

Topic 1: What is a Family? The Legal Regulation of Romantic Relationships

More in Full Notes

2 Marriage

s5(1) Marriage Act 1961 (Cth)

- The union of 2 people to the exclusion of all others, voluntarily entered into for life

- Per s5(1) Marriage Act 1961 (Cth), [name & name] entered into marriage voluntarily for life as [reason].

| Reasons (Why marriage is encouraged by law/government) | |
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| Stability | <ul style="list-style-type: none"> - 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 | <ul style="list-style-type: none"> - Less likely to rely on public funding or services |
| Child-rearing | <ul style="list-style-type: none"> - 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 | <ul style="list-style-type: none"> - Origins of English family law are rooted in religious ideas about the primacy of marriage |
| Others: J Eekelaar, 'Why People Marry: The Many Faces of an Institution' (2007) <i>Family Law Review</i> 41(3) 413. | <ul style="list-style-type: none"> - '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) |

- It is noted that same sex marriage is recognised with the passing of s3 Marriage Amendment (Definition and Religious Freedoms) Act 2017 and the removal of 'man and woman' (Hyde v Hyde)

3 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 on being resumed.

s55 FLA75 - When divorce order takes effect

- 1) Subject to this section, a divorce order made under this Act takes effect by force of this section:
 - (a) at the expiration of a period of 1 month from the making of the order; or
 - (b) from the making of an order under section 55A;whichever is the later

s55A FLA75 - Divorce order where children

- 1) A divorce order in relation to a marriage does not take effect unless the court has, by order, declared that it is satisfied:
 - (a) that there are no children of the marriage who have not attained 18 years of age; or
 - (b) that the only children of the marriage who have not attained 18 years of age are the children specified in the order and that:
 - i. proper arrangements in all the circumstances have been made for the care, welfare and development of those children; or
 - ii. there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements have been made.
- 2) Where, in proceedings for a divorce order in relation to a marriage, the court doubts whether the arrangements made for the care, welfare and development of a child of the marriage are proper in all the circumstances, the court may adjourn the proceedings until a report has been obtained from a family consultant regarding those arrangements.

[Party wanting divorce] would argue as per s48 that they are eligible for a divorce order as the marriage has broken down irretrievably given that [facts]. Moreover, they have separated for more than 12 months and there is no reasonable likelihood of cohabitation as [facts] (s48(2); s48(3)).

OTF, s48 is likely made out and a divorce order would be made by the court one month after the application. Since, it is [current date] and they applied on [date – require a 1 month & 1 day gap], the divorce order becomes effective (s55).

- It should be noted that the period may vary (shortened/extended) as [facts] aligns with the exceptional circumstances in s55A.

3.1 Nullity

- However, the marriage remains void from the start as [reason]

| Reason | |
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| S23 MARRIAGE ACT 1961 | (2) A marriage to which this Division applies is void where: <ul style="list-style-type: none"> (a) either of the parties is, at the time of the marriage, lawfully married to some other person; (b) the parties are within a prohibited relationship; (c) by reason of section 48 the marriage is not a valid marriage; (d) the consent of either of the parties is not a real consent because: <ul style="list-style-type: none"> (i) it was obtained by duress or fraud; (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or (iii) that party did not understand the nature and effect of the marriage ceremony; or (e) either of the parties is not of marriageable age; (3) Marriages of parties within a prohibited relationship are marriages: <ul style="list-style-type: none"> (a) between a person and an ancestor or descendant of the person; or (b) between 2 siblings (whether of the whole blood or the half - blood). |
| Others | <ul style="list-style-type: none"> - Bigamy - Prohibited relationships - Lack of consent - Not of marriageable age - Not solemnised in accordance with the Act |

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More in Full Notes
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3.4 Separation

- Refers to the breakdown of marital relationships and not mere separation
- Separation does not need to be jointly agreed
 - o 1 party can intend to separate and communicate expressly/impliedly to the other party to end the relationship

In the Marriage of Pavey

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| Facts | <ul style="list-style-type: none"> - Mr and Mrs Pavey were living under the same roof - Mr Pavey provided housekeeping money to Mrs Pavey which stopped, causing Mrs Pavey to apply for spousal maintenance |
| Held | <ul style="list-style-type: none"> - Mr Pavey is required to provide spousal maintenance depute living under the same room and doing chores for each other - Need to compare the nature of the relationship before and after separation. - Factors to consider to determine breakdown of marriage when continuing to live together <ul style="list-style-type: none"> o Reasons why the parties separated but continued to live under the same roof o What was the marital relationship before and during the relevant period with reference to: <ul style="list-style-type: none"> ▪ Where the parties lived ▪ Sexual intercourse ▪ Mutual society and protection ▪ Recognition of the existence of the marriage by both spouses in public ▪ Private relationships ▪ Nurture and support of the children o Whether either or both spouses intent to sever/ resume the marital relationship |

4 De facto relationship

4.1 Identifying relationship

- 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
- 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

NOTE:

The person bringing an action will assert the relationship

s4AA(1) FLA75

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

s4AA(3)

No one factor is particularly necessary for the identification of a de facto relationship

s4AA(4)

May attach weight to any factor appropriate in circumstances of each case

s4AA(5)

- 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

X will argue that a de facto relationship existed as they have a relationship as a couple living together on a genuine domestic basis (s4AA(c)). Accordingly, the court will turn on to the circumstances and determine as such (Jonah v White, Murphy J). OTF, X and Y are not legally married and are not related by family. This is further exemplified by [facts] (s4AA(2)).

- It should be noted that this particular circumstances is not determinative and is up to the court's discretion.
- The court may give heavier weight to [factor 1] as [reason] (s4AA(4))

| Jonah (appellant) v White | |
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| Facts | <ul style="list-style-type: none"> - Jonah works in White's company and entered into an intimate relationship - White was married with children but his wife was unaware of the secret relationship - Both maintained separate homes and households and had no joint funds/ investments - White bought a farm where Jonah would visit him - Both parties travelled overseas together once - Jonah bought a property which White provided \$24k, property was sold and got another property in her name - parties had a "...significant degree of mutual commitment to the other expressed overtly...", and found that Jonah loved White and she was devoted to him and that he provided her with significant care and support |
| Held | <p><u>Domestic genuine basis – manifestation of coupledness</u></p> <p>[60]: the key to that definition [de facto relationship] is the manifestation of a relationship where "the parties have so merged their lives that they were, for all practical purposes, 'living together' as a couple on a genuine domestic basis". It is the manifestation of "coupledom", which involves the merger of two lives as just described, that is the core of a de facto relationship as defined and to which each of the statutory factors (and others that might apply to a particular relationship) are directed.</p> |

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| | <p>Parties can be a coupledom despite separate residence</p> <p>[65]: It seems to me to be clearly established by authority that the fact that, for example, the parties live in the same residence, for only a small part of each week does not exclude the possibility that they are “living together as a couple on a genuine domestic basis” or that the maintenance of separate residences is necessarily inconsistent with parties having a de facto relationship. So much is, in my view, clear from the statutory recognition that parties to a relationship can be married but also be in a de facto relationship.</p> <p>[24]; Factors point towards a de facto relationship:</p> <ul style="list-style-type: none"> - long standing relationship - consistent sexual relationship - White’s financial support of Jonah - Relationship was exclusive (save for “a few one night stands”) and, of course, the not insignificant matter of the relationship with his wife <p>[25]; Factors point away from a de facto relationship:</p> <ul style="list-style-type: none"> - parties kept and maintained a household distinct from the other - For White, household involved the maintenance of family relationships, including the support of children - No evidence of any relationship/ intended relationship between Jonah and White’s children - relationship between Jonah and White was clandestine and the time spent between the parties was spent very much together, as distinct from time spent socialising as a couple - White continued to emphasized the limits of the relationship - No joint accounts/ investment and acquired & maintained property in their own names - Parties did not mix with each other’s friends/ business associates |
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| 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 | - Mushin J: “In my view, if a couple do not live together <u>at any time</u> , 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.” |

4.2 End of De Facto Relationship

X would argue that the de facto relationship ended permanently on [date] as the relationship is broken down (Davies v Richardson). This is because [reason – eg. Kept apart] . Accordingly, it is objectively different from [previously when there is still relationship].

| Smyth v Pappas [2011] FamCA 434 | |
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| Facts | <ul style="list-style-type: none"> - Dispute about whether the relationship ended before or after 1 March 2009. - Relationship was characterised by several temporary suspensions. |
| Held | <p>Cronin J</p> <p>“All of the indicea just mentioned were present and apparent at various times during the period that the applicant and the respondent knew one another. There is sufficient evidence to be satisfied that an at an identifiable point, the parties commenced a de facto relationship. The more difficult factual and indeed legal question is, whether and when, the de facto relationship (as distinct from some other form of relationship) ended.”</p> <p>“The process to an ending can be sudden or it can be slow. Either way, the relationship ends and, in my view, that means, permanently. That requires an examination of what the parties were doing and saying over the life of the relationship as well as after it.”...</p> <p>“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...the ending of the relationship must have a permanence about it rather than a temporary suspension.”</p> |

TOPIC 3: Parenthood, Assisted Conception and Surrogacy

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More in Full Notes
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3 Assisted conceptions

- S4: *Artificial conception procedure includes:*
 - (a) *Artificial insemination; and*
 - (b) *The implantation of an embryo in the body of a woman*
- Re Patrick [2002] FLC 93

- This definition is broad enough to cover known donors/informal arrangements; including insemination at home
- Presumptions for children from artificial conception

| Relationship | |
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| <p>S 10: Female + male</p> <p>Husband will be the father, not the sperm provider</p> | <ul style="list-style-type: none"> - Where a married woman, in accordance with the consent of her husband/de facto partner, has undergone a procedure as a result of which she has become pregnant: <ul style="list-style-type: none"> ○ The husband/partner shall be presumed to have caused the pregnancy and to be the father of any child born as a result of the pregnancy ○ Any man, not being her husband/partner, who produced semen for the purposes of the procedure shall be presumed not to have caused the pregnancy and not to be the father of any child born as a result of the pregnancy - Presumption is irrebuttable and prevails over any conflicting presumption. |
| <p>S 13: Female + female</p> <p>Sperm provider will not be the father</p> | <ul style="list-style-type: none"> - If a woman undergoes a procedure as a result of which she becomes pregnant: <ul style="list-style-type: none"> ○ The woman is presumed, for all purposes, to be the mother of any child born as a result of the pregnancy, AND ○ The woman's female partner is presumed, for all purposes, to be a legal parent of any child born as a result of the pregnancy, if she: <ul style="list-style-type: none"> ▪ Was the woman's female partner when she underwent the procedure ▪ Consented to the procedure ○ The man who produced the semen used in the procedure is presumed, for all purposes, not to be the father of the child, whether or not the man is known to the woman or her female partner. - presumption is irrebuttable and prevails over any conflicting presumption. - |
| <p>S 15: No partner</p> <p>Sperm provider will not be the father</p> | <ul style="list-style-type: none"> - If a woman who does not have a partner undergoes a procedure as a result of which she becomes pregnant: <ul style="list-style-type: none"> ○ The woman is presumed, for all purposes, to be the mother of any child born as a result of the pregnancy, AND ○ The man who produced the semen used in the procedure is presumed, for all purposes, not to be the father of the child, whether or not the man is known to the woman. - presumption is irrebuttable and prevails over any conflicting presumption. |
| <p>S60H(1): Artificial conception Female + intended parent</p> <p>Child will not be the child of sperm provider</p> | <ul style="list-style-type: none"> - If a child is born to a woman as a result of an artificial conception procedure while the woman was married to, or a de facto partner of, another <u>person</u> ('the intended parent'); AND either: <ul style="list-style-type: none"> ○ The woman, the intended parent, and any other person who provided genetic material used in the procedure, consented to the procedure, or ○ Under a prescribed law of a State/Territory, the child is recognised as a child of the woman and the other intended parent |

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| | <ul style="list-style-type: none"> - The child is recognised as a child of the woman and the other intended parent - If other person provided genetic material for the procedure, the child is <u>not</u> a child of that person - <i>s60H(5): A person is presumed to have consented to the procedure unless it is proved on the balance of probabilities that they did not consent</i> |
| <p>S60H(2) Maternity</p> <p>Child will be child of woman</p> | <ul style="list-style-type: none"> - If a child is born to a woman as a result of an artificial conception procedure AND under a prescribed law of a State/Territory, the child is recognised as a child of <u>the woman</u>. Then, whether or not the child is biologically a child of the woman, the child is recognised as a child of the woman for the purposes of this Act - If a child is born to a woman as a result of an artificial conception procedure AND under a prescribed law of a State/Territory, the child is recognised as a child of <u>a man</u> - Then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act |
| S60H(3) Paternity | <ul style="list-style-type: none"> - If a child is born to a woman as a result of an artificial conception procedure AND under a prescribed law of a State/Territory, the child is recognised as a child of <u>a man</u> - Then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act |

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Topic 4: Disputes Involving Children

Red Flag:

- Where children should live and for what proportions of time
- Who they should spend time with and have relationships with
- Specific long-term decisions, e.g. schooling, religion, medical decisions etc

All referenced sections are from the *Family Law Act*. OTF, [X/Y] is purporting to [issue – make long term decision/ spend time with child].

Step 1: Parental responsibility – Long-term decisions

s4(1): Long term decisions include

- Issues related to the care, welfare and development of a child, including (but not limited to):
 - a) Education
 - b) Religion
 - c) Health
 - d) The child's name

e) Changes to the child's living arrangements that make it more difficult for them to spend time with a parent

X must have parental responsibility (PR) to make decisions regarding the child. The court would determine if there were any major long-term decisions that would require the court to determine PR

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| Counter | |
| Child is >18yo | Since [child] is [age - >18yo], PR is inapplicable. |
| Child is adopted | Since [child] is adopted, PR is inapplicable. |
| Day-to-day decision | However, Y may argue that [matter] is paramount to a day-to-day decision and thus may not bring an action. |
| Parental right | While X may argue that he has parental rights over the child, it is irrelevant when determining PR. |

Step 2: s65C - Who is eligible to apply for orders?

X may also seek court interventions which may only commence after parties make 'genuine effort' to resolve disputes binding and obtain a certificate. This is satisfied per [s60I(8)] as [facts – eg. Attended FDR].

- Exception: Since there was/may be family violence/ child abuse/ all parties gave consent, parties are excluded from having to file a certificate (ss 60I(8A); 60I(9))

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| FDR | S60I(8) FDR practitioner may give one of these kinds of certificates: |
| | (a) 1 Party did not attend due to the other party's refusal or failure to attend the proceeding |
| | (aa) 1 Party did not attend as FDR practitioner deemed it is inappropriate to conduct |
| | (b) Both party attended FDR and make genuine effort to resolve issue |
| | (c) Both parties attended but 1 party did not make a genuine effort to resolve issue |
| | (d) Both parties attended but FDR practitioner deemed that it was inappropriate to continue |

Step 3: Parental Responsibility – Other arrangement (living, school, meeting etc)

[X] may then apply for a parenting order to seek [aspect of parental responsibility – eg. Where child live, time, communications] as [their the parent/child/grandparent/person in charge of the child's care, welfare and development] (s 65C; s 64B(2)). In determining parenting plans regarding the children, s60B will guide the court.

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| Parenting orders can deal with any aspect of parental responsibility, and will mainly deal with the following matters: |
| - The person(s) with whom a child lives |
| - The Time a child spends with another person(s) |
| - The allocation of parental responsibility |
| - The form of consultation that those who share PR should have with one another (s61DAA) |
| - The communication a child has with another person(s) |
| - Maintenance of a child |

- Any aspect of the care, welfare or development of a child

s60CA - Paramountcy Principle & s60CC considerations (after 6 May 2024)

- Per s 60CA, the child's best interests are the paramount consideration in making a parenting order.
- The presumption of equal shared PR had been removed to accommodate flexible allocation of PR or long-term decisions in relation to the child either jointly or solely (ss64B(3); 61D(3)).
- s 60CC considerations were distinguished into primary and additional in earlier legislation. This approach was removed to simplify considerations and give appropriate weightage to the factors in the circumstances.
- Accordingly, while X may argue that [circumstances/act – eg. Good relationship] would promote a meaningful relationship with the parents [at the date of hearing/in the future per McCall], this consideration has been repealed.

Others (Research):

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| Parent's interest | statutory instruction to treat the welfare or best interests of the child as the paramount consideration does not oblige a court, making the decision, to ignore the legitimate interests and desires of the parents. If there is conflict between these considerations, priority must be accorded to the child's welfare and rights. (Kirby J in <i>AMS v AIF</i> (1999) 199 CLR 160) |
| Deciding between immediate and future benefit | <p><u><i>In the Marriage of Hall</i> (1979) 29 ALR 545; 5 Fam LR 609 at 620</u> 'It is permissible for any court to take a longer view of the child's future than the immediate future before it; this must be done with caution. In the end the decision must accord with the overall welfare of the child. It might not always be legitimate to look so far into the future that a child should be taken from surroundings where he is well and happy, and placed in other surroundings, on some conjectural basis that in the ultimate, he will prosper better in the latter surroundings.'</p> <p>R <u><i>In the Marriage of Raby</i> (1976) 12 ALR 669</u> The future is so difficult to predict in the case of very young children that the court should concentrate on the immediate future; as children become older, it becomes more feasible to plan further into the future. This approach is expressly stated in</p> |

Nevertheless, Y would raise [s60CC]:

More in Full Notes

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| <p>s60CC(2)(d) Capacity of person with parental responsibility to provide for (c)</p> | <p>Courts would consider parents' ability to provide for the child in particular situations. OTF, [facts] had serious consequences upon [his/her] ability to parent the child as [reason].</p> <p>Analogous to Goldman where the mother utilised the children to pursue her vengeance against the father. As such, the children carried the burden of her hostility which had been damaging to their development (Goldman & Goldman (No 2) [2017] FamCA 531 [216])</p> <div data-bbox="373 445 1468 629" style="border: 1px solid black; padding: 5px;"> <p>Research Notes</p> <ol style="list-style-type: none"> 1. There is no difference in substance from 2023 amendments 2. Factors affecting parent's capacity <ul style="list-style-type: none"> - Circumstances that compromise the parenting ability - Parents conduct </div> |
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Topic 5 Financial and Property Disputes

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Property is broadly defined and those acquired before, during or after the relationship ended are subjected to adjustments if they are existing (Duff; Oliver; s4). Courts have discretion to alter property interest if it is appropriate and just and equitable to do so (s 79(1), Mallett wilson J).¹ Courts do not start with an assumption that one party or the other has the right to have their property divided between them (*Stanford & Stanford* (2012) 247 CLR 108). Rather, the Bevan approach is now preferred, reinforcing that the just and equitable requirement is 'one permeating the entire process'

OTF, the property pool includes: [superannuation, chattels, debts/liabilities, investments, companion animal, bank accounts, cash, royalties].

¹ In the Marriage of MALLETT (1984) 52 ALR 193.

- Even if properties are controlled by a third party, there is jurisdiction over property settlements regardless whether the title was held by third parties (X allege X had interest in the property) (Genesalio v Johns [2025] HCA 45)

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| Short marriage | <p>Since the marriage was short, Y may argue that there should be no alteration of property interests/intermingling of the assets held at the commencement of the relationship. Accordingly, it may be appropriate to split the pool into 3 pools:</p> <p>(1) those assets and liabilities held by the Husband; and (2) those assets and liabilities held by the Wife; and (3) the house sale proceeds/ Joint accounts</p> <p>This holistic approach is consistent with authority, including the Full Court's decision in <i>Coghlan & Coghlan</i> [2005] FamCA 429.</p> |
| Long marriage | <p>Since the relationship is long in duration, there was intermingling of the assets and thus, cannot be categorised. Nevertheless, the courts shall adopt a holistic approach as reinforced in <i>Fields & Smith</i> [2015] FamCAFC 57 where the assessment if the contribution is</p> <p>“...not a mathematical exercise, but rather involves the identification and assessment of all of the parties’ respective contributions, in a holistic way across the course of the relationship and in the post separation period to the point of assessment...” [35].</p> |

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