Family law

Concept of family law

The family is the basic unit of society. Comprises a group of people related by birth or marriage. Article 16 of the UDHR says “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state”.

Family originally had the function of reproducing itself by the birth of children through marriage.

The role of the family has changed in modern societies with the roles of men and women now different.
- The blended family: two or more adults who share a household
- Same-sex family
- Single-parent family: one adult in the household
- De facto family: couple have not been married under law
- Nuclear family: ‘traditional family’

The description of the term ‘marriage’ used in the Family Law Act 1975 and the Marriage Act 1961 is based on the definition in the 19th century case of Hyde v Hyde and Woodmansee: “the voluntary union for life of one man and one woman, to the exclusion of all others”

Legal requirements of marriage

Marriage Act 1961 (Cth) sets out requirements of valid marriage:
- Notice of intended marriage must be lodged no less than one calendar month and not earlier than eighteen months
- Must be voluntarily entered into
- Must be of marriageable age (18)
- Must not be related

At the interview with the celebrant the couple will be required to produce:
- ID
- Birth certificate or birth certificate and passport
- If one partner is less than 18, parental consent and a magistrate or judge’s order is required before they can marry

If the marriage is found to be invalid the court can nullify the marriage annulment means that the marriage is deemed to have never taken place as it was illegal.

- There is an expectation the couple will love and support each other
- Only when that relationship experiences difficulties or breaks down does the law have a role to play
- **Consortium vitae**: the association as expecting mutual services and sexual intercourse. Meaning it was possible to have sex with your spouse without consent. This was overturned by the Crimes (Sexual Assault) Amendment Act 1981 NSW - meaning marriage is no longer a defence to sexual assault

*Hyde v Hyde established the common law definition of marriage: “the union of one man and one woman, to the exclusion of all others”*

**Maintenance**

Maintenance is an amount of money paid by a person to support his or her wife or husband or former wife or husband.

- The Family Law Act provides that a person’s responsibility to financially assist his or her spouse continues after divorce. This is known as spousal maintenance
- Child maintenance: under Family Law Act
- Property: at the end of the marriage it will be necessary to divide any property between the husband and wife. The court will determine the amount each party receives if they cannot agree.

**Death and wills**

If a spouse dies intestate (without a will) then the surviving spouse and any children will receive the property.

A marriage revokes any will in existence before the marriage unless it is made in contemplation of the marriage. A divorce now revokes any benefits to a former spouse that are contained in a will.

- Agency: when another person acts on behalf of another (eg power of attorney)

**Alternative family relationships**

1. Aboriginal and torres strait islander marriages
2. Single parent families (23% of community)
3. Blended families (11%)
4. Same sex relationships
5. Polygamous relationships (only under immigration)
6. De-facto

**Legal rights and obligations of parents and children**

- In the 1800s children whose parents had died or were unable to care for them were left to fend for themselves. Slowly a more progressive view prevailed.
- Legislation was introduced to remove children from families and place them in care when their own family failed to protect them.

Even in the 21st century however the rights of children are still being compromised.
Some of the issues regarding children in Australia are:
- The administration of corporal punishment
- The rights of parents to control information

International law

In an effort to improve the recognition of the rights of children, The United Nations Convention on the Rights of the Child (CRC) was adopted by the general assembly of the UN and came into force in September 1990.
- It lays down common standards although each sovereign state may adopt its own means when implementing this convention.
- Australia ratified CRC in 1990 and so is bound to its terms.

There are four principles in this convention:
- Non-discrimination (Art 2)
- Best interests of the child (Art 3)
- The right to life, survival and development (Art 6)
- The views of the child (Art 12)

This gave rise to the Family Law Act 1975 which places the interests of the child as paramount when determining residency, access and maintenance.

The Family and Community Services (FaCS) has the responsibility of removing children from families where they could be or are placed in danger.

Care and control

If a child is abused or neglected, the Children and Young Persons (Care and Protection) Act 1998 allows the Children’s Court of NSW to make an order removing that child from its parents/guardians.

The Family Law Amendment (Shared Responsibility) Act 2005 amended the Family Law Act to enshrine a primary object of shared parental responsibility and imposing upon the Court an obligation to consider making orders for equal, shared and/or substantial contact. It emphasised the child’s right to meaningful family relationships and care, rather than either parent’s ‘right’ to have the child live with them.

In NSW, the law determining a child’s competence to consent to medical treatment is found in:
- The common law in Department of Health and Community Services (NT) V JWB (Marion’s Case) 1992: for people under 18 if they are capable of understanding the nature and consequences of treatment.
- Guardianship Act 1987 NSW deals with people who are incapable of making decisions themselves because of disability.

Autonomy of a child
As a child ages the control by the parents decreases as they approach eighteen.

**Discipline**
When it comes to corporal punishment the law is not clear. The common law says physical punishment of a child was acceptable as long as it was ‘reasonable’ and ‘moderate’.
- This led to the *Crimes Amendment (Child Protection - Physical Mistreatment) Act 2001*
- The Community Services (old DoCS) provides child protection services, parenting support and early intervention, foster care, and adoption services
- However the law will not interfere unless the child is neglected or abused whereupon the Community Services will decide if an application should be made to the Children’s Court to remove that child from such an environment

**Education**
- Every child has the right to child under CROC
- In Australian states it is compulsory to attend school from 6-17
- Many years ago education was not compulsory, now it is one of the foundations of our society

**Adoption and guardianship**
- The adopting parent assumes all rights and responsibilities
- The natural parents must sign a consent form. If the child is over 12 then that child’s consent is also required. The parents then have a period of 30 days to reconsider their decision during this period the child will be placed in the care of foster parents on a temporary basis.
- The adoption of children is regulated by the Adoption Act 2000 NSW
- Adoption Amendment Act 2010 allowed single and same sex parents to adopt. This act, like CROC, has the best interests of the child at heart
- The natural parents can be involved by receiving news of the child’s progress and development with the adoptive parents. In recent years, adoptions have become more open.
- Adoption in Australia is increasingly becoming a solution for children in permanent out of home care

**Overseas adoption**
- Australians are allowed to adopt children from other countries but only through overseas government authorities controlled by the *Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption 1993*
- Adoption will be permitted if every alternative that would enable the child to remain in their country of origin has been explored and rejected.
2. Responses to problems in family relationships

The legal processes involved in dealing with problems in family relationships

Divorce

- In 1901, upon the federation of Australia, marriage and divorce became a federal responsibility.
- This act made the only grounds for divorce now to be the irretrievable breakdown of the marriage which is proved by the couple living separately and apart for 12 months.
- This principle is known as ‘no fault divorce’ in Australian law.
- Binding Financial Agreements (BFA) can be made before, during or after a marriage.
- The Family Law Reform Act 1995 Cth introduced parenting plans, which are written agreements voluntarily entered into by parents. In contrast to court order assigning custody to a parent, parents are encouraged to create plans themselves dealing with the child’s living arrangements, amount of time the child will spend with each parent etc.

Legal consequences of separation

Children

The Family Law Amendment (Shared Parental Responsibility) Act 2006 is the most significant change to the Family Law Act 1975. Under these amendments is the presumption of equal shared responsibility.

- Equal shared parental responsibility means both parents have an equal role in making decisions about major long term issues. This is a rebuttable presumption, meaning it can be challenged
- Must have substantial and significant time
- Shift in legislative terminology reflects a shift in changing social values: custody to residence to live with
- Parenting plans are encouraged

Property

The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 resulted in the jurisdiction of the family courts being broadened to deal with financial matters arising out of a breakdown of the de facto relationship.
Domestic violence

_Eg. Hitting Home, Four Corners_
- The attitudes to domestic violence have changed as our society changes
- One third of police’s work is dealing with domestic violence
- 2014 saw a reform to the defence of murder, meaning provocation can be claimed by men no longer, but can be claimed by women

The priority of the Family Court is the protection of the child rather than the maintenance of a meaningful relationship with an abusive parent.

John Edwards Case July 2018 shot his children with a ‘high powered handgun’

Abused women are allowed to be cross-examined by their abuser. They often do not have legal representation
’... Rosie Batty call to end cross-examination by 'abusers' (SMH, 2016)

Apprehended Violence Orders (AVO’s)

Provisioned under the _Crimes (domestic and personal violence) Act 2007 NSW_
- A victim of domestic violence can apply for an AVO either through the police or a chamber magistrate at any local court
- An AVO is a court order that places certain restrictions upon a person who is accused of domestic violence.
- Breaching an AVO is punishable by a fine of up to $5500 and/or jail time
- An application for an AVO can be made by the person who is seeking to be protected by the order (‘private application’) or a police officer (‘police application’). If the person seeking the order is under 16 then the applicant must be made by a police officer.
- In the childrens court the police may ask the court to make an interim order for a longer period such as six months to allow the defendant to undertake counselling or to allow the defendant and other person involved to resolve the issues through mediation.
- The first court date is called a mention. The application may be dealt with on the day or it may be adjourned. If a final AVO is not made you may be able to appeal to the District Court within 28 days. The defendant is not given a criminal record, but if the defendant breaches the AVO it is a criminal offence.
- ADVO is when the people involved have a relationship. APVO is when there is no personal relationship.
- 3000 APVOs granted by local courts in 2017
- _Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act 2016_ = NSW first state to recognise ADVOS from other jurisdictions
‘Domestic violence orders need stronger enforcement’ (Conversation, 2014) claims protection orders are breached many times and do not work for all victims of domestic violence.

**Parenting Orders**

Parenting orders are orders made by a court about the arrangement for care of children. They can be made by the Family Court or the Federal Circuit Court. If there is an AVO and a family law parenting order, the parenting order will override the AVO if the order says different things.

**National Plan to Reduce Violence against Women and their Children 2010-2022**
- Focuses on domestic and family violence and sexual assault
- Divided into four action plans over the 12 year period
- The first action plan 2010-2013 saw a number of key initiatives established including 1800 Respect - the first national professional telephone and online counselling service for women experiencing, or at risk of, domestic violence

**The roles of courts and dispute resolutions**

**Children’s court**
- Hears cases relating to the care and protection of children under the Children and Young Persons (Care and Protection) Act 1998 NSW
- The standard of proof is that it is ‘very highly probable’ that the child is in need of care
- Court proceedings are informal and the child always has representation.

**Federal Circuit Court**
- Established in 1999 under the Federal Magistrates Act 199 Cth
- Independent federal court under Australian constitution
- The objective of the federal circuit court is to provide a simpler and more accessible alternative to litigation in the superior courts and to relieve the workload of those courts

**Family court**

Established under the Family Law Act 1975
- Judges only sometimes wear wigs and gowns and the courts are open, though the names of those involved in a hearing may not be reported in the media.
- Through the specialised judges and staff the Family Court helps australians resolve their most complex family disputes
- This court hears cases with complex law and facts, financial arrangements, trusts, serious parenting conflicts etc. (hearings over 4 days)
- The focus in parenting cases is what’s best for the child
The judge controls the case only addressing the relevant issue in dispute. This has given the name ‘less adversarial trial’

Less adversarial trials
- Since 2006
- Only occur at the family court
- Is flexible so that it can meet the needs of the particular situation
- Is anticipated to be less costly compared to traditional trials and will save time in court
- Is inclusive in so far as your involvement in the process
- May be less formal than what is usually the case in a court matter

The Family Court and FCC will be combined as part of sweeping changes to the financially and emotionally-crippling family law system (ABC, May 2018).

Nearly 22000 cases are filled across the two courts each year. Most cases take about a year and a half to just reach trial. The merger of the two courts would result in an extra 8000 cases being heard each year. The ALRC is due to report back to the Government by March 2019.

Both courts operate under the Family Law Act 1975 Cth. the rules which govern how the Family Court operates are contained in the Family Law Rules 2004 Cth, and the rules relating to the FCC are contained in the Federal Circuit Court Rules 2001 Cth

Independent children’s lawyer (ICL)
A lawyer who represents the child’s best interests in proceedings under an appointment made by the court.

Matters where an ICL may be appointed:
- Allegations of child abuse
- Conflict between the parents
- Issues of cultural or religious differences between the child
- Neither parent seems a suitable custodian
- Child is expressing strong views

The ICL is not the child’s legal representative and is not obliged to act on the child’s instructions. The ICL should:
- assist parties to reach a resolution.
- Explain the role/limitations of an ICL, court process.

The ICL will meet with the child unless:
- The child is not of school age
- Exceptional circumstances
- Geographical limitations

Court can appoint an ICL under s68 of Family Law Act 1975.
Family Law Act 1975 emphasises resolving disputes rather than having the court arbitrate between the parties. There are a number of counselling and mediation services available for the parties.
Family Court mediation

- If an application has been made to the Family Court, the parties can use the court’s free mediation service.
- Mediators try to assist the parties to reach an agreement about the court orders they have applied for
- Under recent amendment to the Family Law Act: Family Law Amendment (Shared Parental Responsibility) Act 2006 the federal government has established 65 family relationship centres across Australia that provide resolutions for families on matter such as disputes about the care of children. It most cases they must apply for resolution before going to court.
- Lawyers will not be present although a support person may be present with the agreement of the advisor
- It is cheaper, quicker, and encourages civility between the two parents on their own accord.

What happens in a family court proceeding?

- The focus in parenting cases is always what is the best interest of the child (CROC)
- The judge controls the case only addressing the relevant issues in dispute and the evidence to be heard

The roles of non-government organisations

Relationships.org

Offers services that include counselling, family dispute resolution and a range of family and community support and education programs. There are 65 family relationships centres across Australia
- Offers individual and joint sessions to assist separating families
- Also offers group information sessions and workshops on a range of practical topics to assist families
- Some services are free of charge and other services are for free, dependent on the income of the people attending

Families can access information and advice on:
- Building and strengthening relationships
- Early intervention and prevention services
- Child-friendly services for families in conflict
- Family dispute resolution services
- Parenting plans
- Re-partnering and step-family arrangements
- Information and referral to other services
Centacare

Centacare is an organisation of Catholic Welfare Australia which offers a range of counselling and family services across Australia.

- Family dispute resolution provides mediation as an alternative way of resolving disputes and can avoid the financial and emotional costs of becoming involved in legal action.

There are many advantages including:
- Cost effective
- Quicker than court
- Confidentiality is protected
- The opportunity to reach your own agreements
- Partly funded by the Federal Government so a fee may be charged.

Role of the media

- Through media coverage of the disadvantages faced by men under family law, the Family Law Amendment (Shared Parental Responsibility) Act 2006 Cth was reformed to allow men to maintain contact or spend time with their children following divorce
- Media articles promote and protect victims, urging government to make a change and help prevent violence

“The women failed by our system” (News, 2016) explains the drawbacks of ADVOs

Jean Majdalawi 1996 case was used by the media to highlight struggles faced by women
- She took out restraining order against her ex-partner but he killed her over a custody dispute
- Led to the Crimes Amendment (Apprehended Violence Orders) Bill which improved security for women who take out court orders against offenders

3. Contemporary issues

Recognition of same-sex relationships

In recent times, same-sex relationships have been recognised in a number of ways and the intolerance to them has gradually subsided.
- However, we have moved as a society from anti-gay, to a tolerance - we haven’t yet fully ‘recognised’ (News.com, 2017)
- The Marriage Act 1961 defines marriage
- The most significant amendment obviously is the replacement of the words ‘man and woman’ with 2 people.
- Although same-sex couples had some recognition through state based legislation: Property (Relationships) Act 1984 NSW there was inconsistencies between jurisdictions, and therefore limited effective recognition
- It could be argued that statutes have responded quicker to the changing attitudes towards same-sex couples than the courts
- In December the Marriage Amendment (Definition and Religious Freedoms) Act 2017 was passed as a result of the national plebiscite
- The Marriage Act 1961 was not replaced as it should have been - we simply created an amendment act, which contains many limitations in order to protect religious freedoms
- The Netherlands passed SSM in 2001, Belgium in 2004, and even the ultra Catholic Ireland passed SSM in 2016. Therefore the delay suggests a slow response to the need and thus a lack of justice.
- In Joslin v New Zealand, the UNHRC held that marriage is a definitional construct which, under the ICCPR, includes only one person of the same sex. In other words, they held that marriage was available to all, but gay people choose not to get married.
- Gay men are exposed to violence, and experience high levels of depression and suicide. Suicide contemplation rises in exact proportion to the amount of abuse suffered (The Conversation, July 2014)

The Safe Schools Coalition Australia
- National network of organisations working with school communities to create safer and more inclusive environments for LGBTQ people
- Offers free resources and support for school staff

The changing nature of parental responsibility

Defined in the Family Law Act 1975 as “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children”
The shift from a view of parental rights to control their children to a view of parental responsibility.
- For much of the nineteenth and twentieth centuries the custody of children was seen as a right, rather than a responsibility of parents.
- CROC emphasised the rights of the child rather than the rights of the parent

The Family Law Reform Act 1995 Cth
- Substantially changed the family law act to emphasise the notion of parental responsibility rather than parental rights
- Introduced consideration of family violence as a factor in determining parental responsibility, residence and contact
- However the changes were really only changes in terminology and it allowed women to make false allegations about family violence to prevent the father from seeing his children.

Reforms to the Family Law Amendment (Shared Parental Responsibility) Act 2006 mean that:
- Expectation that both parents will be involved in the important decisions regarding their child
- This change was intended to bring balance to the system however it made parents misinterpret it as meaning equal time
- The court takes into account ‘primary’ and additional’ considerations.
  - Primary considerations include the benefit of the child having a positive and meaningful relationship with both parents, and the need to protect the child from abuse and family violence.
  - Additional circumstances include the child’s wishes, the financial situation, the nature of the relationship, and the ability of the parent to provide for the intellectual and emotional needs of the child

Some argue that children should not have ‘substantial and significant time’ with each parent, where equal time is not considered to be in the best interests of the child.

The Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 Cth was passed in response to the federal government’s Time for Action: The National Council’s Plan to Reduce Violence Against Women and Their Children 2009-21 which identified a number of issues in the current domestic violence and child protection legislative framework.
  - Prioritised the safety of children over their right to a meaningful relationship.

Under this act, courts must now consider any findings related to domestic violence in determining parenting matters.
  - In more than 60% of parenting plans and orders children spend more than half of their time with their mother

The best interest of the child is the paramount consideration when the courts make a parenting order as the presumption is that equal shared parental responsibility is in the best interest of the child.

Surrogacy and birth technologies

What are the issues of surrogacy?
  - Paternity and maternity rights
  - Guardianship
  - Custody and access
  - Maintenance and financial support

**Australian Surrogacy Act 2010**
  - There is no reference in international law to surrogacy.
  - In NSW there is no specific legislation outlawing surrogacy but a surrogacy agreement cannot be enforced and the biological mother can always retain the child.
  - A commercial surrogacy arrangement is illegal in all states and territories.
  - Surrogacy laws differ from state to state, which creates inconsistency, uncertainty and conflict.
Medical science has now made it possible for women to give birth to a child by methods not before considered by the common law.

1. Artificial insemination (donated sperm used)
2. In-vitro fertilisation (IVF) egg fertilised outside then implanted into uterus
3. Cloning is the splitting of an embryo into identical twins or triplets
4. Stem cell research

- **Prohibition of Human Cloning Act 2002**
- **Research Involving Human Embryos Act 2002**

This legislation was introduced in response to community concerns, including ethical concerns, about scientific developments in relation to human reproduction and the utilisation of human embryos. Prohibits unacceptable practices including human cloning and regulates certain uses of excess human embryos created through Assisted Reproductive Technology (ART)

**Re Evelyn (1998)**
- Close friend offered to be the surrogate mother to a family friend
- In 1997 the surrogate family applied to the court for the return of baby Evelyn.
- While she was the child’s biological, and therefore, legal mother, the agreed father was the child’s biological father.
- The full bench of the Family Court found that the baby should be returned to its surrogate mother
- This was the first decision involving a surrogate child to be made by the Family Court. It set a precedent of giving the birth rights to the birth mother.
- This decision was for ‘the best interest of the child’

**Re Michael: Surrogacy Arrangements (2009)**
- Sharon and Paul were unable to have a baby
- Sharon’s mother, Lauren, offered to carry and give birth to the child on behalf of her daughter
- Lauren was in a de facto relationship with Clive
- The birth certificate showed Paul as the father
- The family court found Lauren and Clive were the parents as although the federal Family Law Act allocates parental status to ‘intended parents’ under a surrogacy arrangement, the activation of that agreement depends on the law of the relevant state or territory. In NSW at the time the legislation did not recognise ‘intended parents’ under surrogacy arrangements.
- It was decided that this (which made Lauren and Clive the parents) trumped the rebuttable parentage presumption arising from Paul’s name on the birth certificate

“When mum is nana” (The Australian, 2009)

*Status of the Children Act 1996* treats children born through the use of artificial reproductive technology the same as children born naturally.
Methods of resolving disputes

- The law aims to help parties to reach an amicable termination of their relationship or reconcile a family issue.
- The court focuses more on reconciliation and on encouraging compliance rather than enforcement through the use of sanctions.
- The family court, federal circuit court and the children’s court each have separate roles in resolving dispute resolutions.

Care and protection of children

Children are vulnerable members of society and as such they deserve and are in greater need of higher levels of protection than adults. The abuse of children involves neglect, sexual, physical and emotional abuse.

Early intervention programs can provide help to prevent family problems from escalating into critical situations. The Community Services Early Intervention Program (intensive parenting) provides support and services for families facing specific difficulties to help prevent their problems from escalating.

Eg. Kiesha Abrahams: Kristi Abrahams jailed for at least 16 years for murder of 6yo daughter
Kiesha Weippeart (ABC, 2013)

The Childrens and Young Persons (Care and Protection) Act 1998 makes available a wide range of care and protection orders to the Children’s Court. Under this legislation:

- FACS must be notified if a child is suspected to be at risk of harm
- Police or FACS can remove a child if they believe they are at serious risk
- A care application is made to the Children’s Court by Community Services in order to protect the safety, welfare and well-being of a child or young person.
- When community services make a care application to the Children’s Court, they must prove that the child is in need of care and protection, for one or more specific reasons that are set out in the legislation.

When deciding if the child is in need of care and protection, the magistrate will take into account all of the evidence given to the Court by Community Services and by anyone else, including the parents and the child.

- The court may order that the child’s contact with the offending parent is restricted or that the contact occurs within a controlled environment
- The Family Court can order relevant state and territory agencies to provide information regarding allegations of family violence.
- The legal system has been accused of acting too slowly to protect child victims of abuse
Amendments to the family law amendment (shared parental responsibility) act 2006 requires the court to consider the child’s best interests rather than parental interests. According to the Australian Institute of Health and Welfare report Child Protection Australia 2014, in 2012-13 there were 184,000 children suspected of being harmed or at risk of harm from abuse or neglect nationally.

- The presumption of equal shared parental responsibility does not apply if there is a risk of child abuse or family violence.
- If there is evidence of family violence the court may order that the child’s contact with the offending parent is restricted or that the contact takes place within a controlled environment.
- The family court can order relevant state and territory agencies to provide information regarding allegations of family violence.
- During 2012-13 there were 51,000 children on care and protection orders.
- If a child is found to be ‘in need of care and protection’ the children’s court can make a variety of orders which may involve a child being temporarily or permanently removed from his or her home and placed in the care of someone else, such as a relative or a foster parent.
- Court proceedings are as informal as possible.
- Not adversarial.
- Court must be satisfied on the ‘balance of probabilities’.
- Child is represented by a legal representative.