

## Topic 1 – Introduction to Family Law

<b>What is a Family?</b>
<b>Defining Family</b>
Do we need a legal definition of 'family'?
<b>Entitlements</b> <ol style="list-style-type: none"><li>1. Identifying who should be recognised as next of kin (e.g. medical decisions)</li><li>2. Tax levies and incentives for married couples</li><li>3. Identifying who should benefit if someone dies intestate</li></ol> <b>Responsibilities</b> <ol style="list-style-type: none"><li>1. Obligations between parents and children</li><li>2. Financial responsibilities between partners/former partners</li></ol>
Attempts to define family in Australian law
<b>S43(b) FLA75</b> <p>"need to give the widest possible protection and assistance to the family as the <i>natural and fundamental group unit of society</i>..."</p> <p><b><i>Knightley v Brandon [2013] FAMCAfam 48, Harman J</i></b> "The configuration of 'families'...has changed significantly since [the FLA in 1975]. Each definition will, no doubt, continue to change and evolve. <i>The definition... can change over time</i> in response to changing societal circumstances."</p>
<b>Challenges of Defining Family</b>
Who is the 'family' envisaged by family law?
<ul style="list-style-type: none"><li>• Hetero/gender normative</li><li>• Assumed gender roles</li><li>• Legally married</li><li>• Of white/European origin</li><li>• Middle class</li><li>• Biological children</li></ul> <p>"Due to its historical dominance, the nuclear family is constructed as the 'natural' model of family. On the basis of this 'natural' construction, the nuclear family is presented as the idealised image which underpins the <b>legal</b> understanding of the 'family'" <b>Alan Brown, What is the Family of Law?</b></p> <p><b>On one hand...</b> Universally applicable categories are needed for the law to be realistically practicable</p> <p><b>On the other hand...</b> There is far from universal agreement on the line between family and not-family</p>
<b>Marriage</b>
Why do people marry?
<b>M Hibbs et al, 'Why Marry? Perceptions of the Affianced' (2001) Family Law 197.</b> <b>Surveyed 172 heterosexual engaged couples, identifying 3 main reasons:</b> <ul style="list-style-type: none"><li>• 30% 'Love'</li><li>• 13% 'Commitment'</li><li>• 9% 'A natural progression for the relationship'</li></ul>

Consider: Property and Family Violence (pre-2024 reforms)
<p><b>Kowaliw and Kowaliw [1981] FamCA 70</b> - wastage can be a relevant contribution factor where one of the parties has acted recklessly, negligently or wantonly which reduces or minimises the value or worth of assets</p> <p><b>Kennon and Kennon [1997] FamCA 27</b> - Full Court rejected the notion of 'negative contribution'; f/v may be relevant to property cases where there is a discernible adverse impact on the other party's contributions ie made the contributions 'more arduous'; applies only in 'exceptional cases' or a 'relatively narrow band of cases'</p> <p><b>Baranski and Baranski 2012] FamCAFC 18</b> - f/v may be relevant to post-separation contributions NB: no cases on impact of f/v on current or future circumstances</p>
Other issues – not covered in detail in this unit
<ul style="list-style-type: none"> <li>• Travel</li> <li>• Change of name</li> <li>• Relocation</li> <li>• Hague Convention</li> <li>• Paternity</li> <li>• Adult child maintenance</li> </ul>
What does it mean in practice in current times?
<ul style="list-style-type: none"> <li>• Families will utilise FDR and make their own decisions</li> <li>• Lawyers likely to still look at substantial time/equal time even though it is not required</li> <li>• More flexible arrangements without the presumptive approach</li> <li>• Courts mandated to take FV issues very seriously – <i>promote</i> safety vs protection</li> <li>• Social sciences/expert evidence considered</li> <li>• Practitioners need to be trauma-informed</li> </ul>
<b>How to apply the law in a Problem Question</b>
<p><b>Identify issues in dispute</b></p> <ul style="list-style-type: none"> <li>• long-term decisions, time with child?</li> </ul> <p><b>Identify/apply relevant law to each issue</b></p> <ol style="list-style-type: none"> <li>1. <u>s60CA Paramouncy Principle</u> - I am required to consider the best interests of the child</li> <li>2. <u>s60CC considerations</u> (draw upon <b>relevant case law</b> to aid interpretation of specific considerations, noting how these authorities may now be interpreted in light of new s60CC general considerations and removal of tiered system) <b>use Sham and Bosch as guidance</b></li> </ol> <p><b>Conclude on likely outcome of each issue</b></p> <ul style="list-style-type: none"> <li>• Note that outcomes are discretionary, so there are rarely right/wrong answers. However, the outcomes do need to be realistic, well-reasoned and clearly supported by your analysis of the relevant law</li> </ul>
Assessment Preparation
<p><b>Read through your scenario together</b></p> <ol style="list-style-type: none"> <li>1. Identify relevant issues</li> <li>2. Make notes on relevant law <ul style="list-style-type: none"> <li>• s60CA</li> <li>• s60CC – which are the key considerations?</li> </ul> </li> <li>3. Consider which aspects of your scenario are likely to be non-contentious</li> <li>4. Consider which aspects of your scenario are likely to be contentious with the other side</li> </ol>

- There was no property of any value at the time of separation and the parties' financial circumstances during the relationship were modest.
- 18 months after separation but prior to the parties' divorce, the husband won \$5 million in the lottery.
- The Family Court awarded the wife \$750,000.00 (15% of the \$5 million).
- In reaching their decision, the Court took into account the wife's significant financial and non-financial contributions throughout the marriage, the disparity in the parties' financial circumstances, the wife's ongoing care of the child and the future needs of the wife.

**Farmer v Bramley (2000) 27 Fam LR 316**

- Husband appealed on the basis that redistribution to account for her homemaker/parenting contributions should only be made out of property available to parties at the time she made those contributions.

**Kay J:** 'assessment of contributions made under section 79(4)(a), (b) and (c) does not have to bear a direct relationship to the assets as they presently exist.' Appeal dismissed.

**Guest J dissent:** "Although there need not be a specific nexus between the property and the contribution, they must both occupy the same time and space."

**Current position:** there is no requirement for a party's contribution to relate to only past or present property, rather the court can consider all available property that may be used to meet the order that the court deems appropriate

### Spousal maintenance and property adjustment

An order for property adjustment (s79) may remove the need for one party to maintain the other party.

- Property adjustment is considered before entitlement under s 72 is considered (Clason & Clason [1995] FamCA 10)

### The power to alter property interests

**s79(1)/s90SM**

The court may make 'such orders as it considers appropriate'

**s79(2)/s90SM(2)**

The court shall **must** not make an order unless it is 'satisfied that, in all the circumstances, it is **just and equitable** to make the order'

**May include:**

- Selling the property and dividing the proceeds
- Transferring the entire property to one party
- Substitution of rights (e.g. transferring a lease into the other party's name)

### Consider – Is It Just & Equitable? As you go through the steps

#### What is 'just and equitable'?

Extensive discussion in case law regarding how this standard should be determined...

- Is it that the court needs to decide if it would be just and equitable to make an order to adjust property interests?
- Or is it that the order itself needs to be just and equitable?

**Stanford v Stanford [2012] HCA 52**

"The expression "just and equitable" is a **qualitative** description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds...nevertheless, three fundamental propositions must not be obscured:" [NB: paraphrased!]

1. The question of whether it is 'just and equitable' to alter property interests must be answered having regard to the existing interests.