

Topic 1: Introduction to Family Law

The family as legal entity

“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least, is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover* she performed everything: and is therefore called in our law-French a *feme-covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her *coverture*.”

— Sir William Blackstone’s *Commentaries of the Laws of England*
(extracted in Turnbull and Rundle, *Family Law Principles* (2025) p. 3)

What did this mean in practical terms?

- Own property in their own name
- Enter into contracts without consent of husband
- Sue or be sued
- Keep earnings
- Have separate legal existence from husband

The public-private divide

- Where men dominated public sphere and women confined to the private (domestic sphere)
- The divide was reinforced by law - through doctrine of coverture
- Men earned wages and participated in civic life, and women confined to private sphere performed unpaid domestic work and childcare
- Public sphere was valued and visible while private sphere invisible to the law

Contemporary challenges to the public-private divide

- Still see traces of public-private distinction in family law
- The *Family Law Act 1975* (Cth) does not regulate ‘intact’ marriages
- Recognition of family violence as public concern requiring legal intervention
- Child protection laws allow state intervention when children are at risk
- Laws regulate some aspects of family relationships

What is family?

FAMILY LAW ACT 1975 - SECT 43

Principles to be applied by courts

- (1) A court exercising jurisdiction under this Act must, in the exercise of that jurisdiction, have regard to:
- (a) the need to preserve and protect the institution of marriage as the union of 2 people to the exclusion of all others voluntarily entered into for life;
 - (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
 - (c) the need to protect the rights of children and to promote their welfare;
 - (ca) the need to ensure protection from family violence; and
 - (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.
- (2) Paragraph (1)(a) does not apply in relation to the exercise of jurisdiction conferred or invested by Division 2.

Judicial interpretation

Marriage of Mehmed (No 2) (1987) → Full Court of Family Court considered reference to ‘family’ in s. 79(4)(c) of *Family Law Act 1975* (Cth). Section 79(4)(c): ‘the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent’. The court could only consider husband’s contributions to his spouse and children of the marriage (not children’s partners or wife’s child from subsequent relationship).

Gendered assumptions in family law

- Nuclear family connected to gendered assumptions about parenting roles
- The ‘mother principle’ that originated in English law - seen in case of *Epperson v Dapney* [1976]

- “I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers ... That knowledge includes an understanding of the strong natural bond that exists between mother and child. It includes an awareness that young children are best off with both parents, but if the parents have separated, they are better off with their mother. The bond between a child and a good mother so expresses itself in an unrelenting and self-sacrificing fondness which is greatly to the child's advantage. Fathers and stepmothers may seek to emulate it and on occasions do so with tolerable success. But the mother's attachment is biologically determined by deep genetic forces which can never apply to them.”

In Marriage of Raby and Raby (1976) → “We are of the opinion that the suggested ‘preferred’ role of the mother is not a principle, presumption, a preference, or even a norm. It is a factor to be taken into consideration where relevant”

Gronow v Gronow (1979) → “The principle invoked by the respondent — that a young female child is best left in the custody of the mother — is not, and has never has been, a rule of law. It is, or was, a canon of common sense founded on human experience. The weight or value to be given to it has varied with the times and from case to case.”

Challenges to the nuclear family model

- Broader view of what is meant by family adopted by courts over time
 - ‘To the extent a family remains defined as a nuclear family, this would appear a particularly outdated and unnecessarily constrictive, heteronormative and white Anglo Saxon perspective which fails to recognise the 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.

Contemporary families → Declining marriage rates; Increasing cohabitation; Rising divorce and re-partnering rates; Blended and step families; Smaller family sizes; Increasing workforce participation of women

Diverse communities and families → Different conceptions of family and kinship than the Western idea of nuclear family; Kinship systems extend well beyond the nuclear family to include extended networks of relations; Connection to Country is central to identity and family; There are cultural obligations to kin and community; Collective responsibility for children; Elders play crucial roles in family and community governance; Kinship systems are complex and sophisticated - different indigenous nations have different kinship and structures and rules

Impact of colonisation → Significant impact of colonisation on Indigenous families; Imposition of Western family models and also Christian marriage norms; Land dispossession; Stolen Generations; Intergenerational trauma

Recognition in family law

- s60CC (3)(h) - requires courts to consider ‘any need to protect the child’s cultural identity’ when determining best interests of the child
- 2024 amendments to act amended definition in section 4(1) to include relative of a child

LGBTIQ+ families

- Historical exclusion from legal recognition
- This has changed with
 - Decriminalisation of homosexuality
 - Recognition of same sex de facto relationships
 - Marriage equality
- Diverse pathways to family
 - Adoption
 - Foster and kinship care
 - Assisted reproductive technology
 - Surrogacy
 - Co-parenting arrangements

- Step parenting in blended families

Legal challenges

- Legal parentage and the two-parent model – Australian family law generally assumed children have two parents and LGBTIQ+ families may not fit this model.
- Challenges around how non-biological parent gains legal parental status.
- Trans and gender diverse parents face particular challenges – birth certificates may not reflect actual gender or parental role. Gendered parental categories do not fit all families.
- Chosen family and legal non-recognition – friends who function as family.
- Legal equality does not automatically translate to social acceptance.

Recognition of diverse family forms

- *Re Patrick* (2002), Guest J recognised a same-sex couple with a child as being ‘family’.
- In 2019, *Masson v Parsons* the High Court broadened approach to concept of family – held man who provided sperm to assist a woman conceive a child was a legal parent.
- A recent case, *Ophoven and Berzins* [2025] – court determined that not necessary to have biological connection in order to be considered a legal parent.

Beyond the couple model

- Single parent families
- Multi generational households
- Extended family living arrangements
- Co-parenting outside of romantic relationships
- Chosen families and friendship networks
- Communal living and alternative structures

Limitations of law’s recognition → Property and financial laws do not cover non-couple relationships; Parenting laws assume one or two parents; Next of kin and decision-making rules may not recognise chosen family; Immigration and family reunion focus on couple relationships and parent child relationships

Recognition and exclusion

The law recognises some relationships and family forms while excluding others.

This matters as legal recognition brings rights and protections, so non-recognition can leave people vulnerable.

Recognition also has symbolic significance.

Currently Australian family law recognises:

- Marriage
- De facto relationships
- Parent-child relationships (biological, adoptive, and in some cases social/step-parent)

However, law struggles to recognise:

- Chosen families
- More than two parents
- Co-parenting arrangements outside romantic relationships
- Extended kinship networks
- Non-couple intimate relationships

Family law institutions

Division of powers

- s51 Constitution
- s109 **Inconsistency of laws** → When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.
- s122 **Government of territories** → The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

Legislation and constitutional changes

Matrimonial Causes Act 1959 (Cth)

- Was the first Commonwealth legislation to introduce a uniform divorce law
- The act is the first to define 'matrimonial cause'
- Arguably reinforced traditional ideals around the nuclear family and the importance of marriage

Marriage Act 1961 (Cth)

- Regulates legal aspect of marriage including matters such as
 - Solemnisation
 - Marriageable age
 - Void marriages
 - Legitimation of children
 - Offences - bigamy

Family Law Act 1975 (Cth)

- Introduced no fault divorce - got rid of the previous 14 grounds of divorce
- Establishment of a specialist federal court
- s4 of the FLA defines matrimonial causes
- Children of marriage original definition has changed now covered in s60F(1)-(4)
- Widened powers relating to maintenance, property and custody to applications unrelated to divorce or nullity

Significance of FLA

- Changes the culture around divorce in Australia
- Removed stigma and moral judgement
- Made divorce more accessible
- Recognised that relationship breakdown is a social reality that law should respond to pragmatically
- Shifted focus from past fault to future welfare

Challenges to the FLA

- Did the FLA widen powers too far in including maintenance, property and custody matters unrelated to any proceedings for divorce or nullity?
- *Russell v Russell* → Majority held marriage power includes creation of rights that emerge from marriage as well as enforcement of those rights; However, no need to limit what types of property a proceeding could relate to; Additional concerns before the court related to matters of procedure - specifically s97(1) FLA relating to closed court hearings
- *Farrelly v Farrelly* → Case was being heard when FLA came into effect; Question before court related to division of powers - specifically was the assumption of jurisdiction in FLA around matters like that in this case; HC held that 'matrimonial cause' and 'child of marriage' as they were in the FLA were too 'widely drawn' therefore, beyond powers of the Cth

1976 Amendments of the FLA

- Proceedings relating to maintenance, custody, property and injunctions had to be between parties of marriage
- 'Children of marriage' definition changed - had to be either biological or adopted children of both spouses
- All property proceedings had to relate to proceedings for dissolution of marriage

1983 Amendments to the FLA → Introduced provision proceedings between spouses to happen any time after marriage

2003 Amendments to the FLA

- Part VIIAA - third party power inserted into act
- Gave family court wide jurisdiction to make order that bind third parties
- *Hunt and Hunt* [2006] challenged this - but found provisions affecting property interests of third parties valid, as the interests of one party to marriage were also affected

Referral of Powers by the states

- Section 51 (xxxvii) of the Constitution – allows states to refer powers to the Commonwealth.
- 1986 – New South Wales, South Australia, Tasmania and Victoria referred state powers relating to ‘guardianship, custody, maintenance and access’ in relation to ex-nuptial children to the Commonwealth.
- 1990 – Queensland follows suit as with above states.
- FLA applies to territories – Australian Capital Territory, Northern Territory, Norfolk Island, Christmas Island, and Cocos (Keeling) Island.
- States retain power relating to:
 - Adoption
 - Artificial conception
 - Surrogacy
 - Child welfare
 - Family violence
 - Property and financial disputes between non-married couples who are not covered by federal legislation.

Family law institutions

- FLA introduced the FCA as ‘superior court of record’
- State courts dealt with family law matters before establishment of FCA
- Western Australia only state to set up own state family court - came into being same date as FLA came into force
- The NT Supreme Court exercises family law jurisdiction as there is no family court judge assigned to the territory
- Now state courts no longer have jurisdiction to deal with family law matters outlined in FLA
- Structure of the court: had 2 divisions
- Exercised original and appellate jurisdiction

Advantages of a specialist court

- Specialist in relationship matters
- When FDR was introduced it focused on ADR
- Recognised relationship matters can have unique and sometimes complex issues, different to other civil law matters - procedures and rules developed to respond to this
- Treatment of de facto relationship matters differed to how they were previously dealt with by state courts

Federal Circuit Court of Australia 1999

- Initially known as Federal Magistrates Service
- Designed to be more efficient and less formal than Family Court
- Objective was to provide a more accessible and user-friendly option for parties
- Also was supposed to be more cost effective

Introduction to FDR

- ADR processes embedding in FLA from conciliation and counselling
- Later expanded to FDR

Merging of the courts

- The courts have long been subject of critique, review and recommendations (especially since 2008).
- 2010 – Federal Attorney-General announced that a lower tier of the Family Court would be introduced – however this idea was shelved.
- 2013 – administration of both Family Court and Federal Circuit Court merged – single CEO for both.
- 2018 – Chief Justice of both courts is dual appointment.
- 2019 – Federal Attorney-General announced merger of the two courts.
 - To provide single entry point
 - Streamline rules, processes, practices and cultures
 - Aim to lead to quicker, more cost effective resolution of matters
- 2019 – Federal Circuit and Family Court of Australia Bill 2019 passed.
- 2021 – *Federal Circuit and Family Court of Australia Act 2021* (Cth) comes into affect.

- 1 September 2021 – The Federal Circuit and Family Court of Australia (FCFCA) commences.

FCFCA

- Has two divisions
 - 1 - original and appellate jurisdiction
 - 2 - original jurisdiction - can hear matters other than family law
- Judges are appointed by the GG - need to have suitable knowledge/expertise of family law matters

Critiques

- The reform has been controversial for a number of reasons
 - Loss of structural, systemic specialisation
 - Specialisation necessarily as family law matters often complex and require specialist knowledge
 - No guarantee will reduce costs, delays or the barriers to accessing justice for parties
 - Concerns that will disproportionately impact the most vulnerable and disadvantaged families

Jurisdiction matters

Domicile and the basis of jurisdiction

- The permanent residence of a person within a jurisdiction
- *Domicile Act 1982 (Cth)*
 - s8 - capacity for person to obtain an independent domicile
 - s9 - domicile of children
- Do not need to sever all ties with a domicile to acquire new domicile of choice

FAMILY LAW ACT 1975 - SECT 69E

Child or parent to be present in Australia etc.

- (1) Proceedings may be instituted under this Act in relation to a child only if:
- (a) the child is present in Australia on the relevant day (as defined in subsection (2)); or
 - (b) the child is an Australian citizen, or is ordinarily resident in Australia, on the relevant day; or
 - (c) a parent of the child is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
 - (d) a party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, on the relevant day; or
 - (e) it would be in accordance with a treaty or arrangement in force between Australia and an overseas jurisdiction, or the common law rules of private international law, for the court to exercise jurisdiction in the proceedings.
- (2) In this section:
- "relevant day"**, in relation to proceedings, means:
- (a) if the application instituting the proceedings is filed in a court--the day on which the application is filed; or
 - (b) in any other case--the day on which the application instituting the proceedings is made.
- Note: Division 4 of Part XIII A (International protection of children) has effect despite this section.

Complex jurisdictional issues

Cross Vesting Scheme

- Introduced in 1987
- Aiming to allow related matters to be heard by one court rather than two
- Cross-vested federal jurisdiction in state and territory supreme courts
- *Re Wakim: Ex parte McNally* (1999) - HC held that Ch III of Constitution meant cross-vesting unconstitutional
 - Specifically, vesting Cth courts with state jurisdiction
- States later passed legislation to invalidate judgements made by federal courts under the scheme

Accrued Jurisdiction

- Allows Family Court to deal with non-federal matters if part of a single justiciable controversy
- Aim - avoid two separate processes, duplication, increased costs and inconsistencies.
- *Warby v Warby* [2001] – question was whether Family Court had accrued jurisdiction, especially following decision in *Re Wakim* case. Court decided yes and outlined circumstances where court may exercise accrued jurisdiction.

- Once establish court has accrued jurisdiction must exercise it.
- *Finlayson v Finlayson* (2002) – issue central to resolution of family proceedings, so accrued jurisdiction existed.
- *Whitehouse v Whitehouse* (2009) – absence of a dispute between the parties which Family Court had jurisdiction mean no application possible relying on accrued jurisdiction.

Associate Jurisdiction

Federal Circuit and Family Court of Australia Act 2021 s29

- To the extent that the Constitution permits, jurisdiction is conferred on the Federal Circuit and Family Court of Australia (Division 1) in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Federal Circuit and Family Court of Australia (Division 1) is invoked.

Topic 2: Family Violence

Coercive control → Controlling and manipulative behaviour used against an individual. Includes: isolation, emotional manipulation, surveillance, psychological and financial abuse

FLA s4AB

s4AB(1) → Behaviour that is violent, threatening, or controlling that coerces/controls or causes fear

s4AB(2) → Physical/sexual abuse; stalking; emotional abuse (taunts); property damage; harm to animals; financial abuse; social isolation; deprivation of liberty

s4AB(2A) → Controlling money/assets (incl. super); preventing employment; forcing debts; withholding financial support; dowry-related coercion

s4AB(3) → Child exposed if they see, hear, or experience effects of family violence

s4AB(4) → Witnessing violence; hearing threats; comforting victim; cleaning damage; present during police/ambulance attendance

Case law

Pickford and Pickford [2024]: Intention of alleged perpetrator not a required element. Behaviour can constitute family violence only in one of two ways – coerces or controls the family member OR it causes the family member to be fearful. *Aldridge and Carew JJ*: violent or threatening behaviour can be stand-alone behaviours

Hurley v Melton (No 2) (2020): In relation to s.102NA which notes unrepresented party not permitted to personally cross-examine another party where family violence allegations. Hogan J found that previous findings about a father's abusive behaviour warranted an order that s.102NA apply to both parties.

Crimes (Domestic and Personal Violence Act) 2007 (NSW)

- Criminalises stalking and intimidation
- s15 - application for Apprehended Domestic Violence Orders
- s5 - meaning of 'domestic relationship'
- s11 - meaning of 'domestic violence offence'

FLA s 4 → defines **child abuse** (broad: physical, sexual, psychological, neglect)

Crimes Act s 54D → criminalises **coercive control** (pattern + intent + objective impact)

CDPV Act s 11 → defines "**domestic violence offence**" **broadly**, incorporating multiple offences including coercive control

Intersectional approach

Critical self interrogation → acknowledge commonalities and differences → remember the activist roots of intersectionality → intersectional programming - identify systemic and structural barriers → public policy and social change

Trauma inform practice → 'emotional response to a terrible event like an accident, rape or natural disaster. Immediately after the event, shock and denial are typical. Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea. While these feelings are normal, some people have difficulty moving on with their lives' — American Psychological Association (2015)

'Client-centred' – empower victim-survivor to identify issues, and be involved in the solution/response – allow decision-making. Allow clients to share all details of their experience, relevant or not, and validate feelings. Be

mindful of engagement with client – display patience, thoughtfulness. Think from client perspective. Recognise limits of legal response and whether other supports required – engage with other professionals, as needed. Consider community and background of client – think beyond the narrow lens of the law. Contextualise client behaviour and experience in context of their trauma. Remember everyone reacts to trauma differently. Develop strategies to avoid re-traumatisation. Also, engage in ‘self care’ and be mindful of vicarious trauma.

Trauma informed approach → Places realities of victim-survivors’ traumatic experiences at centre of interaction and make appropriate adjustments. Reframe questions from “what is wrong with you?” to “what happened to you?” Tailor responses to make victim-survivors feel empowered and safe. Incorporate assessment of trauma and trauma symptoms into the whole process/interaction.

Benefits → Allows practitioners to identify trauma and plan appropriate response. Encourages self-reflection for legal practitioners. Encourage client-centred lawyering. Encourages critical reflection on the legal system and the law. Improves client experience and case outcomes. Can build trust and rapport with clients. Promotes client resilience. Creates a legal practice culture that acknowledges vicarious trauma amongst lawyers.

Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011

Section	Rule / Provision	Key Effect	Exam Insight
FLA s 60CC(2)	Best interests (primary factors)	Relationship vs protection from harm	Safety is a core consideration
FLA s 60CC(2A)	Prioritisation rule	Protection from harm prevails if conflict	Safety > shared parenting
FLA s 61DA	Presumption (clarified)	Does not apply if violence/abuse suspected	Prevents unsafe shared decision-making
FLA s 60CF	Disclosure duty	Parties must inform court of violence orders	Improves risk awareness
FLA s 60CG	Court obligation	Orders must avoid risk & align with protection orders	Prevents re-exposure to harm
FLA s 69ZN	Procedural principles	Protect parties + avoid delay	Recognises litigation trauma
FLA s 11F / s 11B	FDR & expert involvement	Must consider violence before mediation	Reduces unsafe dispute resoluti

Melounis and Melounis (No 4): Melounis & Melounis (No 4) [2011] FamCA 664 is an early post-2011 reform case applying the expanded definition of family violence under **s 4AB**. The court recognised that coercive and controlling behaviour constitutes family violence and confirmed that where reasonable grounds exist, the presumption of equal shared parental responsibility does not apply. The case illustrates the prioritisation of child safety in the best interests analysis.

Injunctions

s 114 – General Injunction Power

- Court may grant injunctions where “just or convenient”
- Covers:
 - Personal protection (violence, harassment)
 - Property-related orders
- s 114(2A) → extends to de facto relationships
- s 114(3) → allows ouster orders (exclude party from home)
 - Can exclude even if party has ownership interest
 - Does not affect property rights
- Discretionary → court considers:
 - Safety (especially family violence)
 - Children’s needs
 - Housing alternatives
 - Practicality of cohabitation
- Can combine exclusion + restraining conditions in serious cases

Limits of s 114

Oates v Crest: → Injunction must protect a party to proceedings → Cannot extend to third parties (e.g. new partner)
→ Third parties must rely on state protection orders

s 68B – Child-Focused Injunctions

- Court may make any injunction for child’s welfare
- Can protect: Child; Parent; Person with parental responsibility; Anyone child lives/spends time with
- Examples: Restrain contact with child; Prevent entry to home, school, workplace
- Orders: Can include conditions; Enforceable by police (s 68C, arrest possible)

Child abuse → No single universal definition, but generally includes: Physical abuse; Sexual abuse; Emotional/psychological harm; Neglect. **Family Law Act 1975 (Cth)** (post-2012 reforms): Expanded to include assault, sexual exploitation, psychological harm, neglect. Focus on harm-based approach

Neglect → Recognised as a core form of abuse Involves failure to meet: Basic needs (food, shelter, care); Developmental needs. Must impair or risk impairing the child’s development

Corporal Punishment Debate → Illegal in schools across Australia. In the home: Some jurisdictions allow “reasonable chastisement” Ongoing debate: Where is the line? Increasing push for full ban. **UN Convention on the Rights of the Child:** Views corporal punishment as inconsistent with children’s rights

Female Genital Mutilation (FGM) Criminalised in all Australian jurisdictions (incl. overseas offences) Confirmed illegal even without visible injury (High Court) ~53,000 affected in Australia. Issues: Low prosecution rates; Detection challenges. Global priority → elimination by 2030. Requires law + education + community engagement

Child Sexual Abuse → Defined broadly → any sexual activity involving a child: Cannot consent; Cannot understand; Is unlawful/unacceptable. Causes: No single explanation Theories include: Family dysfunction (criticised); Feminist (power/gender); Finkelhor’s model (enabling conditions); Strong link to family violence

Impacts (long-term): Mental health issues (depression, anxiety); Substance abuse; Eating disorders; Re-victimisation; Personality/psychotic disorders; Increased suicide risk

Legal Responses to Child Abuse

1. Criminal Law
 - Prosecution possible but:
 - Rare and difficult (especially sexual abuse)
 - Evidentiary challenges
2. Child Protection System (State/Territory)

- Focus: current risk to child
- Can:
 - Investigate
 - Remove child (last resort)
- Separate legislation in each jurisdiction
- 3. Family Law System
- Focus: parenting disputes + best interests
- Considers:
 - Past harm
 - Future risk