

(1) Family: Legal Regulation of Romantic Relationships

FAMILY

Definition/quotes:

- **Alan Brown, What is the Family of Law:** “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 **legal** understanding of the ‘family’”
- **Morris Pyz V Infertility Treatment Authority 2005 Vcat 2655:** The notion of "family" does not have defined outer edges. It does not even require some blood relationship with the person whose family is under consideration.
- **Knightley & Brandon 2013 Harman Fm:** 'FAMILY' 'PARENT' Most progressive - no longer nuclear but rather relating to kinship connections. Family will continue to evolve.
 - o “To the extent a ‘family’ remains defined as a ‘nuclear family’ (comprising parent/s and children), this would appear a particularly outdated and unnecessarily constrictive, heteronormative and white Anglo Saxon perspective which fails to recognise diverse views of family arising for and within families of difference. This is particularly clear and pronounced when considering LGBTQ families but also relates to diverse cultural perspectives including, as arises in this case, broader kinship connections and culturally appropriate familial and cultural assistance in parenting children.”

Approaches to defining family:

- **Option 1:** Based on the *form* a family takes - Whether they align with a formal definition, e.g. a couple that has taken steps to marry, or existence of children
- **Option 2:** Based on the *functions* that a family performs - Whether they do certain things that align with dominant ideas about family, e.g. live together, perform caring responsibilities, share finances

Who is the ‘family’ envisaged by family law?

- Hetero/gender normative
- Assumed gender roles
- Legally married
- Of white/European origin
- Middle class
- Biological children

Challenges of defining family:

- **On one hand:** Universally applicable categories are needed for the law to be realistically practicable
- **On the other hand:** There is far from universal agreement on the line between family and not-family

MARRIAGE

Marriage as a legal concept:

- **Hyde v Hyde (1866) All ER Rep 175 (UK definition):** The union of a man and woman to the exclusion of all others, voluntarily entered into for life
- Marriage is defined by **s5(1) Marriage Act 1961 (Cth):** The union of 2 people to the exclusion of all others, voluntarily entered into for life
- Note: “2 people” inserted by amendment of **s3 Marriage Amendment (Definition and Religious Freedoms) Act 2017** THEREFORE **s5(1)** also recognises the marriage of same sex couples though the passing of the Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)

Automatic legal consequences of marriage:

- Invalidates any wills
- Changes tax status

- Changes next of kin for medical decisions and beneficiaries for insurance policies and superannuation
- If divorce, potential obligations to support your spouse via maintenance and/or settle property and assets
- Spousal privilege

Why do people marry?

- **M Hibbs et al, 'Why Marry? Perceptions of the Affianced' (2001) *Family Law* 197.**
 - Surveyed 172 heterosexual engaged couples, identifying 3 main reasons:
 - 30% 'Love'
 - 13% 'Commitment'
 - 9% 'A natural progression for the relationship'
- **J Eekelaar, 'Why People Marry: The Many Faces of an Institution' (2007) *Family Law Review* 41(3) 413.**
 - Interviewed 39 people who had married in the 1980s about their reasons for marrying. Responses were categorised into:
 - 'Compliance with convention' (e.g. religious rules or family expectations)
 - 'External manifestation' (a public statement to the world)
 - 'Completion of an internal process' (confirmation of a new status, e.g. boyfriend to husband)
 - 'Provision for the future' (a way of starting a new phase, e.g. starting a family)
 - 'Pragmatic reasons' (practical reasons which made no difference to their relationship in practice, e.g. paperwork/emigration)

Why has marriage historically been encouraged by law/government?

- **Stability**
 - Economic, physical and emotional stability as partners support each other through ups and downs of life (Eekelaar 2007)
 - Lower crime rates among stably partnered populations! (Sampson, Laub & Wimer 2006)
- **Privatised Responsibility**
 - Less likely to rely on public funding or services
- **Child-rearing?**
 - Several decades of debate over the best environment for raising children
 - Much rhetoric demonising alternative models, e.g. same sex parents and single mothers
- **Religion?**
 - Origins of English family law are rooted in religious ideas about the primacy of marriage

END OF MARRIAGE - DIVORCE

Answering a problem question:

- Introduction: This question requires us to deal with the issue of whether a marriage has ended to be eligible for divorce. Section 48 of the FLA 1975 has to be satisfied to be eligible for a divorce order
- Onus: The party who wants to end the relationship bears the onus to prove the end of marriage (S v B (No 2)).
- [A] will argue that the marriage has broken down irretrievably under the requirements of divorce in s48 FLA75
- As of current, [A] and [R] have/have not separated and thereafter lived separately and apart for a period of not less than 12 months (s48 FLA75(2))
- [R] can try to argue that there is a reasonable likelihood of cohabitation being resumed.
- On the facts, it is likely that s48 FLA75 will be made out satisfying the requirements for divorce. A final divorce order will be made by the court and becomes effective one month after the order is made (s55 FLA75)

Requirements of divorce - s48 FLA75:

- (1) The marriage must have broken down irretrievably.

- (2) This shall be held to be established if the court is satisfied that the parties separated and thereafter lived separately and apart for a period of not less than 12 months immediately prior to [applying for divorce].
- (3) The divorce order shall not be made if there is a reasonable likelihood of cohabitation being resumed.

When divorce order takes effect - s55 FLA75:

- After application, mandatory waiting period of one month before divorce order is made by a court
- Then, divorce orders become effective one month and one day after the order is made. This period can be adjusted (shortened or extended) if exceptional circumstances dictate it is necessary/just, e.g. s55A FLA75 (outstanding arrangements for children of the marriage)

Background to divorce:

- **Pre-1975:**
 - Federal family law incorporated all grounds for divorce previously used by each of the states – 14, including: adultery, desertion, cruelty, habitual drunkenness, imprisonment, insanity
 - Often hinged upon identifying the ‘innocent’ party and/or making allegations against each other, sometimes using private investigators
 - A detailed examination of personal, factual circumstances
- **No Fault Divorce and the FLA75:**
 - **Advantages**
 - Autonomy/self-determination: Factual scrutiny was arguably an unjustified state intervention into personal and family life
 - Better reflects modern society and meets the current level of demand for divorce
 - Removes blame from the picture – better starting point for settlements
 - **Disadvantages**
 - Makes divorce too easy? Simple administrative process, undermines significance of decision to divorce?

The Family Law Act 1975 (Cth)

- **Pre-1901:** Direct adoption of English family law
- **Federation**
 - s51 constitution conferred legislative power on federal parliament in respect of:
 - (xxi) marriage
 - (xxii) divorce & matrimonial causes, & in relation thereto, parental rights, custody, guardianship
 - And (xxxix) matters incidental to any power vested by the constitution
- **Post-Federation:** Federal government did not immediately legislate, meaning states continued to follow inconsistent models akin to the UK
- **Matrimonial Causes Act 1959 (Cth)**
 - First codification of family law into one, federal statute (re: divorce at least!)
 - Still administered by state courts

Family Law in the Commonwealth:

- **The Family Law Act 1975 (Cth) – FLA75**
 - Creation of a federal family court and recognition of family law as a specialist field of practice
 - Created the foundational framework for family law in Australia, but remained limited to married couples by constitutional scope
- **The Family Law Amendment Act 1987 (Cth)**
 - Referral of state powers (using s51(xxxvii) Constitution) relating to ex-nuptial (outside of marriage) children matters (apart from WA)

Modern Australian Family Law:

- The FLA75:

- Comprehensive federal framework of unified family law
- Consistent application across Australia

- Some exceptions...

- The Family Court of Western Australia
- Adoption; child protection; some aspects of parenthood/surrogacy

The FLA75:

- Extensive piece of legislation, continually amended and adapted to keep pace with modern society/changing family types, e.g. different provisions for married/unmarried couples but consistent law
- Your main framework for most of the topics in this unit
- Emphasises the central importance of *discretionary principles* for determining family law outcomes
- What does this suggest about the role of case law and precedent in family law?

DE FACTO RELATIONSHIP

The road to recognition: De facto relationships

- A focus on function rather than form: Examining the nature and quality of a relationship (rather than whether they have undergone a ceremony) can reveal whether the couple would be more appropriately supported by the family law jurisdiction

Identifying De Facto Relationship – Content:

- A retrospective, fact-based inquiry
 - Parties can 'opt in' to the FLA provisions, e.g. via a state/territory relationship registration scheme but, often this issue does not arise until after the breakdown of a relationship, when it is necessary to look back and determine whether a de facto relationship existed
 - At this point, parties can apply for a declaration from a family court judge that a de facto relationship existed
 - Declaration is necessary to reach the threshold of falling into the FLA75 jurisdiction for purposes of post-separation finances and property adjustments
- **S v B (No 2) (2004) 32 Fam LR 429:** *"In this regard there is a difference between a marriage and a de facto relationship. In a marriage, the parties remain married and are presumed to be living as a 'couple' unless the party wishing to end the relationship proves a separation... In a de facto situation it is the party asserting the relationship that must prove cohabitation of the required quality."*

Identifying De Facto Relationship – Process

****First, identify who wants to bring an action, and what do they want by bringing an action?**

****The person bringing the action is the person asserting the relationship.**

- **Issue:** This question requires us to deal with the issue of whether a de facto relationship exists.
- **Rule:** For a de facto relationship to exist, s4AA of the FLA75 has to be satisfied
- [A] will argue that there is a de facto relationship as [A] and [R] have a relationship as a couple living together on a genuine domestic basis (s4AA FLA75; Moby)
- **Onus:** Whoever is seeking to rely on the existence of a de facto relationship for [post-separation finances and property adjustments] bears the onus to prove that a de facto relationship exists (S v B (No 2)).
- [A] can apply for a declaration from a family court judge that a de facto relationship existed to reach the threshold of falling into the FLA75 jurisdiction for purposes of post-separation finances and property adjustments

s4AA(1) FLA75 – Person is in a de facto relationship if:

A person is in a de facto relationship with another person if:

- a) The persons are not legally married to each other
- b) The persons are not related by family
- c) Having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis

s4AA(2) FLA75 - Relevant factors indicative of a de facto relationship

- a) Duration of the relationship
- b) Nature and extent of their common residence
- c) Whether a sexual relationship exists
- d) Degree of financial dependence/interdependence/support arrangements
- e) Ownership, use and acquisition of property
- f) Degree of mutual commitment to a shared life
- g) Whether registered via state/territory registers
- h) Care and support of children
- i) Reputation and public aspects of the relationship

✚ In *Ricci v Jones*, 298 the Full Court approved the following statement made by Murphy J in *Jonah v White* :
299 - The question of whether a de facto relationship exists is a determination of fact (albeit based on findings in relation to a non-exclusive number of statutory considerations) which founds the jurisdiction to make orders of the type contemplated by that part of the Act. The ultimate question is in the nature of a jurisdictional fact. 300 In *Clarence v Crisp* (discussed at 5.134), the Full Court of the Family Court (Thackray, Ainslie-Wallace and Austin JJ) reiterated that the decision whether a de facto relationship existed 'does not involve the exercise of discretion, since the court is required to make a finding of fact.' 301 In this sense, the court said, it is 'arguable only in a loose sense that it is appropriate to speak of "weight" being given to various factors'.

s4AA(3) FLA75: No one factor is particularly necessary for the identification of a de facto relationship

s4AA(4) FLA75: May attach weight to any factor appropriate in circumstances of each case

s4AA(5) FLA75:

- a) De facto relationships can exist between couples of any sex
- b) De facto relationships can exist even if one party is married/already in another de facto relationship

CASES:

Moby v Schulter (2010) FLC 93

- **Facts:** Applicant asserted that a de facto relationship existed for a period of approximately 7 years (although there were several gaps where the couple did not live together during that time), and respondent denied that there was a de facto relationship.
- **Held:**
 - A couple who do not live together at any time, cannot be seen as being in a de facto relationship.
 - However, the concept of "living together" does not import any concept of proportion of time and does not require that a couple live together on a full-time basis.
 - Mushin J: "In my view, if a couple do not live together at any time, they cannot be seen as being in a de facto relationship. However, the concept of "living together" does not import any concept of proportion of time. In particular, it does not require that a couple live together on a full-time basis."

Jonah v White (2012) 48 Fam LR 652:

- **Facts:**
 - The sole issue in this case was whether there had been a de facto relationship between the parties.

- 17 year relationship between applicant and respondent.
- Respondent was married to another person for the entire relationship, so they did not spend significant time together – approx. 2-3 days every few weeks, with a couple of holidays.
- Respondents provided financial support to applicants.

- **Held:**

- Murphy J - “The issue, as it seems to me, is the nature of the union rather than how it manifests itself in quantities of joint time. It is the nature of the union – the merger of two individual lives into life as a couple – that lies at the heart of the statutory considerations and the non-exhaustive nature of them.”
- Focusing on the nature of the union, was there the merger of two individual lives into life as a couple?
- In this case it cannot be said so as it seemed more like a mere affair
- Ms Jonah was not introduced to Mr White’s children and their relationship was not known by anyone
- There was evidence that Mr White would choose his family over Ms Jonah
- *Factors pointing to the relationship being a de facto relationship* [para 68]:
 - the long-standing nature of the relationship (17 years)
 - the parties maintained a consistent sexual relationship
 - the sexual relationship was exclusive of other partners, apart from the respondent maintaining a relationship with his wife and having “a few one night stands”
 - the respondent financially supported the applicant for a number of years (up to \$3000 per month for 11 years)
 - the respondent contributed financially (a lump sum of \$24 000) to the applicant’s home
- *Factors indicating there was no de facto relationship* [para 69]:
 - Each of the parties kept and maintained a household distinct from the other;
 - In the respondent’s case, that household involved the maintenance of family relationships, including the support of children;
 - The evidence does not reveal any relationship, or any intended relationship, between the applicant and the respondent’s children who, it ought be observed, were relatively young when the relationship commenced;
 - The relationship between the applicant and the respondent was clandestine and the time spent between the parties was spent (on either party’s case) very much together, as distinct from time spent socialising as a couple;
 - I accept the respondent’s evidence that he continued to emphasise the limits of the relationship with the applicant and, in particular, I accept his evidence to the effect that, he told the applicant that, if circumstances ever required him to “make a choice”, he would “choose” his wife and family over the applicant;
 - Despite the regular monthly payments and the payment of \$24,000 earlier referred to, the parties maintained no joint bank account; engaged in no joint investments together; and acquired, or maintained, property in their own individual names;
 - The parties rarely mixed with each other’s friends. In that respect the evidence of the applicant’s witnesses – Ms R, Ms H and Ms W – is indicative of very little contact between the respondent and each of them. Ms R said she had never met the respondent, but had spoken to him on the phone. Ms H said her dealings with the respondent were “very limited”. Ms W said she met the respondent “only once”;
 - The respondent ran what seems to have been a successful business, in which for some (early) years, the applicant was employed, but the parties did not mix with the respondent’s business associates. After the applicant’s employment with that business had ceased she had no involvement with it at all;
 - There was virtually no involvement by the respondent in the applicant’s life in Brisbane (where she lived between about 1996 and 2006), and virtually no involvement by the respondent in the applicant’s life in S where she has resided since 2006. (I accept the respondent’s evidence that he has visited S on only three occasions);

- The respondent accepted that he hoped that the relationship with the applicant was permanent, but, I accept, he made plain its nature as he perceived it. It was put by Mr Galloway to the respondent that the parties were in a long-term relationship to which the respondent replied “we were in a relationship; we were having an affair”;
- There was very little time spent by the applicant and the respondent with the applicant’s family. I regard the evidence of the respondent, when he said to the applicant’s mother that their relationship “was not an adventure” as being more reliable than the evidence contained at paragraphs 36 and 37 of the applicant’s affidavit. But, in any event, I do not consider that the evidence contained in those paragraphs is indicative of the “coupledom” or “merger” to which I have earlier referred;
- Despite (or, perhaps, because of) the evidence filed by friends of the applicant in support of her case, I do not accept that the applicant and respondent had a “reputation” as a couple; indeed, there was, on the evidence before me, very few public aspects to their relationship. ”

END OF DE FACTO RELATIONSHIP

When do De Facto Relationships end:

- No legislative definition; rather a factual interrogation as to whether the couple fell within the s4AA definition at a given date:
- Davies v Richardson [2011] NSWSC 810: “...Relationships tend to decline over time. But the question of whether a de facto relationship ‘broke down’...is really one of whether the de facto relationship had come to an end.”

Why does it matter:

- Legal disputes will rather concern a determination of the date on which the relationship broke down. This is important because:
 1. Only de factos that break down after 1 March 2009 are eligible for FLA provisions
 2. Applications for maintenance/property orders under these provisions must be made within 2 years of the end date of a de facto relationship (s44(5)/(5A) FLA75 respectively) unless leave is granted to apply out of time (s44(6))
 3. End date can dictate length of relationship, which is also relevant to the form that such orders might take

Identifying ‘breakdown’ of a de facto relationship – Process:

- Identify when the de facto breakdown has occurred
- Only eligible for FLA provisions if it has occurred after 1 March 2009
- Application for maintenance (s44(5))/property (5A) orders must be made within 2 years unless leave is granted to apply out of time (s44(6)).
- End date can dictate length of relationship, which is also relevant to the form that such orders might take (keep in mind the above where maintenance and property orders must be made within 2 years)
- Section 90SB(a) of the Family Law Act 1975 provides that a Court may only make property orders in relation to a de facto relationship if the duration of the relation is at least two years. (Commencing in 1 March 2009, under the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008) *Don’t need to mention this, only important when deciding spousal maintenance and property adjustments
- ISSUE: This question requires us to deal with the issue of whether a de facto relationship has ended
- [A] will argue that on the [date] the termination of the de facto relationship is permanent and has broken down finally (Davies).
- [A] bears the onus to prove that the de facto relationship has ended.

CASES:

Davies v Richardson:

- **Facts:** New South Wales Supreme Court was required to determine whether a de facto relationship as defined by s 4AA of the FLA had broken down before 1 March 2009. If it had broken down after that date, the relationship would not qualify as a de facto relationship under s 4 of the Property (Relationships) Act 1984 (NSW) and the court would not have jurisdiction over the matter.
- **Held:** agreed with Slack FM in *Vine v Carney* the de facto relationship had broken down to the point that it had failed and had ended. "Absence of a de facto relationship elements under s4AA"
- Court agreed with Slack FM in *Vine v Carney*, 350 who said in respect of the term 'breakdown' in Sch 1 item 86 of the amending legislation: I consider though that the term breakdown in the context of the Act and having regard to the referral of powers by participating States, should be interpreted such that the Court, before exercising power under the Act, should be satisfied, according to the requisite standard of proof (the balance of probabilities), that the de facto relationship had broken down to the point that it had failed and had ended.

Smyth v Pappas:

- **Facts:** Dispute about whether the relationship ended before or after 1 March 2009. Relationship was characterised by several temporary suspensions.
- **Held:** Cronin J expressed the view that 'indications' that a relationship has ended once the parties are no longer living together will not be sufficient to show that a relationship has broken down. The keeping apart has to have finality about it and that is best seen where the de facto relationship has none of its previous characteristics any longer. For example, some parties whose de facto relationship has ended, continue to parent children and perpetuate financial interdependence but they do so in a way which can only be objectively described as different from what had occurred previously when to a large degree, the relationship was a functional one. The ending of the relationship must have a permanence about it rather than a temporary suspension.
- **Case analogy:** In *Smyth v Pappas*, 372 for example, the parties had known each other since 2002 and there was sufficient evidence for the court to conclude that, at an identifiable point, they formed a de facto relationship. Cronin J considered the more difficult question in this case was whether, and when, the de facto relationship ended. During phases of their relationship, for example, the parties did not reside together and had been seeing other people. The court held that to determine whether the relationship had ended permanently required an examination of 'what the parties were doing and saying over the life of the relationship as well as after it'. 373 A number of factors — including sharing a home, jointly caring for a child of the applicant and continuing to be seen at events as a couple — were significant to finding the date at which the relationship had permanently broken down.

Vaughan v Bele (Acknowledgement of the end of relationship):

- **Facts:** court was required to determine whether a de facto relationship as defined by s 4AA existed on 1 March 2009.
- **Held:** Cronin J stated: ... there is a distinction between actions which connote unhappiness in a relationship and the termination of it. **Termination has a distinct finality about it but it must be such that both parties acknowledge but not necessarily accept, that at least one of them has decided to permanently end the relationship.**