the 12 month period of separation required to apply for divorce.

**S50** – Where parties separate but **on one occasion** resumed cohabitation for **less than 3 months** before separating again, the period before and after can be added together to form the 12 month required period.

- **Mge of Keyssner**.
- Insubstantial periods of cohabitation are not counted, but 10 days has been held to be too long to be insubstantial, so s50 would apply.

### Timing

**S55(1)** – Divorce order takes effect one month after it is made.

- **S55(2)** – Court can extend period if likely to be an appeal or reduce it if there are special circumstances justifying it.

**S57** – Order can be rescinded if parties reconcile before it takes effect

## De facto

Have similar rights to married couples in children's and property matters.

**S4AA** – A person is in a de facto relationship if:

- They are not married; and
- They are not related; and
- Having regard to all circumstances of the relationship they are a couple living together on a genuine domestic basis.

**S4AA(2)** – Circumstances to decide include (but are not determinative):

- Duration of relationship
- Nature and extent of common residence
- Whether sexual relationship
- Financial dependence between them
- Ownership and use of property
- Degree of mutual commitment to shared life
- Whether relationship is registered under **Relationships Act 2008**.
- Care and support for children
- Reputation of relationship

**S39A** – At least one of the parties must be an Australian citizen, permanent resident, or present in Australia to make an application.

### Property matters

Once de facto relationship status proved and for de facto couple to institute property proceedings:

**S90SB** - Court must be satisfied that:

- Total period of relationship is at least two years; or
- There is a child of the relationship; or
- One party made substantial contributions and to not make the order would cause serious injustice; or
- The relationship was registered.

### Other factors

**S90SD** - Sufficient connection to participating jurisdiction - Court may make maintenance or property order if court is satisfied:

- **(a)** Either or both parties were resident in the jurisdiction when the application was made; and
- **(b)** Either both parties were resident in the jurisdiction for at least 1/3 of the relationship or the applicant was in the jurisdiction and made substantial contributions; or
- **(1A)** – Both parties were in the jurisdiction when the relationship broke down.

## The test

### Goode v Goode:

1. S65D(1) – Court has power to make parenting orders
2. S65C – Who can apply for parenting order?
3. S61DA – Presumption that ESPR in best interests
  - a. S61DA(2) – Can be rebutted by FV or abuse, or if not in best interests. If rebutted, consider what is in the child's best interests and make an appropriate order.
  - b. If not rebutted, continue below.
4. S65DAA(1) – Equal time
  - a. Is it in the best interests (s60CC) and reasonably practicable (s65DAA(5))?
    - i. Yes – Make order for equal time
    - ii. No – continue below
5. S65DAA(2)(c) – Substantial and significant time
  - a. Is it in the best interests (s60CC) and reasonably practicable (s65DAA(5))?
    - i. Yes – Make order for equal time
    - ii. No – make any order the Court sees fit.

## Who is a parent?

No definition in FLA but includes adoptive parents (s4 – definition of 'parent').

### Presumptions of parentage

S69U – The following presumptions are **rebuttable** on balance of probabilities. If two or more contradict one another, the more likely one will apply.

- S69P – Child born to woman while married – husband presumed to be father
- S69R – If parent's name is on the child's birth certificate – presumed to be parent
- S69Q – Child born to woman who is cohabitating with a man 44-20 weeks before birth of child – man is presumed to be parent

S69W – Court may order parentage test on its own initiative or on application

- The Court will only order a parentage test if there is an '**honest and reasonable doubt**' as to who the parent is – in the mge of F and R.
- If a presumed parent refuses to undergo a parentage test, the Court will make a presumption as to who is the parent – G v H.

### Artificial Reproductive technology (ART)

- S60H – If a child is born to woman via ART that is married or in a de facto relationship at the time of the procedure, the partner is presumed to be the parent.

### Donor

- A donor is not a parent – Re Patrick.
- If the child is conceived naturally then the donor is the parent even if that was not the intention – ND v BM.

## Substantial and significant time

**s65DAA(3)** – Substantial and significant time is where:

- Parent spends time with child on days that fall on weekends and holidays; AND
- Parent spends time with child on days that do not fall on weekends on holidays; AND
- Parent can be involved in the child’s daily routine; AND
- Parent can be involved in occasions and events significant to the child; AND
- Child can be involved in occasions and events significant to the parent.

Provides for **involved** time, not just **more** time. Allows involvement by both parents and improves child’s familiarity with different routines and environments.

## Reasonable practicability

**S65DAA(5)** – In determining reasonably practicability, court will have regard to:

- How far apart the parents live from each other
- Parents’ current and future capacity to implement arrangement for child spending equal time or substantial and significant time with each parent
- Parents’ current and future capacity to communicate and resolve difficulties
- Impact that the arrangement would have on the child
- Other matters the court thinks relevant

## Making decisions

**S4** - Major long-term decisions are those relating to care, welfare, and development of child:

- Education
- Religious and cultural upbringing
- Health
- Name
- Changes to living arrangements that make it difficult to spend time with one parent

**S65DAC** – If there is ESPR, parties must make genuine effort to make decisions about major long-term issues jointly.

**S65DAE** – Parties are not required to consult about issues that are not major long-term issues such as what the child wears or eats on a day-to-day basis.

## Best interests

- **S60CA** – **The best interests of children are paramount.** - This is an overriding factor that the Court will always consider.
- **S60CC** – How to decide what is in the child’s best interest. Made up of primary and additional factors.
  - **S60CC(2)** - Primary factors:
    - Benefit to child of having meaningful relationship with both parents
      - **G and C** – Cannot always guarantee parents will be able to have a meaningful relationship
      - **Mazorski v Albright** – Meaningful is qualitative. Can have a meaningful rship even without spending equal time.



## Family violence and child abuse

**S61DA(2)** - Important because it can be a ground for rebutting the presumption of equal shared parental responsibility.

### Victorian jurisdiction

**Personal Safety Intervention Order Act 2010** – PSIVO can be issued if the respondent is not a family member

- **S1** – Purpose to protect safety of victims of assault, harassment, property damage or interference with property, stalking and serious threats (prohibited behaviours).
- **S2** – Purposes achieved by providing PSIVO system, encouraging mediation to resolve disputes, creating offence for contravention of PSIVO

**Family Violence Protection Act 2008** – FVIVO issued if the respondent is a family member. All sections below refer to this Act.

- **S1** – Purpose is to maximise safety for children and adults who have experienced fv, prevent fv, and promote accountability of perpetrators
- **S5** – Definition of family violence – Behaviour that is:
  - Physically or sexually abusive
  - Emotionally or psychologically abusive
  - Economically abusive
  - Threatening
  - Coercive
  - In any other way **controls or dominates** the family member and causes them to **feel fear** for the safety of themselves or another person
  - Causes a child to hear, see, or otherwise be exposed to behaviour above

### Terminology

AFM = Affected family member – this person makes the application

Family member = broad definition

- **S8** – Family member is a person who is a:
  - Spouse
  - domestic partner
  - someone who has had intimate personal relationship
  - is or has been a relative
  - a child who normally resides with the person
  - a child of a person who has had an intimate relationship
- **S8(2)** – Includes person who AFM would regard as a family member – consider:
  - Whether they live together
  - Nature of ties between them
  - Reputation of their being family in community
  - Cultural recognition of being like a family
  - Duration of relationship
  - Financial dependence
  - Provision of responsibility or care
- **S10** – Includes relatives:
  - By whole blood, half-blood, or by marriage

## Spousal maintenance

Financial support provided by one spouse to the other for general living and upkeep.

- Usually short-term
- **Test** – s72 - Needs vs capacity
  - A party has a right to sp maint if they are **unable** to support themselves adequately but the other is **reasonably able** to do so.
  - Adequate means 'reasonable in the circumstances' – **In the mge of Nutting**.
  - **Mitchell v Mitchell** – Husband was a barrister with a substantial income, wife was a nurse who had not worked for 27 years. Full Court held the wife was eligible for sp maint because even though she got money from property division she had no earning capacity whereas the husband did.
- Can be periodic payments, lump sum, or transfer of assets

**S74(1) and s90SE** – Court can make such order **as it considers proper** for provision of maint.

- What is 'proper' considered in **Robinson and Wills** – An order which is insufficient or excessive in the circumstances is not proper.
- Wide discretion
- Bad conduct such as having an affair is not relevant – **Soblusky and Soblusky**.

### Threshold to trigger

- Married – Does not require breakdown, but generally hard to show need if it has not
- De facto – Known as 'partner's maintenance' – relationship must have broken down.

### Time limits

- Married – Within 12 months of separation
- De facto – Within 2 years of separation
- **S44(4)** – Leave can be granted to apply out of time due to hardship
  - **In the mge of Richardson** – Need for welfare shows hardship

### Factors to consider

**S75(2)** – Matters to be taken into account:

- **(a)** Age and health of parties
- **(b)** Income, property, and financial resources and capacity to obtain gainful employment
  - **DJM v LJM** – determine earning capacity by considering ability, willingness and opportunity. In this case the applicant had voluntarily taken a pay cut. Court said he had the capacity to earn higher but chose not to.
- **(c)** Whether there is a child
  - Child does not automatically entitle to sp maint
- **(d)** Necessary commitments to support themselves or a child or another person
- **(e)** Responsibility to support another person
- **(f)** Pension and superannuation
- **(g)** Reasonable standard of living