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PART 1 – FAMILY LAW BASICS

A) FAMILY LAW CONCEPTS

MARRIAGE

- Voluntary
- Two people (previously man & woman, 9 December 2017).
- Generally over 18 (exception one party can be 16 with consent of parents/court)
- Form of marriage.
- Foreign marriages.
- Court will hear applications in relation to the validity of marriage e.g. *Re Kevin*
- Court will hear applications for nullity.

DIVORCE

- Only applies to married couples.
- Must be separated for 12 months and confirm that marriage has irretrievably broken down.
- Can you still live under the same roof but be separated?
- Can apply for divorce before or after children and/or property issues resolved. (Separate legal issue to children and property – made on a separate application).
- Upon application divorce becomes one month and one day (one full calendar month from the date of hearing).

DOMESTIC RELATIONSHIP (D FACTO)

- Voluntary
- Anytime
- Generally at least 18 years of age
- Between man and woman or between same-sex couple

CHILDREN

- The Act focuses on the rights of children and the responsibilities that each parent has towards their children, rather than on parental rights.
- Both parents have parental responsibility (until 18), subject to any court order (parental responsibility)
- When a court makes a parenting order, the act requires it to regard the best interests of the child as the most important consideration.

PROPERTY

- Part VIII of the Family Law Act 1975 provides for financial / property settlements and spousal maintenance (Part VIIIAB applies to de facto relationships).
- Property and financial resources of spouses.
- Court has the power to make orders it considers appropriate (altering the interests of the parties in the property s 79 FLA).
- The court will not make an order unless it's just and equitable to make the order.

B) STATISTICS

MARRIAGE YEAR	2020	2021	2022	2023
Total number registered	78,989	89,164	127,161	118,439
Median age for Males	32.2	32.1	32.5	32.9
Median age for females	30.6	30.5	30.9	31.2

<https://www.abs.gov.au/statistics/people/people-and-communities/marriages-and-divorces-australia/latest-release>

DIVORCE YEAR	2020	2021	2022	2023
Total number of divorces	49,510	56,244	49,241	48,700
Median duration from marriage to divorce	12.1 years	12.2 years	12.8 years	13 years
Median age for males	45.6	45.9	46.7	47.1
Median age for females	42.8	43.0	43.7	44.1

<https://www.abs.gov.au/statistics/people/people-and-communities/marriages-and-divorces-australia/latest-release>

PART 2 – DEFINITIONS AND FUNCTIONS OF A FAMILY**A) DEFINING A FAMILY**

- DICTIONARY DEFINITIONS:
 - Cambridge:
 - 'A group of people who are related to each other, such as mother, a father, and their children'.
 - Macquarie (9th edition, 2023)
 - 'Parents and their children, whether dwelling together or not; one's children collectively; any group of persons closely related by blood, as parents, children, uncles, aunts, and cousins; and all those persons descended from a common progenitor'; a group of persons who form a household and who regard themselves as having familial ties.

B) FUNCTIONS OF A FAMILY

- **Defining a modern family:**
 - Tasks and activities carried out by the members of a family individually, or by the family unit as a whole.
 - **Australian families are diverse**, dynamic and take many forms, including blended families. Many children in Australia live with either a single parent, a non-biological parent, a step-parent, step or half-siblings or grandparents.
- <https://www.familyrelationships.gov.au/parenting/repartnering-blended-families>

PART 3 – HUMAN RIGHTS INSTRUMENTS

- **UN CONVENTION ON THE RIGHTS OF THE CHILD**
 - The *Family Law Act 1975* has established provisions taking into account the **UN Convention on the Rights of the Child** 1989 and are included at Schedule 1 (Child Protection Convention).
- **CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 (Vic)**
- **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)**

WEEK 1 – SEMINAR 1

AUTHORITY FOR THIS UNIT

- **Family Law Act 1975 (Cth)**
 - http://www.austlii.edu.au/cgibin/viewdb/au/legis/cth/consol_act/fla1975114/
- **Marriage Act 1961 (Cth)**
 - http://www.austlii.edu.au/cgibin/viewdb/au/legis/cth/consol_act/ma196185/

- **Federal Circuit and Family Court of Australia (Family Law) Rules 2021**
- <https://www.legislation.gov.au/Details/F2021L01197>
- **Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021**
- <https://www.legislation.gov.au/Details/F2021L01205>
- Practice Directions as released by FCFCO.
- Case law (very interesting cases!).

STEPS IN FAMILY LAW

Domestic relationship (Defacto):	• Voluntary • Anytime • Generally over 18 • Between man and woman or between same sex couple
Marriage	• S 43(1)(a)FLA • Voluntary • Between two people • Generally over 18 (exception one party can be 16 with consent of parents/court) • Court will hear applications in relation to the validity of marriage i.e. Re Kevin • Applications for nullity (as though it never happened) – bigamy
Divorce	• Only applies to married couples. • Must be separated for 12 months and confirm that marriage has irretrievably broken down. - Can you still live under the same roof but be separated? - Can you apply for divorce before or after children and/or property issues resolved? • Divorce separate legal issue to children and property – made on a separate application. • Upon application, divorce becomes final 4 weeks from the date of hearing.
Children	• 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 (refer to ss 60F, H, HA & HB when we cover children). • Application can be made any time after separation (divorce is not a pre-requisite). • The pre-requisite is family dispute resolution – s 60I (of course some exceptions) • Applications can be made in relation to the following issues: - Who the child lives with; - Who the child spends time with a communicates with; - Who is a parent? – Re Patrick [2002] FamCA 193; Masson v Parsons [2019] HCA 21 - Parental responsibility – sole or equal. - Passport application – ability to travel. - Airport watch list – ability to travel. - Changing a child's name

	- Medical issues – i.e. hormone treatment – <i>Re Alex; Re Marion; Re Jamie; Re Kelvin; Re Mark</i> - Recovery – Location – domestic/international
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PROPERTY DISPUTES

- Now applies to **married** (Part VIII) and **de facto partners** (Part VIIIAB)
- Applications can be made by **married people any time prior to divorce** – if divorced then must **apply within 12 months** of the **divorce becoming final**.
- **De facto** couples must make **application within 2 years of separation**.
- Disputes can involve: Houses, money, shares, companies, family trusts, debts, superannuation, pensions.

SPOUSAL MAINTENANCE

- For married couples can **apply any time before divorce**
 - Can make separate application.
 - Can apply whilst applying for property orders.
 - Can reapply even after order made.
 - Can make urgent applications.
 - Can make applications in a case.
- Defacto couples must file application for spousal maintenance within 2 years of separation.
- Can ask for lump sum, periodic payments, some property in lieu of money, pension split.
- Alimony – American version of spousal maintenance
- In Australia it is a bit different and usually just for a period of time
- Lump sum or periodic payments, in the event or until any property dispute is resolved.

SETTLEMENT DISPUTES

BY AGREEMENT

- **Verbal / Action** (i.e. distribution of property) / **Parenting plan** (re children)
- **Non-binding**
- Don't need to go through the court process.
- Only binding where they have consent orders from the court/binding financial agreement/go to contest

BINDING AGREEMENT

1. Consent Orders:

- **Filed by the parties with the court** – in relation to property, **court must be satisfied** that the agreement is just and equitable.
- This is a **settlement agreement reached by consent** and **approved by the court**.

- In relation to children court – must be **satisfied** **parenting arrangements** are in the **best interests of the children**.
- In relation to **property**, court must be **satisfied** that **settlement reached** is **just** and **equitable for both parties**.

2. Binding Financial Agreement (BFA)

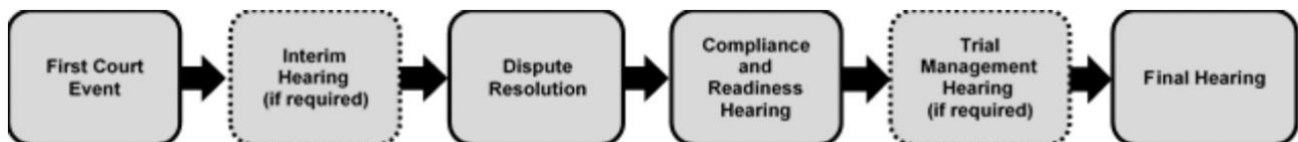
- Applies to **married** and **de facto couples** – can be done **prior** to living together, **during** the time they live together and **after** separation.
- They are **binding** if they **meet** the **legislation requirements**.
- See **Black v Black (2008) FLC 93-357** and changes to law following that case.
- **Both parties** must **receive independent legal advice** and **solicitors must sign statement of independent legal advice**.

3. Contested Matters

- This is where **no agreement reached**.
- One party **makes (files) an application** – then the **process begins...**

CONTESTED MATTERS

- Ex parte applications (**rare**)
- **Urgent** hearings – abridgement of time
 - Usually takes **6 weeks** to get hearing.
 - This way you **get it within 2 weeks** (usually)
- Urgent interim hearing



- <https://www.fccoa.gov.au/fl/pd/fam-cpd#cpd5first>
- Allocation between divisions - see 4.9 CPD.
- First Court event – heard by Judicial Registrar
- See court events – point 5 CPD.
- See chapter 2 of rules – Starting a proceeding.

DOCUMENTS

Divorce	• Divorce application • Counselling certificate for those married under 2 years. • Affidavit in some circumstances • https://www.fccoa.gov.au/fl/divorce/divorce-overview
Children's Matters	• Initiating Application • Section 60I Certificate: if no certificate → Affidavit – no filing FDR - Under Family Law Act

	- Cert from family dispute resolution practitioner – file a copy of that certificate with your court application - Affidavit as to why you are not providing the certificate and why you haven't attempted family dispute resolution. • A genuine steps certificate: (Confirming applicant's compliance with pre-action procedures – schedule 1) • Notice of Child Abuse, Family Violence or Risk • Parenting Questionnaire • Undertaking as to disclosure • Filing fees or application for reduction of fees (health care card; legal aid grant; in prison). - Response. - Affidavit? (see rule 2.14 and 5.08) - Note: copy of any Family violence Order see rule 2.10 - https://www.fccoa.gov.au/fl/pd/fam-parenting
Property	• Initiating Application • Genuine Steps Certificate (confirming applicant's compliance with pre-action procedures – schedule 1) • Financial Statement • Financial Questionnaire • Undertaking as to Disclosure (see rule 6.02) • Filing fees • Response • Affidavit? (see rule 2.14 and 5.08) • Note: copy of any Family Violence Order – see rule 2.10 • https://www.fccoa.gov.au/fl/pd/fam-financial
Spousal Maintenance	• Section 75(2) • Same as property – can be same application (for both) • https://www.fccoa.gov.au/fl/fp/spousal-maintenance

FDR (FAMILY DISPUTE RESOLUTION)

- known as part of pre-action procedures.
- Need to have attempted to resolve dispute.

DOCUMENTS – CONTINUED...

- **When an application is filed**, it must be **served on the other party** (see Rules)
- Service kit (Divorce) – **acknowledgement of service**; **affidavit of service**
- **Divorce applications** also require:
 - **Proof of signature** of other party
 - **Another affidavit**

USEFUL DEFINITIONS

CHILDREN

- **Live with** – NOT residence – NOT custody
- **Spend time with** and **communication with** – NOT access (visitation)

- Living with children / spending time and communicating → most current terminology

PROPERTY

- Assets and Liabilities (debts)
- Property Pool (add up the assets – take away the liabilities: what is left is the property pool)
- Spousal maintenance – not Alimony (we are not in the USA and it works quite differently here)

CHILD PROTECTION CONVENTION SCHEDULE 1 FAMILY LAW ACT 1975

- The *Family Law Act 1975* has established provisions taking into account the UN Convention on the Rights of the Child 1989 and are included at schedule 1 of the act – Child Protection Convention.
- Relates to the international protection of children.

WEEK 2: Family Law in a Federation

PART 1 – HISTORICAL INTRODUCTION & JURISDICTIONAL DEVELOPMENTS

- A. OUR FAMILY LAW SYSTEM PRIOR TO 1975
- B. AUSTRALIAN CONSTITUTION - HEADS OF POWER
- C. AUSTRALIAN CONSTITUTION – INTERPRETATION AND MEANING OF MARRIAGE FOR THE PURPOSES OF 51 XXI
- D. MARRIAGE AS DEFINED IN LEGISLATION
- E. RECENT CHALLENGES TO THE COURT'S JURISDICTION
- F. STATES' REFERRAL OF FAMILY LAW POWERS
- G. MAGISTRATES' COURT
- H. CROSS VESTING

PART 2 – THE FAMILY LAW ACT AND THE FAMILY COURTS

- A. THE FAMILY LAW ACT 1975
- B. FAMILY COURT OF AUSTRALIA
- C. FEDERAL CIRCUIT COURT
- D. FAMILY COURT OF AUSTRALIA – MATTERS
- E. FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (commenced 1 September 2021)
- F. CHILD PROTECTION

1A. OUR FAMILY LAW SYSTEM PRIOR TO 1975

MATRIMONIAL CAUSES ACT 1959

- Federal government exercised its jurisdiction over marriage and divorce through the enactment of the *Matrimonial Causes Act (1959)*. ('*Barwick Act*')
- Introduced uniform divorce laws.
- Provided the only principal relief – divorce or declaration of nullity.
- First time – divorce by consent: complete marriage breakdown, separated for five years and no prospect reuniting.
- Alternative – fault: 14 grounds.

WHITLAM GOVERNMENT – 1972

- Reform of substantive law.
- *Family Law Act 1975 (Cth)*.
- Support marriage and family life; Preserve family as much as we can.
- Creation of federal court – the Family Court of Australia.
- Abolition of matrimonial fault - s 48(1) irretrievable breakdown s 48(2) live separately for 12 months before filing.

1B. AUSTRALIAN CONSTITUTION – HEADS OF POWER

- *Commonwealth Of Australia Constitution Act*
- Chapter I. The Parliament.
- Part V - Powers of the Parliament
- 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -
 - (xxi.) Marriage;
 - (xxii.) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.
- Gives the Commonwealth Parliament the power to legislate in respect of the important, though non-exhaustive, family law subjects of marriage, divorce and matrimonial causes.
- *See FLA s 4(1)(ca)(i) – definition 'matrimonial causes' extended following 1976 HC case of *Russell and Russell*: a matrimonial cause means a proceeding between the parties to a marriage, with respect to the property of the parties or either of them, being proceedings that arise out of the marital relationship.

- *A matrimonial cause **must refer** to **legal proceedings arising out of the marital relationship**, no longer need a link between the property issues and the parties getting a divorce.

1C. AUSTRALIAN CONSTITUTION – INTERPRETATION AND MEANING OF 'MARRIAGE' OF THE PURPOSES OF 51 (xxi)

- **Constitutional interpreter.**
- Established **principle of constitutional interpretation**: **words** in the **Constitution** be given their **meaning at the time of enactment** (originalism) – static.
- Accordingly, look to meaning of 'marriage' in early 1900's.
- 1900's: meaning of marriage was at that time, **the union of a man and woman to the exclusion of all others, voluntarily entered into for life**. Marriage is a formal, monogamous, heterosexual union for life.
- This is in accordance with the definition of marriage in the English case of *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 at 133 – 'classic'.
- The definition of marriage in *Hyde v Hyde* and *Woodmansee* 1866! - **legal meaning of 'marriage' in Australia until 2017**
- **Problem with restricting the term 'marriage'** in s 51 (xxi) to the definition in *Hyde v Hyde and Woodmansee* is that it **prevented** the **Parliament from legislating** in respect of **three types of domestic unions** which are **common in Australia**.
 1. **Aboriginal customary marriage**;
 2. **De facto relationships**; AND
 3. **Homosexual relationships**.

The Commonwealth of Australia v The Australian Capital Territory [2013] HCA 55

- **High Court in 2013 revisited the Constitutional definition of marriage under s 51(xxi). It was held that:**
 - Interestingly, the **power in sec (51xxi)** is **not confined to the narrow definition** contained in the **Marriage Act 1961 (Cth)**.
 - Means "**marriage**" in s 51(xxi) includes a marriage between persons of the same sex.
 - The HCA found that the **Commonwealth Parliament has power** under the **Australian Constitution** to **legislate** with respect to **same sex marriage**, and that under the Constitution and federal law as it now stands, whether same sex marriage should be provided for by law is a matter for the federal Parliament.
- **CLARIFIED:**
 - **Marriage Act does not now provide** for the **formation or recognition** of marriage between **same sex couples**.
 - **The Marriage Act provides that a marriage can be solemnised in Australia only between a man and a woman and that a union solemnised in a foreign country between a same sex couple must not be recognised as a marriage in Australia. That Act is a comprehensive and exhaustive statement of the law of marriage**". (At 55)
- Therefore, the HCA held that the **Marriage Equality (Same Sex) Act 2013 (ACT)** cannot operate concurrently with the federal **Marriage Act 1961 (Cth)**.

- Ultimately confirmed that the marriage power (s 51 (xxi)) is available only to the Commonwealth Government.

1D. 'MARRIAGE' AS DEFINED IN LEGISLATION

- **Marriage Act 1961 (Cth) - s 5(1) Interpretation**
 - 'Meant the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.
 - Now: "marriage" means the union of 2 people to the exclusion of all others, voluntarily entered into for life.
- **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.
 - "Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.
 - 'Marriage, according to the law in Australia, is the union of two people to the exclusion of all others, voluntarily entered into for life.'
- **Family Law Act 1975 (Cth) s 43(1)(a)**
 - A court exercising jurisdiction under this Act shall have regard to:
 - 'The need to preserve and protect the institution of marriage as the union of two people to the exclusion of all others voluntarily entered into for life'.

1E. 'RECENT CHALLENGE TO THE COURT'S JURISDICTION'

Covington and Covington [2021] FamCAFC 52

- Mother challenged the Family Court of Australia's jurisdiction to make orders that a child be vaccinated.
 - Mother appealed and the Full Court of the Family Court confirmed that the court has jurisdiction to order that a child be vaccinated regardless of parental consent.
 - Mother sought to appeal to High Court on the basis of s 51 (xxxiiiA) of the Constitution which forbids the Commonwealth requiring people to undergo medical treatment. She argued that this section provided freedom from compulsory vaccination.
 - On 9 September 2021 High Court of Australia dismissed the mother's application for special leave to appeal bringing this matter to the end. The decision stands as authority for the proposition that the Court may order inoculations where these are in the child's best interest irrespective of parental consent.

1F. STATE'S REFERRAL OF FAMILY LAW POWERS TO THE CTH

- 1986 – 1990 - Referral to the Commonwealth of state legislative powers in respect of children by five states: New South Wales, Victoria, Queensland, South Australia and Tasmania.
- Referrals made pursuant to s 51 (xxxvii) of the Constitution - enables the Parliament to make laws with respect to:

- *Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any state or states ...*
- These referrals of power were taken up by the Cth in the **Family Law Amendment Act 1987**.
- In summary, the legislation has the effect of referring State powers with respect to guardianship (parental responsibility), custody (with whom the child lives), maintenance (child support) and access (with whom the child spends time with) in relation to ex-nuptial children to the Commonwealth.
- Leaves State jurisdiction to deal with adoption (except in Victoria) and State child welfare legislation.
- Constitutional limits – the original 1975 FLA could only deal with property and financial matters following the breakdown of a marriage.
- Cth passed **Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008** - Aim was to bring financial disputes arising from the breakdown of de facto relationships (same-sex or opposite) under FLA.
- Amendment relied on the referral to the Commonwealth of state legislative powers in respect of de facto financial matters.
- 2009 – Majority states referred their powers.
- 2010 – SA.
- Western Australia only non-referring state.

1G. MAGISTRATES' COURTS

- Jurisdiction for state and federal matters.
- Restricted jurisdiction in relation to family law matters under FLA.
- Can only hear consent matters.
- Defended matters must be referred to the federal courts.
- No divorce.

1H. CROSS VESTING

- Prior to 17 June 1999 a superior court could exercise the jurisdiction of another.
- *Re Wakim* - HC held cross-vesting legislation did not validly confer state jurisdiction on federal courts.
- As a result of *Re Wakim* the Court no longer has vested in it the civil jurisdictions of the Supreme Court or state jurisdiction of Family Court of WA.
- Note cross-vesting is permitted between Federal Courts.

2A. BACKGROUND TO FLA

- Came into force 5 January 1976

Primary objective of the *Family Law Act* was:

- 1) Governments response to the dissatisfaction with existing system - Reform.
- 2) Reform laws governing dissolution of a marriage (divorce).
- 3) Create unity amongst Australian family law.
- 4) Replaced *Matrimonial Causes Act* and superseding state and territory laws re 'guardianship, custody, access and maintenance of children of a marriage.

- 5) The FLA became the main law on matters involving divorce, property settlement after the breakdown of a marriage or de facto relationship, spousal maintenance and issues relating to parenting arrangements after separation.
- 6) Established a central, federal, family court.
- 7) Procedures simplified and formalities reduced.
- 8) Focuses on supporting and preserving marriage and families – counselling and conciliation.

2A. FAMILY COURT OF WESTERN AUSTRALIA

- When the **Family Law Act 1975** was passed each state was given the opportunity to establish its own family court.
- Only Western Australia did so.
- The Family Court of Western Australia exercises federal jurisdiction (under the FLA, Marriage Act 1961 and Child Support Legislation) and state jurisdiction (deals with matters such as adoption, child welfare and ex-nuptial children).
- Appeals relating to the operation of federal law go to the Full Court of the Family Court of Australia, while appeals on matters of state jurisdiction go to the Western Australian Supreme Court.

2B. FAMILY COURT OF AUSTRALIA (HISTORICAL)

- The **Family Court of Australia** establishes and specifies its members and officers in Pt IV of the FLA. Section 21 states (HISTORICAL NOW, superseded 1 September 2021) :
 1. A court, to be known as the Family Court of Australia, is created by this Act.
 2. The court is a superior court of record.
 3. The court consists of:
 - A **Chief Judge**, who shall be called the **Chief Justice of the court** (Hon. William Alstergren)
 - A **Deputy Chief Judge**, who shall be called the **Deputy Chief Justice** of the courts; and
 - **Judge Administrators**, **Senior Judges** and **other Judges**, not exceeding, in total, such number as is prescribed.
- **JUDICIAL STRUCTURE** – Chief Justice, Deputy Chief Justice, Judge Administrators and Judges of the Appeal Division, Senior Judges, Judges, Judicial Registrars, Senior Registrars, Deputy Registrars.

2C – FEDERAL CIRCUIT COURT – (HISTORICAL)

- *Federal Magistrates Act 1999* established the Federal Magistrates Court.
- In 2012 the Act was renamed the *Federal Circuit Court of Australia Act 1999* (Cth) and matters were then heard in the Federal Circuit Court ('FCC')
- Jurisdiction of FCC encompasses broad range legal areas including, family law, bankruptcy, trade practices, migration etc.
- Aim to:
 - Deal with less complicated matters - Lessen workload of Family Court.
 - Reduced fees.
 - Simplify rules and procedures – quicker.

2D – FAMILY COURT AUSTRALIA – MATTERS (HISTORICAL)

- **FAMILY COURT RETAINED EXCLUSIVE JURISDICTION** in these areas:
 - proceedings for decree nullity of marriage;
 - proceedings for a declaration as to validity of marriage;
 - appeals from courts of summary jurisdiction;
 - appeals from FCC matters litigated under FLA transfers; and
 - leave to grant adoption proceedings.
 - 1. Serious allegations of child abuse – Magellan list.
 - 2. International abductions.
 - 3. International relocation.
 - 4. Complex trusts and overseas assets.
 - 5. Contravention of orders.
 - 6. Special medical procedures.
 - 7. Disputes re appropriateness of case to be heard within Australia.
 - 8. Complex questions of jurisdiction.
 - 9. Final hearings – excess 4 days.
 - 10. Complex financial cases – more 2 parties.
 - 11. Complex trusts/valuations of trusts/overseas assets/corporate structures / superannuation issues.
- **NOTE:** The FCoA has exclusive jurisdiction in relation to adoption and the validity of marriages and divorces.
 - **Transfers**
 - **NONE OF THIS MATTERS ANYMORE (overview) – HISTORICAL -**
 - **THE NEW COURT STRUCTURE COMMENCED 1 SEPTEMBER 2021**