

Changes In Family Law

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Introduction

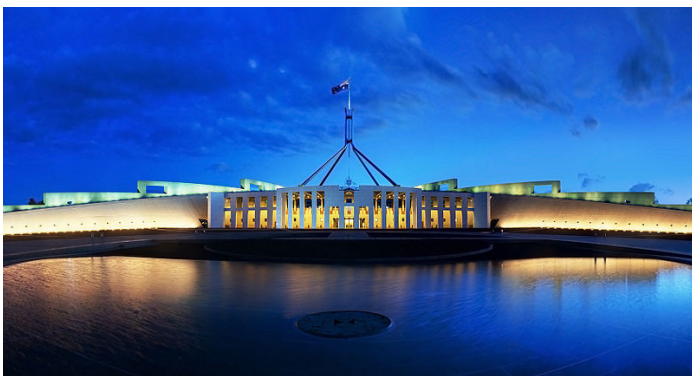
Family law in Australia is an evolving, organic body of law. It covers a wide variety of matters ranging from the division of property between separated couples to parenting arrangements for children. It also includes discrete issues such as adoption, marriage and IVF. Because Australia has a common law system, like the United Kingdom and New Zealand (compared with the civil law system in Europe), family law includes laws under state legislation and federal legislation, as well as a substantial and growing body of case law and precedent.¹ Family law also often intersects with other areas of law such as bankruptcy, probate, partnerships, trusts and even criminal law. That means that a good family lawyer has to keep abreast of developments in many different areas of legal theory and practice.

The principal act in family law is the *Family Law Act 1975 (Cth)*.² It is a federal statute that applies all around Australia. It regulates most but not all issues in family law. It forms the basis for much of the discussion in this article and will be referred to as the FLA. In order to understand the background to the enactment of the FLA in 1975, we have to refer to constitutional law and the Australian Constitution.

The Australian Constitution

At federation in 1901, the six British colonies became six Australian states and formed the Commonwealth of Australia under the *Commonwealth of Australia Constitution Act 1900 (UK)*.³ The Constitution contains 128 sections. Section 51 sets out forty legislative powers of the parliament. Neither the Commonwealth nor the states have exclusive powers under the Constitution 'covering the field' i.e. covering the entire field of family law. Rather, some family law powers remained with the states at federation and remain separate state law; some family law powers were conferred on the Commonwealth and are incorporated in federal law. Other powers have been referred by the states to the Commonwealth to form part of federal law.

Figure 1: Parliament House of Australia



The power to make laws in family matters was conferred upon the Commonwealth Parliament by section 51(xxii) (called the 'marriage power') and section 51(xxiii) (called the 'divorce and matrimonial causes power') of the Constitution. In addition, section 51 (xxxvii) allows states to refer powers to the

Commonwealth. The most significant exercise of this 'reference of powers' occurred in the 1980s when all states except Western Australia referred their powers over *ex nuptial* children (i.e. children born out of marriage) to the Commonwealth. That is why the FLA covers all children, irrespective of the marital status of their parents at conception or at birth.⁴

STUDENT ACTIVITIES

1. Why can the Commonwealth Parliament make laws relating to family law?
2. Explain the division of power between the states and the Commonwealth under the Constitution.
3. Give an example of an area of law that is shared between the states and the Commonwealth and an area of law that is exclusive to the Commonwealth.
4. Why do you think the states have referred their power to make laws in relation to ex-nuptial children to the Commonwealth?

History Of The Family Law Act 1975 (Cth)

From 1901 for virtually the next 60 years, the Commonwealth Parliament only passed a few statutes about family law and so we had eight different family law systems in operation until the *Matrimonial Causes Act 1959 (Cth)* and the *Marriage Act 1961 (Cth)* were enacted. Both came into operation in 1961. These two acts consolidated the laws regulating marriage, divorce (with a total of 14 different grounds for divorce), nullity, children's arrangements, maintenance and property settlement into two federal statutes.

The Marriage Act continues in operation. This act regulates marriage i.e. a marriage can only occur between a man and a woman who are both over 18 years; who are not married to somebody else; who are not in a prohibited relationship with one another, who give free consent and voluntarily participate in a ceremony officiated by an authorised celebrant.

Increasingly, people are getting married later in life. According to the latest Australian Bureau of Statistics (ABS) figures, the median marrying age for men is 31.6 years and the median marrying age for women is 29.3 years.⁵

STUDENT ACTIVITIES

5. Explain the purpose of the *Matrimonial Causes Act* and the *Marriage Act*.
6. Investigate the median marrying age in the 1970s. Why do you think it has changed?

The Family Law Act 1975

This act was passed in 1975 and came into effect in January 1976. It wholly repealed the *Matrimonial Causes Act* and remains the principal act in our family law system. The act was revolutionary in several ways. First, it established a specialist court called the Family Court of Australia with specialist judges

and an infrastructure dedicated solely to administering the *Family Law Act*. Second, it introduced ‘no fault’ divorce. Third, it established a counselling and alternative dispute resolution section within the Court itself. Fourth, it set out principal rights, duties, obligations and entitlements that apply to families even **without** the breakdown of the family unit. Fifth, it regulates rights and obligations **after** the breakdown of a marriage or relationship in relation to children, financial support and property. Sixth, it introduced formal equality of the sexes so that the entire act is couched in gender-neutral terms. Finally, the act set up new national institutions for on-going research, reviews and advice on reforms of the act.

Figure 2: Family Court of Australia, Sydney



Three courts have jurisdiction under the FLA. These are the Family Court of Australia⁶ which deals with complex cases; the Federal Magistrates Court⁷ which deals with most family law cases and the state Magistrates’ Court in limited cases.

The notion of the typical nuclear family has changed a lot in the past few decades. The FLA covers all sorts of relationships and families including married couples; *de facto* couples (also called ‘domestic partners’); same-sex couples (who can register their union in some states like Victoria); girlfriend/boyfriend relationships; single parents and grandparents. When a relationship breaks down, the parties may want a divorce (if they were married). They may also want to resolve children’s matters and their financial relationship. None of these are dependent on the other and each form of relief can be sought independently. Of course, lawyers and litigation can be time-consuming and

expensive both in terms of money and resources and in terms of emotional cost. In some cases, legal aid is available.

STUDENT ACTIVITIES

7. How do you think the *Family Law Act* has provided a family law system that benefits people with family problems?
8. Which types of people are able to take their dispute to the Family Court? Explain.

Divorce

The most common way of dissolving a marriage is divorce. This is sometimes also called a dissolution of marriage. Australia has the third highest divorce rate in the world with an over 40 per cent divorce rate. There is only one ground for divorce and that is ‘irretrievable breakdown of marriage’.⁸ Fault is not relevant. Parties must have been separated for a continuous period of at least 12 months before applying for a divorce.⁹ There must also be no chance of reconciliation.¹⁰ The FLA defines separation to include separation under the one roof¹¹ and there are numerous cases about what constitutes separation.

Nullity

There is another way of dissolving a marriage. A marriage can be annulled by way of an order of nullity. The Family Court can grant a nullity (otherwise known as an annulment of marriage) under the FLA¹² upon one of the grounds set out in the *Marriage Act*.¹³ For example, if one of the spouses is still married to another person at the time of the marriage concerned, then that person is guilty of bigamy, which is an offence (attracting a possible jail sentence) and the innocent party could obtain a nullity. If a marriage is annulled, it is void *ab initio* that is void from the start as if the marriage never took place so both parties could say that they had not been married to one another. An order for a nullity is rare because there are prescribed grounds such as bigamy, fraud or duress. A claim that you entered into a marriage of convenience (that is you married someone to help that person obtain permanent residency or Australian citizenship) or that your marriage was not consummated (that is not having sex with your spouse) do not constitute grounds for annulment.

STUDENT ACTIVITIES

9. Explain what grounds are required in order to obtain a divorce. How are you able to prove that this has occurred?
10. How relevant is it when seeking a divorce that one spouse has been unfaithful? Explain.
11. Explain one example when it would be possible to annul a marriage and one example when it would not be possible to annul a marriage.

Children

The FLA covers all children under the age of 18 years irrespective of the marital status of their parents at the time of conception or at the time of birth.¹⁴ The only children not covered are those children under the care of a child welfare authority such as the Department of Human Services (DHS) in Victoria.¹⁵ These children are children who are under the

protection of the DHS and placed under supervision with family members or in foster care.

Upon a relationship breaking down, parties can reach agreement about the care of their children or they can apply to a court to decide. The vast majority of disputes about children are resolved by agreement. If not resolved, a court of competent jurisdiction can make parenting orders such as who has parental responsibility; where a child should live and with whom; what time a child spends with each parent and other family members; the frequency and any conditions of such contact and other matters relevant to a child's welfare. The paramount consideration for making a parenting order is the 'best interests of the child'¹⁶ and the FLA sets out two primary and 13 additional mandatory considerations to determine the best interests of the child.¹⁷ This can include hearing about the children's views or wishes.¹⁸ There is a lot of case law about children's matters but each case is determined on its facts and individual merits. Of course, children's cases are often the most emotional for the parties involved and the most difficult for a court to determine.

Before applying to court to determine children's matters, it is compulsory for the parties to attend some form of counselling or mediation.¹⁹ This is designed to assist the parents to reach an amicable decision between themselves rather than resorting to often lengthy and expensive legal proceedings. Taking a matter to court is a last resort.

Family Violence And Child Abuse

Family violence or domestic violence involving adults and/or children is relevant in deciding on the future of children in family matters and can also be of limited relevance in property proceedings.

Children can be the direct or primary victims of abuse by their parents or other family members. Such abuse can be emotional/psychological, physical or sexual abuse or can be in the form of neglect. Children can also be secondary or indirect victims witnessing or being exposed to violence in their family settings. In either case, there is indisputable social science literature that family violence can have long term and sometimes irreparable damage on all aspects of a child's future development. The FLA has numerous provisions promoting and ensuring the protection and safety of children when making orders.²⁰

As for family violence between adults, the FLA has limited provisions. This is more the domain of each state and territory. There are therefore eight different systems operating around Australia. In Victoria, the *Family Violence Protection Act 2008 (Vic)* provides for protective orders called 'family violence intervention orders'. The definition of family violence is very wide and includes physical, psychological, sexual, economic abuse and other forms of coercive and threatening behaviour.²¹ These can only be sought in state Magistrates' Courts. There are also special police powers under this act. Police play a vital part in protecting victims/survivors of family violence (mostly women and children) and in prosecuting perpetrators (mostly men).

Child Support

It is the obligation of all parents to financially support their children until the age of 18 years. Sometimes this financial

support can continue through tertiary education. Child support is regulated not by the FLA but by the Child Support Scheme under separate legislation including the *Child Support (Assessment) Act 1989 (Cth)*. This act establishes the Child Support Agency which assesses, administers and collects child support payable according to a fairly complicated formula. There is a lot of case law about child support and legal questions are determined either by the SSAT (Social Security Appeals Tribunal), which is a federal Tribunal, the Family Court or the Federal Magistrates Court.

Spousal Maintenance

Unlike child support, it is not a legal obligation for one spouse to financially support the other. It is an entitlement under the FLA. That means that a spouse can apply for spousal maintenance. Since changes in 2009, 'spouse' not only includes married parties but also *de facto* (cohabiting) couples and same-sex couples. There is a two limbed test. First, the applicant spouse has to show the 'need' for financial support and then the applicant must show that the other spouse has the 'capacity' to pay.²² There is no formula or specific agency as there is with child support. For obvious reasons, child support takes priority over spousal maintenance.

Property Settlement

Upon a relationship breaking down, parties can divide property between themselves by way of agreement or by having a court decide. The vast majority of cases resolve by agreement. If not resolved, parties can seek court orders about the distribution of property. The FLA prescribes the relevant considerations.²³ Property includes not only real property but also personal property, businesses and investments, savings, superannuation, vehicles and furniture. There are often complicating factors in property disputes and there is a lot of case law in this area. There are unusual cases involving Tattsлото wins, inheritances, gifts, compensation awards and complex trust structures.

STUDENT ACTIVITIES

12. Can matters relating to all children be taken to the Family Court? Explain.
13. How are most cases relating to children decided?
14. What must occur before taking a matter to court to decide a family matter relating to children.
15. Explain how family violence issues can be relevant in deciding what is in the best interests of the child.
16. Which agency is responsible for regulating child support? If you were claiming child support, which court or tribunal could you take the matter to?
17. If you were a man who had a one-night stand, and unbeknown to you, this resulted in the birth of a child, would you be responsible for the financial support of that child? Do you agree with this? Discuss.
18. Explain how a person might be entitled to spousal maintenance.

Conclusion

Family law cases often involve many of the above areas of dispute. It can be an emotionally taxing area of law but also an exciting one which has to keep abreast of societal mores

and community attitudes. Family law should also ideally educate the community about the dynamics of ever-changing family constellations and the various challenges facing modern Australian families.

STUDENT ACTIVITIES

19. Investigation

Investigate the *Family Law Act* on the internet. Look up <www.comlaw.gov.au> and under browse find and open up the act.

- Explain five issues covered under the *Family Law Act*.
- Under the definitions find and explain the meaning of family matters.
- Briefly explain the jurisdiction of the Family Court.
- Explain how a court determines the best interests of a child (see S68E of the FLA).

20 You have been approached by a friend who has two children.

The friend is having marital problems and would like your advice. Write a brief report about what he or she could expect if the parties decide to divorce and what the parties would need to do to resolve disputes.

Notes

- Such case law and precedent is called *res judicata*.
- The *Family Law Act 1975* can be found at www.austlii.edu.au
- See *The Australian Constitution (Annotated)*, 2000, Constitutional Centenary Foundation, Melbourne

- For a detailed explanation of Commonwealth and State powers in family law, see Dickey, Anthony, 2007, 5th ed, *Family Law* (chapter 2), Thomson Law Book Co, Sydney
- See Australian Bureau of Statistics, Melbourne, *Marriages and Divorces and Australian Social Trends* published regularly. See www.abs.gov.au
- The Family Court website has a lot of useful information about the court and the FLA including important cases. See www.familycourt.gov.au
- The Federal Magistrates Court website also has a lot of useful information including forms, fees, procedures and case law. See www.fmc.gov.au
- Section 48(1) FLA
- Section 48(2) FLA
- Section 48(3) FLA
- Section 49 FLA
- Section 51 FLA
- Sections 23 and 23B of the *Marriage Act 1961 (Cth)*
- Part VII of the FLA deals with children's matters.
- Section 69ZK FLA
- Section 65E FLA
- Section 60CC FLA
- In some cases a court can appoint an Independent Children's Lawyer to convey the child's wishes, if any.
- Parts II and III of the FLA deal with counselling and mediation.
- On child abuse generally, see Brown, Thea and Alexander, Renata, 2007, *Child Abuse and Family Law*, Allen and Unwin, Sydney
- See sections 5 to 7 of the *Family Violence Protection Act 2008*. The Act can be viewed on <www.austlii.edu.au> or <www.justice.vic.gov.au>
- See sections 72 and 75 of the FLA.
- Part VIII of the FLA deals with property matters.

Legal Update

By **Beth Wilson**

Health Services Commissioner

Gasbag Lawyers Out Of Puff

The law can be very expensive with access to it prohibitive for many ordinary people. In a bid to reduce the costs of litigation Victoria's Attorney-General Rob Hulls has announced the introduction of a bill providing for compulsory pre-trial conferences and to place time limits on how long lawyers can argue their cases for. The Attorney-General hopes the pre-trial conferences will reduce the number of cases that get to court and, of those that do proceed to court, lawyers who 'love the sound of their own voices' will be curtailed. He said, 'For too long, well-resourced litigants have been able to use their financial power to play tactical games ... until the other party is forced into an unfair settlement or withdraws.' The Law Institute of Victoria has accused the Attorney-General of unfounded criticism of lawyers.

Gene Patenting

Law firm Maurice Blackburn has filed a challenge to gene patenting in the Federal Court. In what will be a landmark case the Australian issue of a patents on genes for breast and ovarian cancer will be challenged. Many medical researchers have called for the cessation of patenting of genes, of which there are about 16,000 worldwide covering many human illnesses. The patenting of genes for ovarian and breast

cancer has been successfully challenged in New York and an Australian Senate Inquiry is investigating the impact of gene patents (*The Age* 8/6/2010).

Health Reforms

Some major reforms in health practitioner regulations have now been realised. The *Health Practitioner Regulation National Law Act 2009* came into force on 1 July 2010. For the first time ten categories of health practitioners have been registered under a national scheme replacing the state and territory schemes. The Australian Health Practitioner Regulation Agency is now responsible for registration, accreditation and setting of standards for doctors, nurses and midwives, dentists, chiropractors, optometrists, physiotherapists, podiatrists, osteopaths, pharmacists and psychologists. The primary objective of registration and accreditation is the protection of the public.

The Healthcare Identifiers Bill was passed by the Commonwealth Parliament on 27 June 2010. This allows Medicare to start issuing a unique 16 digit healthcare identifier to every Australian. Doctors, hospitals other healthcare organisations and allied health providers will also be issued with identifiers in a bid to increase efficiency and safety of health service provision.

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