

# **FAMILY LAW**

**SEMESTER 2, 2015**

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## Class 1 – Introduction:

### **Administration Matters:**

- Reading list is divided into topics → Allows for flexibility + the possibility of each topic extending longer than 1 week

### **Assessments:**

- Class Participation – 20%
  - Preparation for class + At least two comments on the online forum (answer question posted on Moodle)
- Class Tests – 15% each in Week 5 and 10
  - One will be a problem question, the other an essay based policy question (open book)
- Final Paper or Final Exam Option
  - Can choose exam or a 3000 word research essay
    - 4-5 research questions will be posted in week 8/9 (need to opt in before the questions are seen)
  - Final Exam – Choice between problem question and essay

### **What is the Family?**

- Culture, Blood and Relationships control what is a family
  - Family is an ever evolving concept... Changed form 5 years ago, will be changed again in 5 years
- Family law is about status → Its about the position of an individual in relation to others... Status applies 24/7, with no boundaries
  - EG: Status of marriage removes the ability to marry another person, allows the other spouse to gain a visa
    - Another legal procedure (divorce) is needed to change the status
  - EG: Children – Is the *son of a father* and *mother* who becomes entitled to inheritance and becomes restricted on who they can marry (bloodlines)
- Family law is a fluid subject → Not always possible to identify all the players and situations which impact the family

### **A Short History of English Marriage and Divorce Law:**

#### Marriage:

- In early Christianity marriage was a private affair
  - Was simply constituted by the parties saying to each other that they regarded themselves as married to each other
  - By the 12<sup>th</sup> century, marriage had become a matter of church jurisdiction
- Pre 1857, divorce as we know it did not exist (but there were ways of escaping martial responsibility)

### Marriage Breakdown and its early remedies:

- **Annulment** – The legal setting aside of a marriage because it was tainted by some flaw... Such as one party was already married or the parties were too closely related
- **Parliamentary Divorce** – The Divorce and Matrimonial Causes Act 1857 (UK) allowed for a parliamentary divorce where:
  - (1) A divorce *a mensa et thoro* was obtained from the Ecclesiastical Court
  - (2) Sue for damages in the common law courts
- **Divorce for the common man (and woman?)** – Male-dominated law allowing divorce due to living in sin (possible to take action against wife's seducer)

### The Coming of Divorce:

- Several strands in the establishment thinking had gone against making divorce available:
  - (1) Economic – To ensure that the upkeep of dependent persons (women and children) did not become a burden of the community
  - (2) Social stability – The family was regarded as the pillar of society and the family rested on marriage
  - (3) Religious – The mainstream churches all supported indissolubility
- When divorce was initially made available it required fault as it was necessary to preserve marriage at all costs
  - 1853 Royal Commission confirmed the view that adultery (fault) was the only basis for divorce

### From Fault to Irretrievable breakdown:

- **Adultery** – Early in the 20<sup>th</sup> century a new approach began to arise, that of 'irretrievable breakdown of marriage' → Approach looked to the substance, rather than the empty form of a relationship
- **Cruelty, desertion and incurable insanity** – Irretrievable breakdown as the sole determinant in adjudging a relationship was given judicial endorsement in 1943
  - An intention to desert was regarded as a sufficient basis for divorce despite the community interest remaining that marriages should be maintained
- **Irretrievable breakdown** – A shift away from the requirement of proving intent in cruelty was seen in *Russell v Russell* where a 'danger to life, limb or health, bodily or mental, or a reasonable apprehension of it' was required to be proven

### **Developing an Australian Family Law:**

- s 51 gives the Commonwealth legislative power on 2 relevant topics:
  - (xxi) Marriage
  - (xxii) Divorce and matrimonial causes, and in relation thereto, parental rights and the custody and guardianship of infants
- Cth powers expanded by s 51(xxxix), which relates to matters incidental to the execution of any power vested by the Constitution

- Prior to 1954 the States had not referred their powers and thus retained the ability to control family law

#### Matrimonial Causes Act 1959:

- Act consolidated the laws of nullity and divorce of the States into one legal code which was applicable throughout Australia
  - Act aggregated all the various grounds of divorce... As a result there were 14 grounds of divorce

#### Family Law Act 1975:

- FLA created the Family Law Court to administer divorce and ancillary matters
  - Fault not needed as an enquiry into the cause of divorce was not proper
  - A single new ground of divorce was introduced – Irretrievable breakdown of marriage established by proving that the parties had ‘separated and thereafter lived separately and apart for a continuous period of not less than 12 months’

#### The creation of the Family Court of Australia:

- As the creation of a specialist family law jurisdiction no longer seemed such an unnecessary extravagance (due to growth in population and court workload), the FCA was established
  - The use of social workers, psychologists and marriage counsellors was seen to an increasing extent as indispensable, or at least desirable in the FCA
  - General requirement that the court shall proceed without undue formality, and that proceedings should not be protracted (s 97(3)).

#### **Glennon – Obligations Between adult Partners: Moving From to Function?**

- Employment law and family law interact
  - Taxation – Different tax law applicable to families
  - Divorce – Income will be pooled if the two parties separate

#### **Dewar – The Normal Chaos of Family Law:**

- Family life itself is chaotic, and thus the difficulty and emotion within Family Law is unsurprising → Chaos that encompasses family life lends itself to the law
  - Complexities and difficulties in the law cannot be avoided
- Individuals within family life are not always thinking rationally (often common after divorce) therefore the law is not simple
- Critique – The existence of a fluid, non-concrete, law arises the possibility of confusion, difficulty and irrationality

#### **Obergefell v Hodges 576 US (2015):**

- **Facts** – 14 same-sex couples filed suits claiming that respondent state officials violate the 14<sup>th</sup> amendment by denying them the right to marry

- **Held** – The 14<sup>th</sup> amendment requires a State to license a marriage between 2 people of the same sex
- The court thought that it was important to note the history of the subject:
  - (1) The history of marriage as a union between 2 persons of the opposite sex marks the beginning of these cases
  - (2) The history of marriage is one of both continuity and change
- **Justice Kennedy in discussing marriage** - 'Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspiration'
- **Decision** – The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clause of the 14<sup>th</sup> Amendment couple of the same-sex may not be deprived of that right and that liberty
  - States must also recognise same-sex marriages validly performed out of State

#### **Families in Australia:**

- 1990 – 6.9 registered marriages per 100 000 people
- 2010 – 5.4 registered marriages per 100 000 people. 121 000 in total
- 2010 – 53% of persons above 18 were in a registered marriage
- 2014 – 118 962 marriages took place, down 4 284 from 2013
- Divorce has increased over the past 3 decades
  - 2013 – 50 200 divorces granted (compared to 42 600 in 1990) → The crude divorce rate was however comparatively lower making the most accurate statistic 2.3 per 1000 compared to 2.5 in 1990
  - 2013 – The median duration from marriage to divorce is 12.1 years
  - 2013 – Median age at divorce for males is 44.8, females is 42.2
- De facto relationships have also arisen in popularity
  - 2010 – 11% (1.9 million) of Australian's aged 18 years and over were living in a de facto relationship
  - Most common amongst younger people → 22% of people aged 20-29 years compared to 9.4% of people aged 40-49
    - The proportionate rate of people aged 20-29 living in a de facto relationship has doubled since 1992
  - 2009/10 – Around 46 300 people living in a same sex couple
  - Cohabitation prior to marriage has increased over the past 20 years. In the early 1990s, 56% of marriages were preceded by cohabitation, in 2010 that number increased to 79%
- Birth rates over the past half-century:
  - 2010 – 14 children per 1000, 2013 – 13 children per 1000
  - The proportion of births occurring outside registered marriage has increased over the past two decades
    - 34% of all births in 2010, up from 22% of all births in 1990

- 2010 – Median age of unmarried mother was 27.3 (24.0 in 1990), median age of married mother was 31.0
- 2010 - Median age of unmarried father was 29.8, median age of married mother was 34.0 (increased 2.6 years for both married and unmarried fathers since 1990)
- Adoption rates have substantially declined since the 1970s
  - 1971/2 – 9798 adoptions, 1991/2 – 1052 adoptions, 2005 – 576
  - Possible reasons arise from the rise in reproductions technology to have children (eg: IVF, artificial insemination)
    - Laws have not changed, however a decline in the number of children available for adoption has been seen

## Class 2 – Constitutional Framework and Introduction to Marriage and De Facto Relationship

### **Constitutional Powers:**

- s 51 of the Constitution gives the parliament the 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
  - (xxxix) Incidental power to enable the making of legislation in matters incidental to the execution of any power vested in the parliament
- **Incentives to the Cth having Family Law powers** – Uniformity (may also be a disincentive if the Cth is unwilling to enact change)... Uniformity avoids having differential status in each state,
- McHugh J in *Re Wakim* optimistically raised the possibility that marriage may mean a voluntary union for life between two *people* to the exclusion of others
  - Is only constitutionally enshrined as to be between a man and a woman
- The use of associated jurisdiction brings many matters within the realms of s 51 → Is an objective 'associated with matters in which the jurisdiction of the Commonwealth is invoked' (expressly recognised in s 33 FLA)
  - Laws relating to marriage will embrace the establishment of the relationship and also the consequences of that relation... including the status of the married parties, their mutual rights and obligations, the legitimacy of children and their civil rights
- s 51 (xxii)'s reference to matrimonial causes was regarded as being concerned with matters 'subsidiary and consequential to marriage and divorce' including property maintenance of wives and children and marriage settlements
- The states largely controlled marriage and divorce for 60 years prior to the *Marriage Act 1961* and the *Matrimonial Causes Act 1959*
  - These acts suspended the laws of the states and formulated one uniform Commonwealth law on marriage and divorce

### **The Marriage Power:**

- Marriage = The union of one man and one woman for life to the exclusion of all others (*Hyde v Hyde*)

### ***The Marriage Act Case: Attorney-General (Vic) v The Commonwealth (1962) 107 CLR 529:***

- **Facts** – A constitutional challenge was brought from Victoria in regards to the validity of 4 sections of the *Marriage Act*
  - s 89 – Legitimation of ex-nuptial children by the subsequent marriage of the parents
  - s 90 - Legitimation of ex-nuptial children by the subsequent marriage of the parents, when the marriage took place outside Australia and the father was not domiciled/residing in Australia at the time



- s 91 – Putative marriage – The child of a void marriage is deemed legitimate if either party had reasonable grounds to believe the marriage was validly entered into
- s 94 – Prohibition on bigamy (marrying more than one person)
- **Issue** – What is the scope of ‘marriage’? How far could the Cth go?
- **Held (Taylor)** – Marriage has a primary and secondary aspect (2 realms unanimously accepted by the HCA)
  - **Primary** – The conditions and circumstances in which men and women might enter into matrimony, the method of doing so and the consequences of incapacities, impediments and informalities
    - Who might be married and how (personal rights and status)
  - **Secondary** – The consequences of the relation, including the status of the married parties, their mutual rights and obligations, the legitimacy of children and their civil rights
    - The respective rights, duties and obligations of the parties
    - **Menzies J** – It would be unrealistic for the power not to extend to the obligations/rights of the parties
- **Held (Kitto)** – Raised the question (but declined to answer) regarding the possibility of ‘marriage’ extending to enabling Parliament to legislate as to the effect of marriage on the property of the spouses, their contractual and tortious responsibility, and their rights of succession’
  - Law is with respect to marriage as the provision concerned the legitimisation of children → Was directly relevant to marriage itself
    - Children considered illegitimate *because* they were born outside of marriage... Status derives from the action of marriage therefore the law is within the realm of the principle
  - Traditional view is that there was reluctance to go as far as property disputes and child maintenance issues
- **Decision** – All the laws valid as part of the secondary aspect of the marriage power
  - Laws concerning marriage were within the ancillary power of the Cth

### **The Matrimonial Causes Power:**

- The denotation of ‘matrimonial causes’ will change according to changing conditions → The development of new concepts means that its meaning is ever-evolving
  - Cause = Any suit, action, matter, or other similar proceeding
  - Matrimonial Cause = Legal proceedings arising out of, or concerning, a matrimonial relationship
- **English Divorce and Matrimonial Cause Act 1857** – Included divorce, nullity, judicial separation, jactitation and restitution of conjugal rights
- **s 5 Matrimonial Causes Act 1959** – Matrimonial causes included
  - **(a)** proceedings for a decree of dissolution or nullity of marriage, judicial separation, jactitation and restitution of conjugal rights

- (b) proceedings for a declaration of the validity of a dissolution or annulment of a marriage
- (c) proceedings with respect to the maintenance of a party to proceedings, settlements, damages in respect of adultery... (SEE P.146 TEXT)
- (d) any other proceedings in relation to concurrent, pending or completed referred to in the preceding three paragraphs
  - Note: The maintenance of wives and children + the custody and guardianship of children was left out

**Lansell v Lansell (1964) 110 CLR 353:**

- **Facts** – Lansell’s had been married but had been granted a divorce under Victorian law. Application was made to settle the property which they owned
  - Cth legislation allowed the Court to by order require a party to a marriage to make, for the benefit of all or any of the parties to or the children of the marriage, such a **settlement of property** to which the parties are or either of them is entitled **as the Court thinks just and equitable**
- **Issue** – Whether the matrimonial cause’s power gave the Cth the power to order settlement of matrimonial property → Did the court have jurisdiction to make such an order?
- **Held** – The matrimonial causes power extended to such proceedings
  - Settlement within power as it involves dealing fully with the relationship which is the subject of the matrimonial cause
  - Power is incidental/consequential to marriage and thus within the realms of s 51 (xxii)
- **Held (Kitto)** – The power to make orders with respect to maintenance is inherently connected to the status of the married parties
  - Common sense conclusion to extend matrimonial powers to deal with property issues as the Cth has the power to deal with divorce
    - Connection between property and maintenance → Decision with respect to marriage maintenance is essentially a decision in regards to property (two are inseparable, overlapping issues)
- **Held**– Possible to include the settlement of property as incidental to the execution of the divorce and matrimonial causes power
- **Ratio** – The meaning of ‘matrimonial causes’ broadened to include the settlement of property which married couple owned

**Family Law Act 1975:**

- FLA (1975) set up the Family Court of Australia
- The law brought some significant changes to Family Law, including the definition of ‘matrimonial causes’ and ‘child or a marriage’
  - Matrimonial causes (as at 2015) –
  - ‘Child of a marriage’ (s 5 as at 2015) – (a) a child adopted since the marriage, (b) a child born before the marriage

- NOTE: *Russell* invalidated the expansion of the definition to a children of either the husband or wife that is ordinarily a member of the household

***Russell v Russell* (1976) 50 ALJR 594:**

- **Facts** – FLA gave the Cth an independent power to deal with property settlements and children to a marriage → Does not have to be associated with proceedings related to divorce
  - Expand power to regulation of adopted children, children prior to a marriage and any child who is regarded as an orderly member of the household (foster and step-children)
  - Act also challenged (successfully) on the basis that the Cth does not have the power to require a State court to be closed → No power to transform a State Court (but can prescribe matters of practice and procedure such as not wearing wigs or robes)
- **Issue** – Whether proceedings between the parties to a marriage with respect to the property of either or both were authorised by the power
  - Could the power deal with orders for maintenance, property and custody where such an application is unrelated to any divorce or nullity proceedings?
- **Held (Barwick J)** – Marriage does not extend to the creation of a jurisdiction to deal with the creation of a jurisdiction to entertain and determine proceedings for maintenance, custody and settlement of property. When considering if a law is within power, consider the two following questions:
  - (1) Who the parties to the dispute are?
    - If the parties to the dispute are married, they fall within the scope of the power
  - (2) What is the nature of the dispute?
    - Property issues (including the division of property) come under the definition of matrimonial causes
- **Held (Mason J)** – Power read down to allow for property orders as a matter of ancillary relief to divorce proceedings (law valid however read down)
- **Decision** – Marriage power encompassed both the creation of rights generally arising out of the marriage relationship and the enforcement of those rights
  - Provision relating to *any* property whatever of the parties was held to be invalid because it would have travelled beyond the marriage relationship
    - Law read down to be valid in relation to proceedings of children from married couples
- **LAW** – Where proceedings in relation to property arising out of the marriage relationship were instituted by the parties, the marriage power extends to enable those proceedings to continue after a party's death
  - Property settlement only within the marriage where it is directly relevant to the marriage!

### The effects of *Russell v Russell*:

- Following the reading down of the legislation in *Russell*, the *Family Law Amendment Act 1976* (Cth) narrowed the definition of matrimonial causes (later broadened)
  - Limited Cth power to children + property in relation to parties to a marriage
    - There could be no proceedings relating to property, maintenance, custody and injunctions that were not between the parties to a marriage, or related to such proceedings
- **LAW** - The narrow definition of 'matrimonial causes' was slightly expanded by the *Family Law Amendment Act 1983* (Cth) to include 'proceedings arising out of the marital relationship' → Allows children, others & property to be regulated by the Cth
  - Connection between children, custody and guardianship is sufficient enough to accept the conclusion that children are part of a marriage
    - Sufficient connection test was used by the court to uphold the constitutional validity of including children
  - Sufficient connection with the marriage relationship has been established for property rights

### *Marriage of Warby* (2001) 28 Fam LR 443

- **Facts** – A married couple purchased a house using the wife's father's money. During the marriage, the husband paid a substantial more in regards to the property and claimed that is would repay his debt to the father. The wife disagreed, saying that the money was simply mortgage repayments and had nothing to do with ownership
- **Held** – Court established a test to determine the jurisdiction of the Family Court
  - (1) What the parties have done → What is the dispute about?
  - (2) The types of their relationships
  - (3) The laws which attach rights or liabilities to their conduct and relationships
  - (4) Whether the claims are part of a single justiciable controversy and in determining that question whether the claims are 'attached' and not 'severable' or 'disparate'
  - (5) Whether the claims are non-severable from a matrimonial cause, and arise out of a common sub-stratum of facts
    - Does it arise from separation or a property dispute?
  - (6) Whether the court has the power to grant appropriate remedies in respect of the 'attached' claims
- **Decision** – Family Court is not restricted to the determination of Family matters → Has an accrued jurisdiction to determine controversies which Family law claims or causes falls apart of
  - Factual circumstances of the case will determine whether or not the court has jurisdiction
- **Ratio** - Jurisdiction of the court extends to anything that has a connection to a Family law claim (possible to extend to a 3<sup>rd</sup> party bringing a property dispute against a

married couple – Has something to do with family but is not what the court was designed for!)

### **The Limits of Federal Jurisdiction:**

- The limits of Commonwealth legislative power are principally marked out by the marriage and matrimonial causes power → Has been widened since 1983 to include ‘proceedings arising out of the marital relationship’
- Child welfare and adoption remains with the states
- States have referred their powers in regards to *de facto* relationships to the Federal Parliament so that they can fall under the bracket of family law

### **3<sup>rd</sup> Parties and the ‘Child of the Marriage’:**

- Proceedings between the parties to a marriage for the custody of a child of that marriage is a matter to be dealt with exclusively in the federal jurisdiction
  - Once that jurisdiction has been exercised, any further proceedings concerning the matter must remain in the same jurisdiction so long as those proceedings were between the parties to a marriage or one party and a 3<sup>rd</sup> party

### **Wardship and the Welfare Jurisdiction of the Family Court:**

- The court, under its *parens patriae* (parental jurisdiction) is to safeguard the welfare of those unable to look after themselves
  - Family Court has extremely broad powers under s 64 in relation to the welfare of a child (*Secretary, Department of Health and Community Services v JWB and SMB*)
  - The wardship power to allow medical treatment of minors is within the Commonwealth’s marriage power
    - Sufficient connection established as the protection is of children who arise directly out of the marriage relationship
- FLA confers a general welfare jurisdiction on the Family Court in regards to children of a marriage!
  - Must be a sufficient connection between a law dealing with the welfare of the children of a marriage and the marriage relationship (*P v P*)
- The purpose of the law must however be with respect to the welfare of the child (migration law not within realms in *Minister for Immigration & Multicultural & Indigenous Affairs and B (No 3)*)

### **Other proceedings between the Parties:**

- **s 119 FLA** – Either party to a marriage may bring proceedings in contract or tort against the other party

### **Overcoming the Limitations: First Steps:**

- The commonwealth retains plenary power over the territories and thus the state/federal dichotomy of power is avoided
- In the states, s 39 of the FLA invests the Supreme Courts of the States with the jurisdiction to hear and determine matrimonial causes

### **NEW Family Law Act – The meaning of matrimonial causes: → SEE WK 2 SLIDES**

a) proceedings between the parties to a marriage, or by the parties to a marriage, for:

- (i) a divorce order in relation to the marriage; or
- (ii) a decree of nullity of marriage; or

(b) proceedings for a declaration as to the validity of:

- (i) a marriage; or
- (ii) a divorce; or
- (iii) the annulment of a marriage; by decree or otherwise; or

(c) proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage; or

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

- (i) arising out of the marital relationship;
- (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or

### **Family Circuit Court Coverage:**

**Parenting** - orders regarding the child/children of a marriage or de facto relationship that has broken down.

• **Parentage declarations and testing** - order declaring that a person is a parent of a child/children or to assist in determining the parentage of a child/children.

• **Financial** - orders relating to the division of property or payment of maintenance following the breakdown of a marriage or eligible de facto relationship.

• **Divorce** - all applications for divorce, except orders relating to nullity and validity of marriage and divorce.

• **Child support** - certain applications and appeals.

• **Child maintenance** - an order for child maintenance in special circumstances.

• **Contravention** - application alleging a breach of a court order.

• **Injunctions** - application for an injunction in a current or pending matter.

• **Location and recovery** - order for information or the ability to publish information about a child/children's location or the return of a child/children to a party.

## **Family Court Dispute Resolution:**

### s 90AD – Extended meaning of matrimonial cause and property:

(1) A debt owed by a party to a marriage is to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause

(2) For the purposes of paragraph 114(1)(e) (an injunction in relation to the property of a party to the marriage), property includes a debt owed by a party to a marriage

### s 21 Federal Circuit Court of Australia Act 1999:

Six non-judicial methods of resolving disputes (primary dispute resolution processes)

- Counselling, Mediation, Arbitration, Neutral evaluation, Case appraisal, conciliation

### Part 3 (s 10-20) Federal Circuit Court of Australia Act 1999:

**Jurisdiction of the Federal Circuit Court** = Parenting, Financial, Divorce, Child support, child maintenance, parentage declarations and testing, contravention, injunction, location and recover

### Family Law Rules 2004:

Parties must undergo one of the following proceedings before bring a matter to the Family Court → Negotiation, conciliation, arbitration or counselling

- Must get certification that the parties have undergone proceedings to work out their issues before the Family Court will have jurisdiction (exceptions granted for child matters and domestic violence)

### s 43 Family Law Act – Guiding principle to be applied by Courts:

(1) The Family Court shall, in the exercise of its jurisdiction under this Act **have regard to:**

(a) the **need to preserve and protect the institution of marriage** as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

→ Parties are advised to work things out... Divorce order should be the last resort!

(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.

## Class 3 – Marriage and De Facto Relationship

### Quiz Comments:

- Week 5 – Simple problem question that will cover material from classes 1-4
  - 45 minutes open book (bring paper and pen)
- Parentage Component will be included

### Marriage:

#### **Essential Characteristics:**

- **Marriage Act 1961 s 5(1)** – Marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life (builds on *Hyde v Hyde*)
  - 4 concepts = Voluntary, for life, one man and one woman, to the exclusion of all others → Succinct definition not including in *Marriage Act* until 2004!
    - Australian definition also indicated that same-sex relationships will not be regarded as a marriage (approach confirmed in the invalidation of an ACT law in *Cth v ACT* [2013] HCA)
  - All of these characteristics must be satisfied at the time of the marriage (anything that happens afterwards is not retrospectively applicable)
- **Family Law Act 1975** – Courts are to have regard to the need to ‘preserve and protect the institution of marriage’

#### Monogamy/Polygamy:

- **Marriage Act 1961 s 23(1)(a) and s 23B(1)(a)** - A person entering a marriage cannot already be married → Cannot have more than 1 partner!
  - Can get matrimonial relief from overseas contracted polygamous marriages but *only* for the purposes of the Family Law Act (s 6)
- Aboriginal customary marriages may also be recognised to be marriages for any Commonwealth or state law purposes
- Policy reason behind restricting marriage to one woman and one man are based around the need to not undermine women

#### A man and a woman:

- **Marriage Act 1961 s88EA** – A same-sex union must not be recognised as a marriage in Australia
- The sex of an individual is to be determined at the time of marriage, not the time of birth → Is possible for a sex-change to marry (*Re Kevin; Validity of Marriage of Transsexual* (2001) 28 Fam LR 158)
  - Kevin was permitted to marry as although he was born a woman, his sex change led to recognition as a female
    - Court looked towards the appearance, perception and personal recognition of Kevin as a male in declaring him a male
  - Remains to be seen whether anything less than full surgical gender reassignment will be considered sufficient



- *Corbett v Corbett* (Eng. Case) – Transgender male underwent a number of surgeries to be classified as a female. She got married however left him shortly after
  - Male did not file for a divorce... Argued that the marriage never took place as it had no validity (was not between a man and a woman)
  - **Held** – Corbett underwent surgery and consequently looks and behaves as a woman but she cannot have children → As the couple was unable to have children, the marriage is void for not being between one man & one woman

#### A voluntary union:

- **Marriage Act 1961 s 23B** - A marriage entered into when the consent is not true is void

#### For life:

- At the point in time when the marriage is contracted, the parties' intention is that it should be for life → Cannot stipulated the term of a marriage (*Nachimson*)

#### **Engagements and breach of promise:**

- At common law, an engagement of agreement to marry constituted an enforceable contract, breach of which was subject to legal sanctions
- **Marriage Act 1961 s 111A** (inserted in 1976) – The right to damages where one party would call off the marriage was abolished
- **Marriage Act 1961 s 111A(2)** – May recover gifts (such as rings) if legal promise to marry is breached
  - Gifts can be considered as conditional on the marriage → Condition will have failed if marriage does not take place and thus gifts are to be returned

#### **Codifying Marriage:**

- Traditional marriage was based on mutual consent between the parties and the subsequent physical union of the parties... No religious or other ceremony required
  - Marriage became a public matter in the 1850s with the requirement of a ceremony + 2 witnesses becoming necessary in 1563 church weddings
- 1753 Clandestine Marriage Act introduced a legal requirement that marriage had to be celebrated before an ordained priest, in the presence of 2 witnesses and with confirmation via either publication or the obtaining of a license
- State enacted marriages are not recognised as valid marriages → No duality principle in Australia (state marriages not valid)

#### Marriage Act 1961:

- Under the Marriage Act, to contract a valid marriage both parties must have *capacity* and must *consent* to the union and the essential *formalities* must be complied with
  - Failure to satisfy any of these 3 grounds will result in the marriage being void (*Marriage Act 1961 s 23 and 23B*)

- **Marriage Act 1961 s 23** – A marriage is **void** where:
  - (a) either of the parties was, at the time of marriage, **lawfully married** to some other person
  - (b) the parties are **within a prohibited relationship**
  - (c) the marriage was **not created by a valid ceremony**
  - (d) the consent of either of the parties was not a real consent because:
    - (i) it was obtained by **duress or fraud**
    - (ii) the party was **mistaken as to the identity** of the other party or as to the **nature of the ceremony** performed
    - (iii) that party was **mentally incapable of understanding** the nature and effect of **the marriage ceremony**
  - (e) either of the parties was **not of marriageable age**
- Voidable marriage – Does not require the court's decision as it is not regarded as a valid marriage (no legal marriage therefore no need to render it void)
  - NOTE: Concept of voidable marriage was removed in the *Marriage Act 1961*

#### **Capacity to marry:**

- Capacity must exist in 3 respects → Must be free to marry, must not stand within a prohibited degrees of a relationship and must be of marriageable age

#### Freedom to Marry:

- A person is free to marry if he or she is not already married → Subsequent marriage is void if one party is married
  - Any prior marriage must be terminated by divorce or death
- **Marriage Act 1961 s 42(1)(b)(i)** – A marriage celebrant must be satisfied that a person to be married is free to do so
- A person going through a ceremony where they are already married may be guilty of bigamy

#### Prohibited Relationships:

- **Marriage Act 1961 s 23(2) and 23B(2)** – Marriage of parties within a prohibited relationship are marriages as follows:
  - (a) between a person and an ancestor or descendant of the person (mother, grandfather/ father, grandfather)
  - (b) between a brother and a sister (whether whole blood or half-blood)
    - Includes a relationship traced through, or to, a person who is or was an adopted child
- Blood relations may marry one another, unless they are in a direct ascent-descent relationship or brother and sister... An uncle is permitted to marry his niece!
  - Endogamy relationships – Marriages within the family are void
  - Exogamy relationships – Marriages within the family are not void

### Marriage Ceremony:

- The marriage ceremony must be valid for the marriage to be valid:
  - Should be conducted by a legally valid marriage celebrant
  - Should be witnessed by 2 people
- The parties to a marriage must be aware of what they are doing for the marriage to be valid... Unwillingness to marry is a ground to void a marriage

### Marriageable Age:

- Historically, the marriageable age was initially 7, increased to the age of puberty but has since increased to 18 (16 with judge's consent)
  - 1961 - Act introduced the legal age of 18 for males and 16 for females → Age difference founded on the social principle that the male is to look after and care for the female
  - 1991 – Provision was amended in order to avoid sex discrimination... New age was set at **18 for boys and girls** alike (exception for 16 year old who demonstrates special circumstances before the judge)
- **Marriage Act 1961 s 11** – Marriageable age = 18
- **Marriage Act 1961 s 12** – A person who has attained the age of 16 but has not attained the age of 18 may apply to a judge or magistrate for an order authorising him or her to marry a particular person of marriageable age
  - **s 12(4)(b)** – Circumstances of the case must be so exceptional and unusual as to justify the making of the order
    - Must be very exceptional or extremely exceptional (*Re an application by P and P*)
    - Impregnation is not regarded as a special circumstance
    - Ethnic practices/customs may be sufficient to persuade a judge (*Re D*)
    - Purpose of the restriction = Marriages are to be reserved for those who are emotionally of sufficient maturity to undertake the responsibilities of marriage
  - Marriages involving a person whom is not of the marriageable age (and where no judicial order has been made) are void

### Consent:

- Consent only needs to be from one party
- Consent needs to be specific → Must be to certain person at a certain point in time
  - Consent is examined on the day of the ceremony
- Duress (such as violence or serious pressure) vitiates consent
  - Duress becomes enough to void consent where one party was under an immediate threat at the time of the ceremony
- If one party is mistaken to a fact from their partner that cannot be verified, the marriage is void (not void if fact can be verified)
- Only mentally capable people can consent → Not possible to consent if cannot understand the effect of a marriage ceremony

- Mental capability requires a person to comprehend what they are doing + they can comprehend the gravity of the marriage ceremony (and the future consequences/responsibilities of being married) (*A.K v N.C* [2004])

#### Marriage for life:

- Parties cannot marry if there is no intention for the union to last for life (eg: Purpose is to fraud immigration department)
  - If there is no lifelong intention, the court renders the marriage void and it is treated as if it never occurred
    - Judicial declaration of the void nature of the marriage conclusively declares the status of the parties

#### ***In the Marriage of S* [1980] 42 FLR 94:**

- **Facts** – S was a 15 year old female who has an arranged female with an Egyptian male. Pressure was placed on the female, however the marriage broke down after 4 days. An attempt was made to make the marriage void
- **Held** – Duress does not require violence, or the threat of physical violence
  - The pressure exerted to maintain family loyalty and cultural events was satisfactory to evidence duress → Mental duress may void consent!

#### ***Modley v Modley* [2011] FMCAfam 1007:**

- **Facts** – Arranged marriage between a female and male occurred in Lebanon. Female returned to Australia and attempted to render the marriage void
- **Held** – The lack of consent to the marriage was obvious... She was forced into the marriage and had no other choice but to agree → Duress vitiated consent!
  - Illuminates how the court's attitude has relaxed over time... Physical violence is no longer necessary!
    - Family pressure to enter arranged relationships can be concluded as constituting duress

#### ***Marriage of Otway***

- **Held** - If both parties conspire to marry for the purpose of obtaining a visa, there is no fraud/conspiracy
  - Not a ground for declaring the marriage void as the two partners are engaged in a conspiracy between them against 3<sup>rd</sup> parties
    - Both knew what they were getting into any why, both were consenting with an improper motive

#### ***Khawaja v Sinha* [2011] Fam Ca 615:**

- **Held** - Not withholding the fact that a person has HIV Aids does not void a marriage → Parties cannot apply for a marriage to be void if the other party fails to reveal the fact that they have marriage

### Consent to the marriage of minors:

- In addition to judicial permission, written consent is required in order for a person under 18 to marry → Minor's parents are to consent (except where not living together... Usually the parent who the child lives with is to consent)
  - Failure to obtain consent does not render the marriage void however it is an offence punishable by a \$500 fine or 6 months imprisonment
- Judge can substitute parental consent but only where a refusal is unreasonable

### **Formalities**

- Failing to comply with formalities does not automatically invalidate a marriage

### Marriages in Australia by authorised celebrants:

- **Marriage Act 1961 s 41** – A marriage must be solemnised by or in the presence of an authorised celebrant
  - Authorised celebrants = Registered minister of religion, persons authorised to solemnise marriages or an appointed registrar (see p. 230 for specifics)
  - Celebrants mere presence, rather than any active participation, is sufficient (*W v T*)
- Must consent to the marriage ceremony → Cannot get married by mistake/accident
  - Most of the issues arise when religious ceremonies are conducted in a foreign marriage + situations of arranged marriage)
- The matter of solemnisation is laid down in s 41-46 of the Act
  - (1) Written notice of intention to marry must be given to the authorised celebrant at least one month before the date of the marriage
  - (2) Official birth certificate must be produced
  - (3) Each person must certify his or her conjugal status, and his or her belief that there is no impediment to the marriage. Must also provide evidence of death or divorce of any former spouse
  - (4) A marriage may be solemnised on any day, at any time, in any place
  - (5) There must be at least 2 witnesses to the marriage over the age of 18
  - (6) A civil (but not religious) celebrant is required to explain to the parties the legal nature of the Act (eg: marriage is between a man and a women...)
  - (7) After the ceremony, a marriage certificate must be prepared, and must be signed by the parties, the celebrant and the witnesses

### Consular marriages in Australia:

- Marriage Act permits marriages of foreign nationals within Australia by appropriate consular officials
  - Parties must not be within the prohibited degrees, must not be already married and must be of marriageable age

### Australian Marriages overseas:

- Australian embassy and consular official cannot marry Australian citizens overseas
  - Defence force exceptions are existent

### **Recognition of Foreign Marriages:**

- Primary importance is given to the law of the overseas country when validating overseas marriages
  - General principle is that validly contracted marriages should be recognised in other jurisdictions (**Marriage Act 1961 s 88C, 88D**)
    - Must not be within the prohibited degrees according to Aust. law + there must be real consent (**Marriage Act 1961 s 88D(2)**)
  - Valid in place of ceremony generally equates to valid in Australia
    - Must submit to the local forms of marriage → Only exception is where this is impossible (*Marriage of X*)
- **Marriage Act 1961 s 88E** – A marriage will be recognised as valid in Australia if it would be recognised as valid according to common law rules (formalities satisfied in the place of celebration and the parties have the capacity under foreign laws)

### No recognition of 'foreign' same-sex marriages:

- **Marriage Act 1961 s88EA** – A same-sex union solemnised in a foreign country must not be recognised as a marriage in Australia

### **Presumed validity of marriage:**

- One does not always need conclusive proof of a marriage for a court to find that one exists as there are a number of presumptions that the court is willing to make:
  - (1) Cohabitation for a long time, where the reputation is acquired and accepted as married allows for a presumption of marriage
  - (2) Evidence that parties went through a marriage ceremony is presumed to have resulted in a valid marriage
- There is a presumption in favour of marriage → Those denying the marriage have the burden of establishing evidence of no marriage (on the balance of probabilities)

### **Second Marriage Ceremonies:**

- **Marriage Act 1961 s 113** – Generally unlawful for a person who is already lawfully married to go through a further form of marriage with their own spouse (2<sup>nd</sup> marriage is rendered invalid)
  - **Marriage Act 1961 s 99(6)** – Offence for a celebrant to solemnise this
- Exceptions = (1) Can go through a religious ceremony where previously married by a civil ceremony, (2) Where there is doubt as to the legal efficacy of the form of ceremony of marriage

### **Legitimation:**

- **Marriage Act 1961 s 89(1)** – The child of a marriage is not dependent on birth occurring whilst the parties are in wedlock

### De Facto Relationships:

- Property rights are the same for a de facto relationship as they are for a married relationship → Economic consequences of break-up do not depend on the parties expectations at the start of the relationship
  - Function of the law is the same for all couples
- Except for the formalities and registration of a marriage, there is often no difference between the nature and quality of a de fact relationship and a marriage
  - This fact has not stopped discrimination allegations by same-sex couples

### De Facto Relationships and the FLA:

- 2009 Amendment Act introduced the 'de fact financial clause' to bring de facto's within the family law jurisdiction
  - Financial consequences of relationship breakdown are now the same as married couples
- **Family Law Act s 90SE, 90SG** – A person seeking a property order must satisfy the court that they are in a de facto relationship
  - **Family Law Act s 60H** – Proof of a de facto relationship needed for parentage classification of a child born as a result of an artificial conception procedure

### The FLA Definition:

s 4AA(1) of the FLA states:

- (1) A person is in a **de facto relationship** with another person if:
- (a) the persons are **not legally married** to each other; and
  - (b) the persons are **not related by family** (see subsection (6)); and
  - (c) having regard to all the circumstances of their relationship, they have a relationship as a **couple living together on a genuine domestic basis**.

s 4AA(2) of the FLA states:

Those circumstances may include any or all of the following:

- (a) the **duration** of the relationship;
- (b) the **nature and extent** of their common **residence**;
- (c) whether a **sexual relationship** exists;
- (d) the **degree of financial dependence or interdependence**, and any arrangements for financial support, between them; (subjective assessment)
- (e) the ownership, use and acquisition of their **property**;
- (f) the degree of **mutual commitment to a shared life**;
- (g) whether the relationship is or was **registered** under a prescribed law of a State or Territory as a prescribed kind of relationship;
- (h) the **care and support of children**;
- (i) the **reputation and public aspects** of the relationship.

s 4AA further provides:

- (3) No **particular finding in relation to any circumstance is to be regarded as necessary** in deciding whether the persons have a de facto relationship.

(4) A court determining whether a de facto relationship exists is **entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate** to the court in the circumstances of the case.

(5) For the purposes of this Act:

- (a) a de facto relationship **can exist between 2 persons of different sexes** and between 2 persons of the same sex; and
- (b) a de facto relationship **can exist even if one of the persons is legally married to someone else or in another de facto relationship.**

The nature of the s 4AA inquiry:

- The court does not exercise a discretionary power, but it is required to consider a multitude of circumstances in order to make a full factual determination
  - The question of whether a de facto relationship exists is a determination of fact to be determined on a case-by-case basis (*Jonah v White*)
- s 4AA(2) list is not exhaustive... No certain factor is considered determinative either

A couple living together on a genuine domestic basis:

- Recognition of living together on a genuine domestic basis is dependent on circumstantial evidence
  - Presenting selves as family was determinate in *PY and CY*
- ‘Genuine domestic basis’ must be given its ordinary meaning (*Moby v Schulter*)
- ‘Living together’ is not to be taken in isolation and read to require that de facto couples always live together (*Moby*)
- Mutual commitment to a shared life is not regarded as essential
- A coupledness/merger of two lives was required as necessary to prove a de facto relationship in *Jonah v White*
  - Often difficult to determine when the parties have crossed the invisible line and can be regarded as living together on a genuine domestic basis
    - Look to the circumstances of the case and compare to s 4AA!
- Court does not consider the subjective intentions of the parties in considering the status of a relationship

<b>Married Relationship</b>	<b>De Facto Relationship</b>
- Must satisfy legal formalities + get a certificate after marriage ceremony	- No formalities to be satisfied, no certification required
- Can only be between a man and a woman	- Can be between same sex couples
- Must be a degree of mutual commitment to a shared life	- No commitment to a shared life required
- Criminal offence to be party to 2 marriages simultaneously	- A person can be in 2 relationships or more at one time