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Essential Family Law

Rosemary Dalby

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ESSENTIAL FAMILY LAW

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ESSENTIAL FAMILY LAW

Second Edition

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Foreword

This book is part of the Cavendish Essential Series. The books in the series constitute a unique publishing venture for Australia in that they are intended as a helpful revision aid for the hard-pressed student. They are not intended to be a substitute for the more detailed textbooks which are already listed in the current Cavendish catalogue.

Each book follows a prescribed format consisting of a checklist covering each of the areas in the chapter, and an expanded treatment of 'Essential' issues looking at examination topics in depth.

The authors are all Australian law academics who bring to their subjects a wealth of experience in academic and legal practice.

Professor David Barker
General Editor
Dean of the Faculty of Law,
University of Technology, Sydney

Acknowledgments

Since its first edition, many changes have occurred in the areas covered in this book. Most recently, the Australian Parliament legislated to make pre-nuptial agreements legally enforceable. Less celebrated, but also contained in the same Family Law Amendment Act 2000, is established a three tiered compliance regime for orders affecting children. States have passed de facto relationships legislation, some extending provisions to same sex relationships. Federal magistrates' courts have been instituted and reports suggest their success in easing Family Court caseloads. Sensitivity to Aboriginal child adoptions has been reflected in NSW care and protection legislation.

Currently, the Family Law Legislation Amendment (Superannuation) Bill 2000 is proceeding through Parliament. The Bill proposes to allow couples to divide their superannuation on marital breakdown. In his Second Reading Speech, the Attorney General noted that, as a nation, Australians hold an aggregate of $439 billion in superannuation assets and that this figure will almost double in five years. The final treatment of this legislation will be interesting to observe.

The writer acknowledges family law practitioners, colleagues and the love of the Lord Jesus in creating time for this edition to be completed by its deadline.

Rosemary Dalby
January 2001

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Introduction

Recent statistics show that just under 91% of all couples in Australia are married to each other, with only 9.1% (openly) living in de facto relationships. Generally, however, the marriage rate trend is in long term decline. In 1988, there were 116,800 marriages registered in Australia. Ten years later, despite a slight increase in 1998, over the previous year, the figure was down to 110,600. The marriage rate had peaked in 1942 at 12 marriages per 1,000 population. Currently it stands at 5.9 per 1,000, which is lower than the US rate but higher than in Canada and the UK.

The divorce rate is in a long term upward trend. In 1988, 41,000 divorces were granted in Australia and 51,400 in 1998. Currently, divorces represent about 12.4 per 1,000 married couples. The Australian divorce rate is lower than in the US but about the same as in Canada and the UK. (All figures provided by the Australian Bureau of Statistics.)

In July 1999, the NSW Parliament passed the Property (Relationships) Legislation Amendment Act 1999, which extended the definition of de facto relationships to include same sex relationships. The former de facto Relationships Act 1984 was renamed the Property (Relationships) Act 1984 and now includes in its provisions the right of same sex surviving partners to inherit property on the death of their partner.

In December 1999, the Queensland Parliament amended the Property Law Act 1974 to regulate financial matters concerning de facto relationships. This legislation also includes same sex couples within its definition. Currently, NSW, Queensland and the ACT (under its Domestic Relationships Act 1994) include same sex relationships in their de facto property legislation (see below, p 41 *et seq*).

In the course of his judgment of the Full High Court cross-vesting case, *Re Wakim* (1999), McHugh J noted in passing:

> Thus, in 1901, 'marriage' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably 'marriage' now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.

Despite these trends, the present structure of the law of marriage and divorce does not face great changes in the near future. Later chapters will deal with matters pertaining to de facto relationships in more detail.

Marriage

The Australian Constitution confers power on the Parliament to legislate with respect to 'Marriage' by s 51(xxi) and 'divorce and matrimonial causes' by s 51(xxii). Under the marriage power, the Commonwealth passed the Marriage Act in 1961.

Under s 11 of the Marriage Act, a person may marry at 18 years or over. Section 12 allows for children of 16 to apply to a judge or magistrate for an order authorising them to marry where the court is satisfied the circumstances are exceptional and unusual (s 12(2)(b)). The reported cases mostly involve a pregnancy which seems to support the decision in favour of the couple marrying.

In addition, where a minor wishes to marry (by applying under s 12), he or she must produce to the authorised celebrant the written consent of those listed in the Schedule to the Marriage Act as parents or guardians (s 13). If both parents are alive and living together, then usually both must consent. Where the parents live apart and the minor lives mainly with one parent, that parent must consent. If the minor lives with neither parent and the parents were never married to each other, the mother's consent is required.

If any required consent is refused, an application to a judge or magistrate can be made, and, if satisfied on the relevant facts and circumstances that consent has been unreasonably withheld, he or she may give consent in the parent or guardian's place (s 16).

Marriages on Australian soil assume the parties to be a man and a woman. Sections 46(1) and 69(2) refer to the 'union of a man and a woman to the exclusion of all others, voluntarily entered into for life": the classic definition as set out in *Hyde v Hyde and Woodmansee* (1866). As mentioned above, the prospect of same sex marriages in Australia has been alluded to at High Court level.

Formalities

Marriages must be solemnised by or in the presence of an 'authorised celebrant' (s 41). These are defined in s 5(1) to include ministers of religion and marriage celebrants as authorised. In W and T (1998), the words 'in the presence of' were construed broadly to permit an unauthorised minister to conduct a wedding whilst observed by the authorised minister from the back of the church. Despite this interpretation, the Family Court set out recommended guidelines for marriage celebrants to preclude these circumstances in the future. It was recommended that the authorised celebrant should be 'a part of the ceremonial group or at the very least, be in reasonable proximity to it'. This was felt to be necessary since 'the celebrant bears the responsibility to ensure the marriage is carried out in accordance with the law and he or she must therefore be able to intervene if some procedure is adopted or steps taken, which would be in direct conflict with what the legislature has intended'.

Section 26 provides for the Proclamation by the Governor General declaring a religious organisation to be a 'recognised denomination' for the purposes of the Marriage Act.

Recognised denominations currently include over 80 religious bodies. Ministers of religion must be nominated for registration by their denomination (s 29) and must be 21 years of age and ordinarily resident in Australia. They are entitled to receive a fee for conducting the marriage under s 118. However, s 33 provides for deregistration by the Registrar upon grounds including that of making a business of solemnising marriages for profit or gain (s 33(1)(d)(ii)).

Section 39 provides for other officers of a State or Territory whose function it is to solemnise marriages (registry office marriages) as well as the appointment of other 'fit and proper persons' for that purpose, subject to specified conditions (marriage celebrants).

Under s 42(1), notice in writing must be given to the authorised celebrant no earlier than six months and no later than one month before the wedding. Birth certificates must be produced for both parties or statutory declarations in the absence of certificates, stating date and place of birth. Parties must declare their status, their belief that there is no legal impediment to the marriage, and other matters as prescribed (s 42(1)(c)). If the declaration states that a party is divorced or widowed, evidence of the death or divorce must be produced to the authorised celebrant (s 42(10)). Section 42(5A) requires the authorised celebrant to give parties intending to marry a notice as to the obligations and consequences of marriage and the availability of marriage counselling.

Two people who are, or appear to the celebrant to be, over 18 years must be present as witnesses to the marriage (s 44). Section 45 provides for any form of ceremony recognised by the religious body of which the celebrant is a minister. However, if the authorised celebrant is not a minister, it is sufficient if parties recite in the presence of the celebrant and witnesses the words:

> I call upon the persons here present to witness that I [AB] take thee [CD] to be my lawful wedded wife/husband,

or words to that effect (s 45(2)). The authorised celebrant, not being a minister of religion must recite to the parties in the presence of the witnesses the words:

> I am duly authorised by law to solemnise marriages according to law… I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter. Marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life,

or words to that effect (s 46(1)).

Australia recognises foreign marriages pursuant to its adoption of principles under the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages (s 88A). Under s 88C, the recognition provisions apply to marriages which were valid under the local law of the foreign county. Section 88D makes these marriages valid in Australia unless they come within the exceptions. These include:

- either party at the time of the marriage was already married and that marriage was recognised in Australia as valid;
- parties not being of marriageable age when one party was domiciled in Australia at the time of the marriage;

- prohibited relationships under s 23B (full and half siblings, parents and grandparents, including these relationships through adoption);
- the consent of either party was vitiated by duress, fraud, mistake or mental incapacity (s 23B(1)(d)); (see below, p 10);
- neither party was domiciled in Australia at the time of the marriage and either party is currently under 16 years.

Embassy and consulate marriages

Marriages solemnised in Australia by or in the presence of diplomatic or consular officers of 'proclaimed overseas countries' will be recognised as valid in Australia, subject to certain conditions. Under s 54, the Governor General may declare a proclaimed overseas country where it recognises, first, Australian consular or diplomatic marriages in its own country, and, second, its own own law or custom authorises marriages outside its own country. The diplomatic or consular officers of the proclaimed overseas country may then solemnise marriages under s 55 provided that neither party is an Australian citizen, neither is already married, both are of marriageable age and a prohibited relationship does not exist. Such marriages will be recognised as valid in Australia under s 56, provided that they are registered by the Registrar of Foreign Marriages, comply with the law or custom of the overseas country and would not be void under para 23B(1)(d) (see below, p 10).

Dissolution (divorce)

Section 48(1) of the Family Law Act 1975 gives as the only ground for divorce (or 'decree of dissolution'): that the marriage has broken down irretrievably (all following references are to that Act).

The only way to prove irretrievable breakdown is to satisfy the court that, the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage (s 48(2)).

In addition, a decree shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed (s 48(3)).

Separation can occur due to the action or conduct of only one of the parties (s 49(1)). It may also be held to have taken place, and the parties be taken to have lived 'separately and apart', where they remain in the same residence ('separation under one roof'), or if either party renders some household services to the other (s 49(2)).

In practice, 'one roof divorce applications are infrequent now that property and other orders can be sought without proceedings for 'principal relief (dissolution or nullity) being in progress.

Proceedings for a decree of dissolution or nullity may be instituted by either party to the marriage, or jointly by both (s 44(1A)).

Resumption of cohabitation

In framing the dissolution provisions of the Act, the legislature was guided by the principle that reconciliation was to be encouraged without prejudice to the parties' rights to relief should the reconciliation fail. Hence, s 50(1) gives couples a period of three months resumed cohabitation before the original separation date is forfeited. Section 50 provides:

> (1) For the purposes of proceedings for a decree of dissolution of marriage, where, after the parties to the marriage separated, they resumed cohabitation on one occasion but, within a period of three months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the filing of the application, the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart.
> (2) For the purposes of sub-s (1), a period of cohabitation shall be deemed to have continued during any interruption of the cohabitation that, in the opinion of the court, was not substantial.

So, if the parties separate on 1 January 2001, resume cohabitation on 1 March and separate finally on 31 May, the application for dissolution can be commenced on 2 April 2002. (The provision requires 12 months of living separately and apart after separation and before the date of filing, hence filing on 1 April is too soon.)

Separate on 1 Jan 2001	Separate again on 31 May	12 months ends 1 April 2002
2 Jan–28 Feb (2 months minus 1 day)	Mar–31 May (Within 3 months)	1 June –1 April (10 months plus 1 day)

If, between 1 March and 31 May 2000, the parties interrupt their resumed cohabitation insubstantially, they do not revive the separation date. Their one permitted period of resumed cohabitation, if inside three months, remains on foot However, if the interruption to cohabitation is 'substantial', the earlier separation is not counted and the 12 month period starts running again. The court has found a substantial interruption where the period of cohabitation is brought to an end by one spouse cohabiting with a third person; this then brings to an end the 'one occasion' of resumed cohabitation permitted within s 50(1) (see *Keyssner* (1976)).

Clarke (1986) held that a reconciliation on its own does not end the state of separation; what is required is a resumption of actual cohabitation. Similarly, in *Bell* (1979), the court found that resumption of cohabitation requires a bilateral intention to resume the 'state of things'. So one party's intention is not enough without the other party's consent (at least), and cohabitation must in fact resume.

In *Todd* (1976), the court adopted previous cases which found that isolated acts of sexual intercourse between otherwise separated spouses do not create a resumption of cohabitation. In that case, the court also observed that it may be necessary to examine and contrast the state of the marital relationship before and after an alleged separation, in order to establish whether separation has in fact taken place.

In *Henry* (1996), the husband filed an application for dissolution on 10 November 1993. He argued that separation took place overseas on 31 October 1992 by way of a telephone conversation with his wife. The wife argued that letters written by the husband during 1993 proved that he regarded the marriage as continuing. The trial judge found that the letters revealed that the marriage had not irretrievably broken down. On appeal, the Full Court cited the decisions in *Clarke* and *Todd,* Nicholson CJ noting that the principles they contain are still applicable. The court found that the wife's actions after 31 October 1992 (including an attempt to freeze the husband's bank accounts) demonstrated an acceptance of the separation, and the husband's letters not to amount to an intention to reconcile. Fogarty J noted:

> As *Clarke's* case and others illustrate, a reconciliation is achieved when there is a resumption of cohabitation, at least of the kind which had existed previously to its termination, and…that could not be demonstrated here…

Before a decree of dissolution will issue for short marriages of under two years' duration, proof must be shown that reconciliation has been at least 'considered'. Section 44(1B) provides that an application will not be granted unless a certificate signed by an approved family counsellor shows that the

parties have considered a reconciliation with the counsellor's assistance. However, if the court gives leave under s 44(1C), this requirement is waived. Leave may be granted if the court is satisfied that there are special circumstances by reason of which the application should proceed.

Decree nisi and decree absolute

The decree of dissolution is a decree nisi (s 54), which becomes absolute one month later, or one month from an order under s 55A as to the welfare of children, whichever is later (s 55(1)). Having a decree nisi does not dissolve the marriage. Therefore, if one party dies before the decree nisi is due to become absolute, sub-s 55(4) states that the decree nisi shall not become absolute.The survivor then remains the widow or widower of the deceased for all purposes. Similarly, parties may not remarry until the decree becomes absolute for fear of committing bigamy under s 94 of the Marriage Act 1961. Section 59 simply states that parties may marry again when the decree has become absolute.

The decree nisi may be rescinded on the ground of reconciliation (s 57) or where the court is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance (s 58). In the latter case, application may be brought either by a party or by the intervention of the Attorney General.

Section 93 provides that an appeal does not lie from a decree of dissolution after the decree becomes absolute. Before this time, the original court or a court where an appeal has been commenced may extend or reduce the period before which the decree nisi becomes absolute (s 55(2)). The extension is required to be in connection with an appeal or possible appeal. The reduction depends on the court being satisfied of special circumstances.

The old High Court case of *Brennan* (1953) had held the decree absolute to be unassailable. In *Miller* (1983), the Full Family Court expressed the view that *Brennan*'s case had to be confined to circumstances where the decree absolute had been acted upon by one or both of the parties. The Full Court set out three categories in which a decree absolute may be avoided or impeached:

> (a) a failure to comply with legislative requirements which are conditions precedent to the decree nisi becoming absolute;
> (b) where there was an absence of an element fundamental to the granting of the decree, for example, the absence of any marriage to dissolve, the absence of any jurisdictional connection to the Court by either of the parties…or constitutional limits;

(c) where there has been a procedural irregularity which has caused a denial of justice.

In *Cross* (1995), Kay J considered an application filed on 7 July seeking rescission of a decree of dissolution made absolute on 29 May. The applicant and her husband had decided to reconcile while she was in hospital in April. However, she did not complete the Form 15 Notice of Withdrawal of Pleading, which was sent to her during a relapse of her illness. The application was mistakenly processed in the parties' absence by a registrar as an application for a dissolution where there were no children of the marriage under 18 years (s 98A). There were in fact two children under 18 and the wife's application for divorce had stated their details. His Honour found serious procedural irregularities in this case and set aside the decree.

Arrangements for the children

Section 55A(1) provides that a decree nisi does not become absolute unless the court makes an order declaring itself satisfied either:

(a) that there are no children of the marriage under 18 years of age; or
(b) that the only children of the marriage who have not reached 18 years of age are specified in the order; and
    (i) that proper arrangements in all the circumstances have been made for their care, welfare and development; or
    (ii) there are circumstances by reason of which the decree nisi should become absolute even though the court is not satisfied that such arrangements have been made.

A special definition of 'children of the marriage' is given for this section in s 55A(3). All children treated by the husband and wife as a child of the family at the relevant time are children of the marriage. The sub-section includes an ex-nuptial child of either party, an adopted child of either, and a child of neither party. The court has held that this list is not intended to exclude any other child as long as it is treated as a child of the family at the relevant time (the relevant time being immediately prior to separation: s 55A(4)).

The breadth of the definition is consistent with the practical view of arrangements for the welfare of the children in an application for dissolution. These are not proceedings for parenting orders where substantially detailed and specific arrangements must be considered (see below, p 79 *et seq*). In proceedings for dissolution, the court is concerned

only to satisfy itself as to the care, welfare and development, in the foreseeable future, of each child of the marriage who will be affected by the divorce. The Form 4 Application for Divorce lists as details to be completed for each child: housing; supervision; contact; financial support; education; and health.

Circumstances under s 55A(1)(b)(ii) have not been specified by the court (see *Opperman* (1978)). However, this provision is frequently invoked where the respondent cannot be located after reasonable inquiry.

In *Maunder* (1999), the husband in Brunei filed an application for divorce. The wife, who lived in Australia with the children, opposed the application. The trial judge made a declaration under s 55A(1)(b)(ii), stating that it was 'not customary for the court…to hold parties to ransom for dissolution of marriage whilst other issues were under debate'. The Full Court found these reasons inadequate as 'circumstances' and upheld the wife's appeal. The effect of the decision was that the decree nisi remained intact and would not become absolute until the s 55A declaration was made. The Court observed:

> The section is designed to protect children who are frequently the innocent victims of the breakdown of their parents' marriage. It seeks to balance the right of the parents to get on with their lives as separate entities from each other with the need to ensure that the best circumstances can be created for their children. None of the matters urged upon us would outweigh the stringent duty identified in *Opperman*'s case so as to tip the scales in favour of the husband.

Nullity

Section 51 of the Family Law Act 1975 states that an application under the Act for a decree of nullity shall be based on the ground that the marriage is void. Section 23B of the Marriage Act 1961 sets out the circumstances where a marriage is void. (Section 23 applies to marriages solemnised between 20 June 1977 and 7 April 1986, whereas s 23B applies from 7 April 1986.)

Section 23B(1) states a marriage is void in the following circumstances and not otherwise:

(a) either of the parties is at the time of the marriage lawfully married to some other person;
(b) the parties are within a prohibited relationship;
(c) by reason of s 48 the marriage is not valid;

(d) the consent of either party is not real consent because:
  (i) it was obtained by duress or fraud;
  (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed;
  (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony;

(e) either of the parties is not of marriageable age.

Married to another

This ground is also bigamy under s 94(1). However, a charge of bigamy is subject to the heavier criminal onus of proof (beyond reasonable doubt), and any available defence, such as reasonable belief in the death of the previous spouse. Section 6 of the Family Law Act 1975 provides that a polygamous marriage entered into outside Australia shall be deemed to be a marriage for the purpose of proceedings under the 1975 Act.

Prohibited relationships

Section 23B(2) defines these as relationships between a person and an ancestor or descendent, or between a brother and a sister—whether whole blood or half-blood. Subsection 23B(3) includes these relationships arising through adoptions.

Section 48 formalities

See above, p 3. Section 48 provides that marriages solemnised otherwise than in accordance with ss 40–47 of the Marriage Act are not valid. However, sub-s 48(2) lists a large number of exceptions. These include:

- failure to give the s 42 notice or declaration or produce the required documents to the celebrant;
- failure to observe the requirement for witnesses;
- failure of a minor to produce consent;
- failure of the authorised celebrant (not being a minister of religion) to say the recommended words (s 46);
- if the person solemnising the marriage was not authorised to do so, and either party at the time of the marriage believed that person to be authorised, the marriage is not invalid (s 48(3)).

Thus, most of the formalities requirements will not invalidate a marriage. However, penalties for non-compliance, as set out in Pt VII, may apply.

Duress

The level of coercion sufficient to avoid a marriage on the ground of consent vitiated by duress is high. Collins J in *Cooper (falsely called Crane) v Crane* (1891) set out the original requirements:

> …either [the wife] was so perturbed by terror that her mind was unhinged and she did not understand what she was doing…or though she understood what she was doing her powers of volition were so paralysed that, by her words and acts, she merely gave expression to the will of the respondent and not her own.

In a case concerning an arranged marriage (*In the Marriage of S* (1980)), Watson J found the requirement of fear and terror 'unnecessarily limiting' and stated:

> A sense of mental oppression can be generated by causes other than fear or terror. If there are circumstances which taken together lead to the conclusion that because of oppression a particular person has not exercised a voluntary consent to a marriage, that consent is vitiated by duress and is not a real consent.

His Honour found the young Egyptian woman to have been 'caught in a psychological prison of family loyalty…and a culture that demanded filial obedience. If she had "no consenting will" it was because these matters were operative—not threats, violence, imprisonment or physical constraint'.

In *Teves v Campomayor* (1995), Lindenmayer J cited earlier cases in finding that duress does not require a direct threat of physical violence so long as there is 'sufficient oppression, from whatever source, acting upon a party to vitiate the reality of their consent'. In that case, the wife had been raped by the husband 12 months prior to the marriage (in the Philippines) and subjected to repeated acts of violence until she agreed to marry him. His Honour cited *Kecskemethy v Magyar* (1961), where a decree of nullity was refused since there was no evidence of force or constraint at the time of the ceremony itself. In the present case, his Honour found that a gap of 10 days had elapsed between the husband's final acts of violence, which caused the wife to agree to marry him, and the date of the marriage ceremony.

In refusing the wife's application, Lindenmayer J held:

> The cases…make it clear that it is duress at the time of the marriage ceremony that is critical. Clearly, this can be induced by events prior to it, but in the end it is for the applicant to show that at the time she gave her consent at the ceremony, some overbearing force was operating.

Fraud

Fraud as a ground of nullity has generated some debate, particularly in the area of sham marriages for immigration purposes. In *Deniz* (1977), a Turkish national seeking permanent residence in Australia convinced an Australian Lebanese schoolgirl that he loved her and wanted to marry her. After the ceremony, he told her of his true intentions and she consequently attempted suicide. The court found a fraud 'going to the root of the marriage contract' and annulled the marriage. However, this decision has not been followed. In *Osman and Mourali* (1990), Nygh J rejected an application for annulment on similar facts, stating:

> …if a person wishes to go through a ceremony of marriage with a person whose identity he or she is aware of, then it matters not that that consent is induced by promises of eternal happiness, luxurious living or even the promise to live together forever after. For, if it were a ground that a party was defrauded as to the intention to cohabit, where should the court draw the line?

His Honour observed that the avenue of divorce, being quick, cheap and no longer shrouded in stigma, was available to the applicant instead.

Similarly, in *Hosking* (1995), Lindenmayer J declined to follow *Deniz*. Although accepting that the wife had the ulterior motive of residency, his Honour pointed out that Hosking's consent to the acquisition of his marital status was real.

Mistaken identity

This ground refers to an error of identity of person, not an error as to the person's attributes or qualities. The identity of Ernest does not depend on his attributes or his name, which might in fact be Jack. What is important is whether the person calling himself Ernest is the same man the applicant consented to marry (*C v C* (1942)).

In *C and D (falsely called C)* (1979), the court found a case of mistaken identity such as to vitiate consent where the husband was revealed after the marriage ceremony to be hermaphrodite.

Mental incapacity

This ground requires that the party is incapable of understanding the nature of the marriage ceremony and the responsibilities normally attaching to marriage (see *In the Estate of Park* (1954)).

Not of marriageable age

The marriage is void if either of the parties is not of marriageable age (see above, p 4). Section 12(3) of the Marriage Act 1961 provides that, where a judge or magistrate makes an order authorising a person aged 16 to under 18 to marry, the applicant is deemed to be of marriageable age, but only in relation to the other party specified in the order. This order ceases to have effect three months from the date that it is made.

2 Property

You should be familiar with the following areas:

- the treatment of superannuation on marriage breakdown
- contribution factors and other factors in altering property interests
- the treatment of initial contributions
- global and asset by asset approaches
- the treatment of the homemaker contribution
- s 75(2) of the Family Law Act 1975 matters
- income disparity
- five grounds for setting aside property orders
- the significance of full and frank disclosure
- the treatment of third party interests
- qualifying to come within the Property (Relationships) Act 1984 (NSW)
- constructive trusts in de facto property claims

Matrimonial property

In responding to the property amendment proposals set out in the Commonwealth Government's 1999 Discussion Paper, *Property and Family Law: Options For Change,* the Chief Justice of the Family Court, Nicholson J, made the following observations representing the majority of Family Court judges:

> The property provisions contained essentially in s 79 of the [Family Law] Act have been in existence in Australia for over 20 years. They have been the subject of considerable jurisprudential development over that time. There is a high settlement rate which has continued throughout that period. The small number of cases which actually go to trial support the

> view that generally the current regime is working satisfactorily. Experience demonstrates that in the vast majority of cases which do go to trial it is not the law or the structured approach under s 79 which is in issue…but because of the factual peculiarities of the particular case.

His Honour listed the following issues which typically cause cases to proceed to judgment:

- the existence and value of particular property;
- the significance of property acquired prior to or very late in the marriage;
- very unusual or particular contributions by one party;
- special needs arising out of the circumstances of a party or the children.

Property

Section 4(1) of the Family Law Act 1975 defines property as follows:

> 'Property' in relation to the parties to a marriage or either of them, means property to which the parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

The question of what is regarded as property becomes important for the purposes of orders under s 79 altering property interests (see below, p 21 *et seq*).

Shares

In *Duff* (1977), the court found shares held by the husband and wife in the family company to be property within the meaning of the Act. The Full Court declined to set out a catalogue of what the term might include and stated that 'property means property both real and personal and includes choses in action'. The court went on to approve a comprehensive meaning given to the term in earlier cases.

Superannuation

The issue of how superannuation interests were to be treated has been raised in many cases prior to the advent of the Family Law Legislation Amendment (Superannuation) Bill 2000. In *Evans* (1991), the Full Court noted that superannuation schemes and their relevant legislation had little regard as to whether the outcome came under the heading of 'property'.

Because superannuation holdings did not fit within the definition of 'property', they could not be made the subject of direct orders altering property interests. However, orders made as to the remaining property were influenced by the amount of those holdings.

In *Mitchell* (1995), the trial judge did not include the substantial superannuation fund as 'property'. However, her Honour substantially increased the percentage to which the wife was entitled in the remaining property under s 75(2) (see below, p 27 *et seq*). The Full Court affirmed this approach and set out a range of options for such a case including:

- proceedings under s 85 to set aside transactions (see below, p 35);
- interim property orders and an adjournment under s 79(5) 'until the financial resource vests as property';
- lump sum maintenance to be payable in future years;
- greater allowance under s 75(2).

The Family Law Legislation Amendment (Superannuation) Bill 2000 inserts Pt VIIIB into the Family Law Act. Schedule 1 to the Bill provides for amendments to the Act dealing with the division of superannuation on marriage breakdown and amendments to other legislation. Schedule 1 will commence from the first anniversary of the day on which royal assent is received. The reason for the delay is explained as being to allow the superannuation industry and relevant government agencies to make necessary adjustments, as well as to allow for educational measures pertaining to the Bill.

Section 90MC of the Bill will extend the meaning of 'matrimonial cause' in para 4(ca) of the Act to include a superannuation interest as property.

Section 90MS of the Bill provides:

> (1) In proceedings under s 79 with respect to the property of spouses, the court may, in accordance with this Division, also make orders in relation to superannuation interests of the spouses;
> (2) A court cannot make an order under s 79 in relation to a superannuation interest except in accordance with this Part.

Section 90MO of the Bill limits the court's power to make an order under s 79 with respect to a superannuation interest if:

- a superannuation agreement is in force; or
- the non-member spouse has served a waiver notice on the trustee under s 90MZA in respect of the interest; or
- a payment flag is operating on the superannuation interest.

Superannuation agreement in force

The Explanatory Memorandum to the Superannuation Bill 2000 notes that s 90MH intends 'that a superannuation agreement should be made in the context of a broader financial agreement dealing with the division of property on marriage breakdown'. Section 90MH(1) of the Bill provides that a financial agreement under Pt VIIIA of the Act may include an agreement that deals with superannuation interests of either or both of the parties as if those interests were property, whether or not the interests exist at the time the agreement is made. Section 90MH(3) provides that the superannuation agreement can only have effect under Pt VIIIB and will not be enforceable under Pt VIIIA.

Section 90MZA waiver

In limited circumstances, the non-member spouse may elect for the superannuation scheme to pay out an entitlement under the payment split (see below, p 19) rather than continue to make payments pursuant to the payment split. This will only be possible when the non-member spouse has been provided with independent financial advice (s 90MZA(2)).

Payment flag operating

A payment flag is defined in the interpretation s 90MD of the Bill as meaning either a provision in a superannuation agreement (s 90ML) or a flagging order made by the court. A payment flag effectively prevents any dealings with the superannuation interest on which it operates. Parties are likely to flag a superannuation interest in circumstances where a condition of release, such as retirement, is approaching.

The court may terminate a payment flag under s 90MM or the parties may make a flag lifting agreement under s 90MN.

Section 90MM of the Bill provides that, if a court makes an order under s 90K setting aside a financial agreement, it may also make an order terminating the operation of the flag. This would only be done in certain circumstances of fraud, the agreement being void or where there is a significant change in circumstances that would make it unfair to give effect to the agreement.

Section 90MO(2) provides that the three limitations in sub-s 90MO(1) do not prevent the court from taking superannuation interests into account when making an order with respect to other property of the spouses. This retains the mechanism previously developed by the court.

Payment splitting or flagging

The Explanatory Memorandum to the Superannuation Bill 2000 noted that, while it is relatively simple to value an accrued interest in an accumulation plan, which can be ascertained at any point in time, defined benefit plans presuppose the happening of future events. Therefore, a set of factors to be set out in the Family Law Regulations will take these events into account. Parties would use these factors in conjunction with personal details and information provided by the trustees to calculate the present day value of an interest in a defined benefit plan. The method of calculation is to be set out in the regulations. Where the valuation factors are not acceptable to a particular superannuation fund, it will be open to the fund to seek approval for its own set of factors.

Under s 90MT of the Bill, a court may make a splitting order related to a superannuation interest in accordance with s 90MS (that is, in property proceedings under s 79). The court may order to the effect that, whenever a splittable payment becomes payable, the non-member spouse is entitled to be paid the amount as calculated in accordance with the regulations and there is a corresponding reduction in the entitlements of the other person. Before making a splitting order, the court must determine the overall value of the interest in accordance with the regulations and allocate a base amount to the non-member spouse, not exceeding the overall value (s 90MT(2)).

In certain circumstances, the court may consider it more appropriate to make a flagging order. If the actual value of the superannuation interest is unknown but may become known in the near future, the court may consider it more appropriate to defer a final decision until then.

A flagging order under s 90MU of the Bill directs the trustee not to make any splittable payment without leave of the court, or requires the trustee to notify the court when the next splittable payment becomes payable. Splittable payments are defined in s 90 ME(1) of the Bill as including:

(a) payment to the spouse;
(b) payment to another person for the benefit of the spouse;
(c) payment to the legal personal representative of the spouse, after the death of the spouse.

Trustees

Section 90 MZD of the Bill provides:

> (1) An order under this Part in relation to a superannuation interest may be expressed to bind the person who is the trustee of the eligible superannuation plan at the time when the order takes effect, but only if that person has been accorded procedural fairness in relation to the making of that order.
> (2) …the order is also binding…on any person who subsequently becomes the trustee…

Procedural fairness is understood as meaning the giving of notice of proceedings, information as to hearing dates and opportunities to be heard in proceedings.

Under s 90MZB of the Bill, the trustee must provide information to an 'eligible person', defined under s 90MZB(4) as the member, a spouse of the member or a person who intends to enter into a superannuation agreement with the member. Penalties attach to non-compliance with an application by an eligible person in the prescribed form.

Multiple payment splits

Where a member of a superannuation scheme marries a number of times, s 90MX of the Bill applies to calculate payment splits in order of their operative dates, starting with the earliest. Section 90MX(3) provides that the amount of the splittable payment (other than the one with the earliest operative date) is reduced by the amount to which another person is entitled under the payment split with the next earlier operative date. The example below has W marrying X, Y and Z in that order, with operative dates of payment splits in the same order. If each payment split provides 50% for the non-member spouse and W becomes entitled to a splittable payment of $100, the payment entitlements are:

X	$50	(having the earliest operative date, amount not reduced).
Y	$25	(splittable payment reduced by X's $50).
Z	$12.50	(splittable payment reduced by X's $50 and Y's $25).
W		receives the remaining $12.50.

In *Van Essen* (2000), the Full Court observed that the new Pt VIIIB 'appears to provide a complete set of rules for the division of any superannuation interest'.

Leave entitlements

In *Tomasetti* (2000), the Full Court cited *Gould* (1996) and found that the trial judge had erred in treating the husband's leave entitlements as property through including their notional value in the calculation of the net pool of the property available for division. As in *Gould's* case, the more likely treatment is to regard leave entitlements as a financial resource under s 75(2)(b) (see below, p 29).

Alteration of property interests

Section 79 provides for the alteration of property interests with respect to 'parties to a marriage'. As to the alteration of property interests of de facto partners, see p 40 *et seq*. Section 79(1) provides:

> In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property in substitution for any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage, such settlement or transfer of property as the court requires.

Parties may bring property proceedings at any time while the marriage is on foot. However, where the parties bring divorce (or annulment) proceedings, s 44(3) requires property and maintenance applications to be brought within a year of the decree nisi becoming absolute, or within a year of the decree of nullity being made, unless the court gives leave in cases of hardship or circumstances of need (s 44(4)). The Family Law Amendment Act 2000 amends this section by enabling parties to consent to proceedings being instituted outside time. In that case, the leave of the court would not be required. However, the court may dismiss the proceedings if it is satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing proceedings to continue would amount to a miscarriage of justice (s 44(3AA)).

Section 79(2) provides that the court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and

equitable to make the order. This provision has been described as the 'controlling' or overriding consideration (see *Norbis* (1986)). The listed considerations in sub-s (4) (see below) must therefore be subject to this overriding consideration.

Section 79(4) sets out the considerations:

> In considering what order (if any) should be made under this section in proceedings with respect to any property of the parties to a marriage or either of them, the court shall take into account:
>
> (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not [the] property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;
>
> (b) the contribution (other than a financial contribution) made directly or indirectly…(as above);
>
> (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;
>
> (d) the effect of any proposed order upon the earning capacity of either party to the marriage;
>
> (e) the matters referred to in s 75(2) so far as they are relevant;
>
> (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and
>
> (g) any child support under the Child Support (Assessment) Act 1989 that a party to the marriage has provided, or is to provide, or might be liable to provide in the future, for a child of the marriage.

The dual exercise, or *'Pastrikos* approach'

The court must consider all of these factors. As a matter of general application these matters are divided into the 'contribution' factors ((a), (b) and (c)) on the one hand, and the factors contained in the remaining paragraphs on the other. The cases have established that the court normally considers 'contribution' factors first, then the matters in paras (d)–(g), especially (e). These last are generally referred to as 'the s 75(2) factors' (see further discussion of these at p 27).This sequence of consideration by the court is often referred to as the 'dual exercise'. *Ferraro* (1993) cites in support of this sequence the earlier cases of *Pastrikos* (1980), *Mallett*

(1984), *Lee Steere* (1985), *Napthali* (1989) and *Dawes* (1990). Family Court judges have also referred to this sequence as the '*Pastrikos* approach'.

Nicholson CJ, Ellis and Renaud JJ in *Davut and Raif* (1994) were of the view that this approach is not only preferred, but, should a judge adopt another method, reasons for that deviation should be given. The court noted that deviation from the sequence is not an actual error but that a proper consideration of all matters under s 79(4) is best served by that sequence.

> In *Pastrikos* (1980), the Full Family Court stated:
> Under s 79, the court has to embark on a dual exercise. The first part of the exercise is to determine the nature and, so far as possible, value of the property of the parties in issue in the proceedings. Usually, the whole of the property of the parties will be relevant. Then the court proceeds to make some assessment of the extent of each party's contribution to those assets…It is not necessary that a party's contribution be tied down to a specific asset; it may be assessed as a general contribution to the property of the parties if the circumstances warrant.

The second part of the exercise is to consider the financial resources, means and needs of the parties and the other matters set out in s 75(2), so far as they are relevant.

The whole of the property

Following on from *Pastrikos,* the courts have set out a prerequisite stage prior to consideration of the 'contribution' factors. Before the 'dual exercise' can validly begin, the court must look at all the income, property and financial resources of the parties, as far as it is possible to isolate these. The High Court in *Mallett* (1984) and *Norbis* (1986) referred to the need to identify and value the whole of the property prior to assessing contributions. The Family Court has distinguished this process from that of giving undue mathematical attention to the parties' contributions when embarking on the 'dual exercise'. What is required at the prerequisite stage is a full and accurate picture of the parties' financial status, without any quarantine of assets, however they may be identified as belonging to one party only.

In the case of *Slater* (1995), the Full Family Court found that the trial judge had erred when he 'quarantined from the weighing up process' a portion of the assets solely contributed by the husband. These included an insurance policy and superannuation acquired by the husband since separation, as well as the post-separation value of substantial

improvements and mortgage payments made by the husband to a property which had formerly been the marital home for 16 years. The trial judge had found it significant that the parties had been separated for many years prior to the hearing. On appeal, the Court referred to *Pastrikos, Norbis* and *Mallett* and added back into the pool those assets quarantined by the trial judge, in order to re-exercise the discretion under s 79. Although the Court noted that the post-separation period had been substantial (18 years broken by short periods of reconciliation), Finn, Kay and Holden JJ nevertheless underlined the fact of the prior 16 year cohabitation which produced seven children, and the task of raising the children having fallen mainly to the wife.

Contributions

Arguments have been put in the course of property proceedings that original contributions of capital should be treated according to business practices. It has been argued that allowances should be given for original ownership, source of funds for improvements and the contributor's revealed intention, whatever the length of the marital relationship. Although s 79(4)(a) requires the court to take into account the matter of financial contribution, both directly and indirectly, the Family Court has generally avoided taking a strict approach in assessing financial contributions where the marriage is of extended duration. As well as being influenced by the context of the legislation, where s 79(4)(b) and (c) refer to non-financial contributions as equal considerations, the court is subject to the overriding provision of s 79(2)—the requirement not to make an order unless it is just and equitable.

The cases have revealed changes in values and policy attaching to legal property and homemaker contributions (see below, pp 26–27).

In *Crawford* (1979), the Full Court stated:

> In our view, the longer the duration of the period of cohabitation the less weight need be given to the initial contribution of capital by either spouse at the beginning of the marriage…we see the significance of the initial contribution gradually diminishing with the passing of the years.

In the case of *Money* (1994), the husband brought into the marriage property worth $242,528 and the wife brought no significant assets. When the parties separated 11 years later, the original property orders gave the parties a 50/50 split of the assets. On appeal, the Full Court by a majority of 2:1 altered this apportionment to 65/35 in favour of the husband. Fogarty J, in dissent, cited *Lee Steere* (1985) as authority for finding the initial

contribution of one party 'offset' by the fact of respective contributions over a long period of marriage. The Full Court adopted this approach in the later case of *Bremner* (1995), where Nicholson CJ added that this approach correctly represents the law.

It must be pointed out that, in *Bremner,* the property concerned was brought in by the husband and retained as valuable vacant land apart from the marital home. This fact, although heavily relied upon by the husband, was held to be of little significance in the context of a marriage lasting 22 years. The Chief Justice noted:

> …when one considers cases of this sort, it should be remembered that they are not decided upon a pure mathematical basis, and looked at from the point of view of abstract justice, it would appear to me that in a case where the assets of the parties are a comparatively modest $360,000, there has been a 20 year marriage and two children, where both parties have worked as these people have, it is difficult to argue with a judgment which divides those assets equally.

Global approach or asset by asset approach

Different considerations will apply in circumstances other than the typical 'long marriage with children' scenario where assets are blended and found to have been contributed to equally. The court's discretion to make orders altering property interests is governed by the 'just and equitable' requirement. Hence, cases arise where it would be manifestly unjust and inequitable not to find assets held separately and apart (see Wilson and Dawson JJ in *Norbis*). The court is entitled to take either a global approach to the asset pool, apportioning contributions to the sum of the pool, or an asset by asset approach according to the circumstances. The latter approach is illustrated in *Davut and Raif* (l994), where an overseas property was acquired by the husband from his parents' national entitlement. Whereas the Full Court apportioned other property of the parties 55/45 in favour of the husband, the overseas property was separately considered and the wife was awarded a smaller contribution of 33.3%.

McMahon (1995) involved a short, childless marriage lasting five years where both parties brought into the marriage substantial assets and an equal measure of business acumen. During the course of the marriage, the wife made several poor investment decisions, while the husband invested successfully. The Full Court found an asset by asset approach preferable to a global approach in the circumstances of the case. These circumstances included the short duration of the marriage coupled with the parties' own careful division of assets. Particularly significant to the court was the fact

that the couple had themselves treated some assets as joint, some as the husband's and some as the wife's. In distinguishing the cases setting out the global approach as preferred or more convenient when assessing the homemaker and parent contribution, Nicholson CJ, Ellis and Buckley JJ noted that, here, that factor was not significant. Both parties had older children from previous marriages and agreed to equality of domestic contribution. Therefore, no obstacle arose to adopting the asset by asset approach.

In *Prpic* (1995), the Full Court adopted an asset by asset approach in the circumstances of the husband receiving a damages award from workplace-related injuries sustained at a time when the marriage was breaking down. The award included a component attributable to loss of earning capacity. The court separately assessed the wife's contribution to that asset at 5%—representing her assistance in establishing and maintaining the husband's earning capacity prior to the breakdown of the marriage. By contrast, the court assessed the wife's contribution to the house and car at 40%.

Non-financial contributions

In *Rolfe* (1979), (then) Chief Justice Evatt noted, in a much quoted passage:

> The purpose of s 79(4)(b), in my opinion, is to ensure just and equitable treatment of a wife who has not earned income during the marriage, but who has contributed as a homemaker and parent to the property. A husband and father is free to earn income, purchase property and pay off the mortgage so long as his wife assumes the responsibility for the home and the children…the Act clearly intends that her contribution should be recognised not in a token way but in a substantial way.

Although the Australian society represented in her Honour's explanation has changed to some extent since the decision, cases are still before the Family Court where marriages were commenced and continued for many years on that basis. In *Ferraro* (1993), the Full Court considered property orders attending a 27 year marriage which yielded assets worth $10.62 million where the parties had started out with virtually nothing. The wife had devoted herself to the role of homemaker and primary care giver to the three children, whilst the husband devoted himself to building up his financial assets and, thus, his role as breadwinner. In this case, the trial judge had demonstrated his lesser regard for the role of homemaker and parent in assessing contributions under s 79(4). On appeal, the Full Court observed:

> The issue here is not whether the wife made direct contributions to the conduct of the business…The facts are that the husband, particularly in the latter years, devoted his full time and attention to his business activities and thus the wife was left with virtually the sole responsibility for the children and the home. That latter circumstance is significant not only in relation to the evaluation of the wife's homemaker contributions under para (c) but is important under para (b) because it freed the husband from those responsibilities in order to pursue without interruption his business activities.

The decision saw an apparently minor adjustment made to the contribution split upon a successful appeal by the wife. The result of the appeal—from the trial judge's finding of 30% to 37.5% for the wife—was supported by the court as reflecting the correct respective contributions, especially in view of the large sums involved. The wife received orders in her favour for the sum of $4.5 million, with the court adding that this area is 'an evolutionary process', where awards under s 79 are subject to the changing legal and social background.

In the later case of *Prpic* (discussed above, p 26), the trial judge had divided the parties' property as to 82.5% for the husband and 17.5% for the wife (in addition to increasing child support payable by the wife well beyond the statutory percentage of her income). On appeal, the Full Court stressed the homemaker role and referred to *Ferraro* in observing: The harder the husband worked to earn an income or to build a house, the less time he had to provide towards his family, and the greater the burden which fell upon the wife in caring for the children.' These observations did not prompt the court to alter the trial judge's award as to the contribution stage of the dual exercise. However, the Full Court carried over this factor to be considered under s 75(2) and thus increased the wife's share of the pool to 25%.

Section 75(2) matters

Fifteen matters are listed under sub-s (2), which pertains both to spousal maintenance under s 75(1) and property orders under sub-s 79(4). These are:

(a) the age and state of health of each party;
(b) the income, property and financial resources of each, and their capacity for 'appropriate gainful employment';
(c) the fact of having the care and control of a child of the marriage under 18 years;

(d) commitments necessary for the support of themselves and others they have a duty to support;
(e) responsibilities to support any other person;
(f) pension, allowance and superannuation entitlements (except if income tested: s 75(3));
(g) a reasonable standard of living;
(h) likelihood of maintenance payments increasing the recipient's earning capacity by supporting training or business options;
(j) the extent to which a party being considered for maintenance has contributed to income, earning capacity, property and financial resources of the other;
(k) the duration of the marriage and the effect on earning capacity of the party being considered for maintenance;
(1) the need to protect a party who wishes to continue in role of parent;
(m) financial circumstances relating to cohabitation;
(n) orders under s 79;
(na) child support;
(o) any fact or circumstance which the justice of the case requires to be taken into account.

The intermeshing of these provisions with maintenance proceedings was examined in *Anast and Anastopoulos* (1982). The Full Court in that case referred to the earlier decisions of *Pastrikos* (1980) and *Albany* (1980) as having established the distinction between property entitlements decided under s 79 according to the dual exercise, and a party's maintenance entitlement under s 72. The legislature had avoided repeating itself in an awkward drafting of s 75(2) factors. The same list had to be considered independently, first, for property orders, and, secondly, for the purposes of maintenance under s 72. In *Albany,* the assets were found to be substantial enough to preclude any further adjustment under s 75(2). In other cases, the Full Court suggested, entitlements under s 79 might still leave a right to maintenance under s 72.

In *Collins* (1990), the Full Court rejected the argument that only a case of financial need should make the court move past its contribution findings to consider the s 75(2) factors. The court stated:

> The s 75(2) factors within s 79 have an independent existence which is quite different from and separate from proceedings for spousal maintenance.

Georgeson (1995) involved a substantial property brought in by the wife at the commencement of the marriage. The significant factors were found to be the ongoing responsibility of the wife for the children and the greater property of the wife (having been assessed at 65%, or $1.3 million), as balanced out by the husband's greater income and earning capacity. Ellis, Finn and Joske JJ emphasised the rule in *Collins* that s 75(2) factors are not confined to issues of financial need. Their Honours found the trial judge had correctly attached significant weight to the ongoing non-financial responsibility of the wife for the children.

In comparison, the Full Court in *McMahon* (see above, p 25), found no reason to make any s 75(2) adjustments in that case. The parties were seen to be equal in their capacity to maintain themselves, there were no children of the marriage, the parties were the same age and their health problems were equivalent. No other fact or circumstance arose to be considered and the trial judge's allowance to the wife of a further 5% was found to be unjustified. It must be pointed out that the facts of *McMahon* stand in stark contrast to the majority of cases coming before the court for property orders.

In *Tomasetti* (2000), the Full Court found the trial judge to have erred in separately evaluating each s 75(2) factor, determining an appropriate percentage adjustment for each and then adding those together. The court found that the correct procedure required the judge to:

> …consider the factors collectively, as a cumulative process, in order to avoid both a manifestly unjust result and the potential for double counting, since some of the [s 75(2)] factors overlap.

Income disparity

Section 75(2)(b) invites frequent consideration by the court, in particular where the husband enjoys a higher earning capacity. In *Waters and Jurek* (1995), it was argued by counsel for the husband that, in cases where both parties enjoyed a high income and earning capacity, it was inappropriate to make any adjustment on the basis of income disparity. This argument was rejected by Baker J, following the reasoning in *Collins* (1990), discussed above. Fogarty J found significant the fact of the wife having income as a psychiatrist in the 'higher range of incomes in Australia' which was likely to increase to a figure closer to the husband's as her workload enlarged. However, his Honour concluded on balance that it was reasonably open to the trial judge to take the psychiatrists' income disparity into account, particularly in view of some evidence that family commitments and the

marriage breakdown may have impinged on her earning capacity. In a substantial discussion on the status of s 75(2) factors, Fogarty J considered the financial implications of role differentiation inside and outside marriage.

His Honour observed:

> …the world outside the marriage does not recognise some of the activities that within the marriage used to be regarded as valuable contributions. Homemaker contributions, for example, are no longer financially equal to those of the breadwinner. Post-separation, the party who had assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage. Yet that party often cannot simply turn to more financially rewarding activities. Often, opportunities to do so are no longer open, or, if they are, time is required before they can be accessed and acted upon.

His Honour remarked that the legislative proposals to change Pt VIII before Parliament in late 1995 made no (significant) changes to s 75(2).

Paragraph (o): the justice of the case

In *Kowaliw* (1981), Baker J stated that conduct relevant to s 75(2)(o) included:

- where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets; and

- where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets the overall effect of which has reduced or minimised their value.

His Honour set out as a statement of general principle that financial losses incurred by parties in the course of a marriage should be shared, although not necessarily equally, except in the above circumstances.

In *Browne and Green* (1999), the Full Court referred to Baker J's statement as the '*Kowaliw* guideline'. The court found it manifestly unjust to depart from the *Kowaliw* guideline in placing on the husband the full burden of losses merely because he initiated and had control over the venture which led to the losses. In this case, the wife was found to be a willing participant in the venture.

In the case of *Re Q* (1995), Kay J made reference to the difficult years that lay ahead of the wife and children after the husband had been convicted of sexually abusing his daughter over a six year period. Implicit in his Honour's s 75(2) adjustments as part of the parties' property proceedings were considerations pertaining to the diminution of the wife's earning

capacity due to her psychiatric illness following the revelation of the husband's offences. Similarly, regard was had to the wife's future needs in managing the children given the difficult circumstances.

Setting aside property orders

Section 79A(1) provides four alternative grounds for setting aside property orders made under s 79. These are:

(a) miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance (see below for the Family Law Amendment Act 2000 changes to this paragraph);
(b) impracticability of the order or part of it being carried out in the circumstances arising since the order was made;
(c) default in carrying out an obligation under the order and the circumstances arising as a result of the default make it just and equitable to vary, set aside or substitute the order;
(d) circumstances of an exceptional nature arising since the making of the order relating to the care, welfare and development of a child of the marriage where the child or the applicant having a caring responsibility for the child would suffer hardship if the court does not vary, set aside or substitute the order.

Where the court is satisfied that one or several of these conditions exist, it may, in its discretion, vary, set aside or substitute the order under s 79 on an application by a person affected by the order.

The cases have clearly established that there are two stages involved in this remedy:

(a) the court must consider whether the ground has been made out;
(b) the court is then required to demonstrate that its discretion has been exercised.

In *Taylor* (1979), Mason J listed the need to end litigation and the 'evil' of allowing cases to be retried on the same evidence as factors against setting aside property orders purely on the ground as made out Judgments therefore set out the ground or grounds raised by the applicant, then clearly state the reasons for exercising the discretion. Where this two stage process is omitted by the court in the application of s 79A(1), an appeal will often lie on that basis. In *Prowse* (1995), the Full Court emphasised that the

legislature had clearly given the court such a discretion even in view of the court's primary finding that a miscarriage of justice has occurred. Baker, Rowlands and Lindenmayer JJ stated:

> The better view, in our opinion, is that an applicant for an order under s 79A(1) bears the onus of satisfying the Court that the original orders should be set aside or varied, and that includes the onus of satisfying the Court not just that there has been a 'miscarriage of justice' but also that the appropriate exercise of the discretion is to so order.

(a) Miscarriage of justice

The first 'ground' is a list of circumstances, any of which must lead to a miscarriage of justice. Hence duress, fraud, suppression of evidence, giving of false evidence or any other circumstance, without giving rise to a miscarriage of justice, does not yield a ground for setting aside property orders. *Gebert* (1990) considered the phrase 'or any other circumstance' as not to be read *ejusdem generis* with the preceding list. *Suiker* (1993) affirmed this interpretation and considered 'miscarriage of justice' to relate not just to the integrity of the judicial process but to a variety of matters and circumstances influencing the outcome of litigation. Hence this ground currently appears to embrace a broad discretionary element in itself. In fact, most cases seem to be brought under this ground with some question of false, suppressed or simply incorrect financial information.

In *Fickling* (1995), the bulk of the husband's property was in the US. In seeking the original property orders, counsel for the wife relied on an 'aide memoire' which overestimated the husband's US property by $2 million. Upon the husband's application to have the orders set aside, Treyvaud J considered the first ground of application under s 79A(1)(a): miscarriage of justice. His Honour found no fraud, suppression or false evidence in the over-valuation, but, rather, a matter of inadvertent misreading. He then went on to consider whether this ought to be considered as a miscarriage of justice and found that it was, 'by reason of any other circumstance'.

Suppression of evidence

In frequent cases involving substantial property holdings, usually by the husband, the wife has sought to have property orders set aside on the ground of the husband's suppression of evidence under s 79A(1)(a). It is well established that, in order to make a just and equitable alteration of property, there must be a full and frank disclosure of all circumstances relevant to determining the true financial position. The Family Court has

adopted an English authority in this matter, *Livesey v Jenkins* (1985). In discussing s 25(1) of the UK's Matrimonial Causes Act 1973, Lord Brandon in that case found the 'principle of full and frank disclosure' well established in contested property proceedings. The principle was found to be equally applicable in the context of making consent orders. But his Lordship distinguished cases where the absence of full and frank disclosure does not justify the court in setting aside an order. Where a relatively minor matter would not have made any substantial difference to the order made, the application on this ground will fail.

Livesey v Jenkins was adopted in *Briese* (1986), *Oriolo* (1985) and *Suiker* (1993). In *Suiker,* the Full Court described as implicit in consent orders the requirement of informed consent Where consent is based on misleading or inadequate information, the court found, there may well be a miscarriage of justice by reason of 'suppression of evidence' or 'any other circumstance'.

In *Morrison* (1995), consent property orders made in 1987 were set aside as late as 1994 on the ground of miscarriage of justice due to 'suppression of evidence' or 'any other circumstance'. In that case, the husband had transferred his interest in a lucrative abalone licence to another diver on the understanding that he had the right to buy back the licence pursuant to a 'Thommo' agreement. The husband was found to be acting in accordance with a standard informal practice in the trade in order to retain the validity of the licence, which specified a strict owner-operator policy. Because of ill health, the husband was unable to work the licence himself. Later, the husband, with the second diver's compliance, sold the abalone licence for $900,000. The second diver received the sum of $30,000 and the husband the balance.

The wife argued successfully that, had she known of the Thommo agreement, she would not have consented to a notional valuation of the licence as $250,000 for the purposes of the consent orders.

The Full Court found:

> …the failure of the husband to disclose the true position robbed the wife of the opportunity of litigating the issue of the true value of the licence. In our view the non-disclosure was of such magnitude that it amounted to a miscarriage of justice…

The Family Law Amendment Act 2000 adds the words 'including failure to disclose relevant information' after the words 'suppression of evidence' in s 79A(1)(a) in order to clarify this ground.

(b) Impracticability

This ground is not available where the applicant has contributed to the prohibitive change in circumstances which have arisen since the order was made. In *Rhode* (1984), Gee J found that it is not in the public interest to permit parties to extricate themselves where they have contributed to their own financial troubles. An illustration occurred in *Fickling* (1995), where the husband's voluntary (US) bankruptcy petition, filed after the property orders were made, was not permitted to be used by the husband under this ground.

(c) Default

In *Fickling* (1995), the wife cross-applied under s 79A(1)(c), seeking to have the original property order in her favour affirmed but categorised as lump sum maintenance under s 74. This was sought in order to retain the benefit of the order in the course of the husband's bankruptcy proceedings. Treyvaud J noted that s 123(6) of the Bankruptcy Act 1966 (Cth) continued the obligation to pay maintenance even after discharge, the US law being similar. The judge found it 'proper' to make the order sought by the wife under s 79A(1)(c) in view of the husband's voluntary bankruptcy being designed to defeat the claims of creditors, including the property order in favour of the wife.

Having assessed the wife's spousal lump sum maintenance under s 74 (see below, p 66 *et seq*), the judge then reduced the property order by that amount.

(d) Circumstances of an exceptional nature

The question whether circumstances are 'exceptional' was considered in *Simpson v Hamlin* (1984), where the Full Court held that the question was whether circumstances were not reasonably expected to occur at the time of the original property orders, and which therefore could be regarded as beyond the ordinary and exceptional. The court also stated that what amounts to exceptional circumstances is very much a question of fact and degree. In *Yousseff* (1995), the parties had received property orders based, in part, on the fact of the wife having custody of the four children of the marriage. After the orders were made, the husband enticed the three boys to run away from the wife. He was consequently sentenced to three months' imprisonment and released on a good behaviour bond. The boys continued to live with the husband, however, and he was later granted custody of them, but not of the girl. In seeking to have the property orders set aside, the husband relied on s 79(A)(1)(d).

Although finding on appeal that the return of the three boys to the husband were circumstances of an exceptional nature, the Full Court observed that the hardship which might be suffered by the husband had been brought about by his own conduct. Thus, in exercising its discretion as to whether to alter the original order, the court preferred not to vary the order giving the wife 90% of the proceeds of the marital home. It must be noted that the decision took into account an overseas property belonging to the husband which he was permitted to dispose of as he wished. The court found that, if the husband had not owned the overseas property, then the orders as they stood would have been inequitable.

Third parties

Section 85(1) provides:

> In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

Section 85(3) instructs the court to have regard to the interests of *bona fide* purchasers or others and to make any order proper for their protection.

In *Ascot Investments Pty Ltd v Harper and Harper* (1981), Gibbs J in the High Court considered that Parliament did not intend to subordinate third party interests to those of parties to a marriage in giving the Family Court its powers. His Honour warned that if in fact the sections had been intended to prejudice the interests of third parties, then it would have been necessary to examine their constitutional validity. However, his Honour went on to consider the position where the rights of a third party constitute a sham, brought into being as a device to evade obligations under the Act:

> Similarly, if a company is completely controlled by one party to a marriage, so that in reality an order against the company is an order against the party, the fact that in form the order appears to affect the rights of the company may not necessarily invalidate it. Except in the case of shams, and companies that are mere puppets of a party to a marriage, the Family Court must take the property of a party to a marriage as it finds it.

In *Stein* (1986), the husband's business was conducted under the name of the trustee company, with the husband and his accountant as directors. He argued that the court was unable to make orders in respect of assets owned by the company. However, the Full Court found that, although the

terms of the trust deed made the husband a beneficiary at the discretion of the trustee, the reality of the situation had to be taken into account:

> In our view, the company…is a mere puppet of the husband. So far as the trust is concerned, the husband has…the power to apply the income and property of the trust for his own benefit. As Strauss J said in *Ashton and Ashton* (1986):
>
> > …this court is not bound by formalities designed to obtain advantages and protection for the husband who stands in reality in the position of the owner. He had de facto legal and beneficial ownership.

In *Bassi* (1999), the husband made dispositions to his new de facto partner and the company she effectively controlled. The de facto was found to have acted in collusion with the husband and thus lacked the *bona fides* required for s 85(3) protection. The court found that the husband and de facto had a close business relationship and both knew that the transactions would diminish the husband's ability to meet his obligations to the wife. The dispositions by the husband to be returned to the asset pool were dealt with by the Full Court as follows:

- an amount relating to the gift of a car but reduced by $10,000, being the difference between the cost of the vehicle and its subsequent sale price;
- contributions to the de facto's mortgage;
- money spent on improvements to the de facto's property, whether or not paid to the de facto or to third party tradesmen;
- money lent to the de facto's company.

Declarations

Section 78 provides:

> (1) In proceedings between the parties to a marriage with respect to existing title or rights in respect of property, the court may declare the title or rights, if any, that a party has in respect of the property.
> (2) Where a court makes a declaration under sub-s (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition and interim or permanent orders as to possession.

Balnaves (1988) involved orders seeking declaration and consequential orders in relation to third party private companies apparently holding family property on trust. The Full Court, in refusing to make the orders

sought, pointed to (the then) s 78 as not only failing to provide that power, but also as presenting an 'insuperable obstacle to that course'.

Later, in *Hendler and Hendler; Moore* (1992), orders were made against the husband's brother-in-law as to an interest in a mobile home, declaring that he held $25,000 on trust for the husband. On appeal by the brother-in-law, where he submitted that he was a third party and thus outside s 78, the wife then amended her application to include a claim under s 85. The Full Court granted this leave, finding the transaction to be within s 85.

Moran (1995) concerned a declaration sought by the wife as to the husband's equitable interests in land registered in the name of his daughter and in assets held by a company. The husband argued that the effect of the wife's application was an attempt to seek declarations that the third parties held property on trust for the husband. Counsel for the wife argued to distinguish *Balnaves* on the basis that the present declaration was not sought against third parties but in fact as between the husband and wife. In addition, no consequential orders were sought. Secondly, should third parties' rights be involved, these were a sham and squarely within the exceptions given by Gibbs J in *Ascot Investments Pty Ltd.* Bulley J accepted both of the wife's submissions and dismissed the husband's application to have those paragraphs in the wife's amended application struck out.

Creditors

Section 79(A)(1) enables any person affected by an order made under s 79 to apply to the court to have it altered.

In *Bailey* (1990), claimants in a controversial medical negligence case sought leave to intervene in property proceedings concerning the deceased doctor's estate. The Full Court cited a number of cases dealing with unsecured creditors' rights to support their finding that establishing what is 'property' for the purposes of the prerequisite stage in making s 79 orders, means establishing net assets. Their Honours found that no distinction could be made between liquidated and unliquidated liabilities for this purpose. The court pointed to the terms of s 79(A)(1) as emphasising the rights of third parties generally to set aside an order. This case extended the categories of successful third parties, where previously the standard applicants were the Taxation Commissioner *(Chemaisse* (1988) and *Rowell* (1989)), the Collector of Customs *(Semmens* (1990)) and the Official Trustee in Bankruptcy.

Guarantees

Garcia v National Bank (1998), a High Court case, concerned a guarantee given by the wife of a businessman to the National Bank. The couple executed a mortgage over their home in favour of the bank, which secured loans made to the husband for use in his business and, later, a personal loan made to the couple. After the wife obtained a divorce, she commenced proceedings seeking declarations that the mortgage and guarantees were void. The trial judge granted her relief in reliance on the principles in *Yerkey v Jones* (1939) (see below). The Court of Appeal upheld the bank's appeal but the High Court found in favour of Mrs Garcia.

It was accepted by the judge that Mrs Garcia appeared to be a capable professional who knew at the time that she was executing a guarantee. However, his Honour found that she did not understand the extent of the guarantee and that she signed it thinking it was risk proof because it was a guarantee of limited overdraft accommodation, to be applied only in the purchase of gold. Nor did she understand that her obligations under the guarantee were secured by the mortgage over her home. The bank had not explained the transaction to her and no independent advice had been given to her about it.

In reaching back to *Yerkey v Jones* (1939), the High Court relied on the second situation set out in that case, that is, where there is no undue influence but a failure to explain adequately and accurately the transaction which the husband seeks to have the wife enter for his immediate economic benefit. In this case:

> [If] the creditor takes adequate steps to inform [the wife] and reasonably supposes that she has an adequate comprehension of the obligation she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document or …the significance of what she is doing, cannot give her an equity to set the instrument aside.

Therefore, the elements required are as follows:

- the wife did not understand the purport and effect of the transaction;
- the transaction was voluntary, in the sense that the wife obtains no gain from the contract;
- the bank is taken to understand that, because of the trust and confidence between the husband and wife, the wife may not have received from the husband a sufficient explanation of the transaction's purport and effect.

Kirby J agreed with the outcome of the decision as to the appeal but disagreed with the reasoning of the majority. Instead, his Honour felt that the court should search for a broader principle, one that is non-discriminatory, not confined to one group and which does not ignore the diversity of women's experiences. His Honour saw the 1939 case as being inappropriate to contemporary Australian circumstances and instead reformulated the principle expressed by Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien* (1994). Kirby J considered the need for:

> …a broader doctrine by which equity protects the vulnerable parties in a relationship and ensures that in proper cases they have full information and, where necessary independent advice before they volunteer to put at risk the major asset of their relationship for the primary advantage of those to whose pressure they may be specially vulnerable.

Agreements

The Family Law Amendment Act 2000 provides a new Pt VIIIA to regulate 'financial agreements'. Section 71A states that Pt VIII does not apply to certain matters covered by binding financial agreements. In other words, the court will not have jurisdiction to make orders in relation to property covered by a financial agreement.

Sections 86 and 87 will no longer have any effect (s 86A). However, any agreement made prior to the commencement of Pt VIIIA will be able to be registered. Financial agreements can be made

- before marriage, but in contemplation of entering the marriage, to come within the Constitution (s 90B); or
- during marriage (s 90C); or
- after the decree nisi dissolving the marriage (s 90D).

The matters which comprise a 'financial agreement' must be provisions as to:

- how all or any of the property or financial resources owned by either or both of the parties at the time of the agreement, acquired during the marriage or, if the agreement is made after dissolution, up to the time of the agreement is to be dealt with;
- maintenance of either of them.

Other matters are permitted to appear in addition to one or both of these provisions.

Section 90F of the Act allows the court to retain jurisdiction in relation to spousal maintenance orders if the court is satisfied that, when the agreement was made, the party would have been unable to support him or herself without social security payments, taking into account the terms and effect of the agreement. The explanatory memorandum adds that the purpose of s 90F is to ensure that people cannot agree away their obligation to maintain the other party with the effect of adding to the social security burden.

Under s 90G of the Act, financial agreements are binding on the parties only if all of the following are observed:

- the agreement is signed by both parties;
- the agreement includes statements that each party has received independent legal advice as to the effect of the agreement, whether it was advantageous and prudent for the party to make it, and whether the provisions were fair and reasonable;
- the agreement contains a certificate by the independent legal advisor stating that the advice was given;
- the agreement has not been terminated or set aside;
- one party must be given the original agreement and the other must receive a copy.

Section 90K of the Act provides that a court may set aside a financial agreement if it is satisfied of any of the following:

- the agreement was obtained by fraud (including non-disclosure of a material matter);
- the agreement is void, voidable or unenforceable;
- it is impracticable for the agreement or part of it to be carried out;
- a material change in circumstances relating to the care, welfare and development of a child of the marriage has occurred since the making of the agreement and the child or a party will suffer hardship if the agreement is not set aside;
- a party to a financial agreement engaged in unconscionable conduct.

De facto property

In 1992, the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act recommended that the Commonwealth Government seek a reference of States' powers in relation

to jurisdiction in property disputes between de facto partners. The Committee recommended that separate Commonwealth legislation deal with de facto property disputes and that the Family Court be vested with jurisdiction of any such legislation. The Government response in December 1993 accepted these recommendations.

In late 1999, the Attorney General stated that he wished to pursue the reference of power in order to achieve a consistent system for both married and de facto couples. Currently, these recommendations have not been implemented and the governing State's legislation (where applicable) prevails.

New South Wales was the first to introduce its De Facto Relationships Act 1984 and Victoria followed with amendments to the Property Law Act 1958 in 1987. The Victorian scheme was more limited than that introduced in New South Wales. The Northern Territory closely followed the New South Wales provisions in passing its De Facto Relationships Act 1991. The Australian Capital Territory passed the Domestic Relationships Act 1994, which, unlike other States' property regimes at the time, covered same sex relationships. South Australia passed the De Facto Relationships Act 1996.

New South Wales amended its legislation in 1999 to include same sex relationships. Queensland passed amendments to its Property Law Act 1974 in December 1999, including same sex relationships in its first de facto property scheme. The Tasmanian De Facto Relationship Act 2000 does not include same sex relationships in its scheme.

The New South Wales Act is discussed here and references are to the Act as amended in 1999.

The Property (Relationships) Legislation Amendment Act 1999 (NSW) came into force on 28 June 1999. It renamed the De Facto Relationships Act 1984 to the Property (Relationships) Act 1984. The definition of 'de facto spouse' now includes cohabiting same sex couples.

Section 4(1) provides that a de facto relationship is between two adult persons:

(a) who live together as a couple; and
(b) who are not married to one another or related by family.

The neutral wording of the definition was specifically intended to include same sex couples.

In addition, the 1999 NSW Act introduced the broader concept of 'domestic relationships', which includes both de facto relationships and close cohabiting relationships between people who are not couples.

Section 5 defines 'domestic relationship' as:

(1) (a) a de facto relationship; or

(b) a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

(2) For the purposes of sub-s (1)(b), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:

(a) for fee or reward; or

(b) on behalf of another person or an organisation…

The Act requires all the circumstances of the relationship be taken into account in determining whether a de facto relationship exists. In addition, a non-exhaustive list of factors is provided, including, in s 4(3):

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependence or interdependence and any arrangements for financial support between the people;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the performance of household duties.

A close personal relationship is intended to cover relationships such as unpaid carers of parties (whether or not a party is incapacitated) but not simply flatmates or parties in shared houses.

Section 14 provides for a party to a domestic relationship to apply to a court for an order for the adjustment of interests with respect to the property of the parties or either of them, or for the granting of maintenance, or both (see below, pp 73–74, for a discussion of de facto maintenance). Section 14(2) adds that that these applications can be made in addition to remedies or relief under any other law (see below, pp 47–50).

A residential nexus is imposed in s 15 of the NSW Act. At least one party must be resident in NSW on the day of filing the application. In addition, either both parties must have been resident in NSW for a 'substantial period' of the domestic relationship, or the applicant must have made 'substantial contributions' in NSW to the wealth and welfare of the family of the kind referred to in s 20(1)(a) or (b). Section 15(2) finds

a 'substantial period' as having been met if the parties have lived together in NSW for at least one-third of their relationship.

Section 20(1) provides that a court may adjust interests of the parties to a domestic relationship in property as seems just and equitable, having regard to:

> (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the parties to the relationship to the acquisition, conservation or improvement of any of the property of the parties or either of them or to the financial resources of the parties or either of them; and
> (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the parties to the relationship to the welfare of the other party or to the welfare of the family constituted by the parties and one or more of the following:
> (i) a child of the parties;
> (ii) a child accepted by the parties or either of them into their household, whether or not the child is a child of either of them.

To come within the scheme, the applicant must satisfy the court that the parties have lived together in a domestic relationship for no less than two years (s 17(1)). Alternatively, s 17(2) provides:

> A court may make an order for this Part where it is satisfied:
> (a) that there is a child of the parties to the application; or
> (b) that the applicant:
> (i) has made substantial contributions of the kind referred to in s 20(1)(a) or 20(1)(b) for which the applicant would otherwise not be adequately compensated if the order were not made; or
> (ii) has the care and control of a child of the respondent, and that the failure to make the order would result in serious injustice to the applicant.

So, the following are alternative qualifications:

- two years living in a domestic relationship;
- a child of the relationship;
- the applicant has made substantial contributions under s 20 and serious injustice would result if the court fails to order;
- the applicant has the care and control of a child of the respondent from another relationship and serious injustice would result if the court fails to order.

Unless the court grants leave to an applicant to extend time, the parties to a domestic relationship must bring the application for a maintenance or property order within two years after the date on which the relationship ceased (s 18).

In *D v McA* (1986), Powell J set out the order of procedure in making property adjustments under the original Act. First, the court was to identify and value the parties' assets. Secondly, the court was to determine any contributions under s 20(1)(a) and (b) by each partner. Thirdly, the court was to decide whether the applicant's contributions had already been sufficiently recognised and compensated for. Finally, it was to determine an order which recognised and compensated the applicant's contributions. His Honour noted:

> …despite the apparent similarity between the terms of s 20 of the Act and the terms of s 79 of the Family Law Act 1975 (Cth), one must recognise that there remain significant differences between the terms of the two provisions…The two differences…are:
>
> (a) that the range of matters to which one might have regard [under] s 20 of the Act is significantly less…; and
>
> (b) …it does not appear open to the court to resort to the power under s 20 of the Act to adjust property interests in order to provide for or assist in providing for, the maintenance of an applicant.

This decision is to be compared with those discussed above under s 75(2) of the Family Law Act 1975 above. Judges were reluctant to grant to de facto property applications the full range of considerations given in matrimonial property decisions.

However, in *Dwyer v Kaljo* (1992), the NSW Court of Appeal allowed for future needs to be added in by expanding the 'just and equitable' requirement, and devised a code of interests in support of this expansion. Handley JA referred to restitution, reliance and expectation interests implicit in considerations of 'justice'. According to the judge's code, 'restitution' interests concerned the applicants benefits rendered to the other partner during the relationship. 'Reliance' interest involved a reasonable reliance on the relationship, and 'expectation' interests concerned the applicant's reasonable expectations from the relationship.

Here, the applicant had lived in a de facto relationship with the respondent businessman for over six years and attended to household and secretarial duties. In addition, she assisted in caring for the respondent's son from his previous marriage. As in *Ferraro*'s case, the respondent's wealth totalled $11 million. However, here the relationship was not only much shorter in duration (six years compared with 27 years), but the parties

had not married. The facts demonstrated a similar range of domestic contributions, one distinction being that, in *Ferraro,* the wife's efforts contributed to the initial creation of the husband's wealth. Here, the respondent's wealth had been established prior to the relationship. The settlement in *Ferraro* was ultimately assessed as $4.5 million for the wife. By contrast, the applicant in *Dwyer v Kaljo* initially received an order for $50,000.

In awarding the applicant $400,000 on appeal, the court found that the relationship had caused the applicant to derive 'reliance and expectation interests' warranting an order which went beyond mere compensation. Handley JA found the respondents' wealth to be an important factor in generating these interests, and that the trial judge's reference to the housekeeper's wages in treating the claim as a *quantum meruit* was quite inappropriate. It is also apparent from the decision that the applicant's comparative youth on commencing the relationship (21 years to the respondent's 46) was a significant factor in the findings of reliance and expectation.

In *Evans v Marmont* (1997), a majority of the NSW Court of Appeal concluded that *Dwyer v Kaljo* was not to be followed. The court decided that s 20 was to be narrowly interpreted. In determining what is just and equitable within the meaning of that section, the NSW court must only consider the matters contained in s 20(1) (a) and (b).

In *McKean and Page* (1999), the Full Family Court found the trial judge in error in having considered matters outside those contained in s 20(1)(a) and (b). The court expressly followed *Evans v Marmont.* By contrast, the ACT Domestic Relationships Act 1994 includes a future needs component In that jurisdiction, decisions of the Family Court under s 79 of the Family Law Act 1975 are directly applied (see *Hallinan and Witynski* (1999)). Similarly, South Australia's De Facto Relationships Act 1996, Queensland's Property Law Act 1974 (as amended) and Tasmania's De Facto Relationship Act 2000 also include future needs as matters to be included in the court's consideration.

Agreements

Relationship agreements are provided for under ss 44–51 of the Property (Relationships) Act 1984 (as amended). Section 44 defines a 'domestic relationship agreement' as meaning:

- an agreement between two persons (whether or not there are other parties to the agreement);
- made in contemplation of their entering into a de facto relationship, or while they are in one;
- that provides for financial matters, whether or not it also provides for other matters;
- including an agreement that varies an earlier domestic relationship agreement;
- including an agreement made in contemplation of the termination of a domestic relationship if the relationship is not terminated within three months after that agreement was made (s 44(2)).

Section 44 defines a termination agreement as:

- an agreement between two persons (whether or not there are other parties to the agreement);
- made in contemplation of the termination of a domestic relationship existing between them, or after its termination;
- providing for financial matters, whether or not it also provides for other matters;
- including an agreement that varies an earlier domestic relationship or termination agreement other than the over three month agreement referred to in s 44(2) above.

Section 45 overrides any 'rule of public policy to the contrary' and provides that two persons who are not married to each other may enter into the agreements defined above. However, s 45(2) provides that nothing in such an agreement affects the power of a court in making an order with respect to children of the parties.

The provisions were designed to permit parties to order their financial affairs with some degree of finality and a 'clean break' on separation. However, they are open to review on several bases. First, s 46 provides that either type of agreement is subject to the law of contract, including the Contracts Review Act 1980. Hence, any invalidating factor in contract law will apply. Secondly, although the existence of either agreement will bind a court to its terms, the formalities of certifying the agreements are onerous. Section 47 requires:

- that the agreement is in writing, signed by the party against whom it is sought to be enforced;
- that each party was given a certificate in the prescribed form by a solicitor before signing the agreement stating that the solicitor advised the party independently of the other as to the effect of the agreement on their rights, whether the agreement was to their advantage, whether it was 'prudent' for the party to enter it, and whether the provisions were fair and reasonable in the foreseeable circumstances;
- that the solicitors' certificates must accompany the agreement.

Section 47(2) states that if any of these matters are missing, it can make an order without being bound by the agreement, although it may have regard to the terms. The court may do so even if the agreement purports to exclude the court's jurisdiction (s 47(3)).

Thirdly, if the court is of the opinion that the parties have by their words or conduct revoked the agreement or that the agreement has 'otherwise ceased to have effect', it need not give effect to its terms (s 50).

In addition, with regard to a domestic relationship agreement (but not a termination agreement), the court may vary or set aside the agreement where the circumstances of the parties have so changed since the time of making the agreement that it would lead to a serious injustice if the provisions were enforced (s 49). Termination agreements have a limited life span: if the relationship does not terminate within three months of the date of signing it, the agreement is treated as a domestic relationship agreement (s 44(2)).

Part C—General law relief

Outside the legislative provisions for property adjustment, de facto partners must generally seek equitable relief. As noted earlier, if parties qualify under the de facto legislation, general law relief is available as an alternative. Relevant Australian decisions in equity revolve around constructive trusts. Two approaches are given here.

No common intention

Under the 'new constructive trust' doctrine, the parties need not show a common intention that both parties would have an interest in the property. The constructive trust will be imposed when it is unconscionable for the registered owner to refuse to recognise the unregistered party's interest.

In *Muschinski v Dodds* (1985) (a High Court case), the plaintiff, Muschinski, paid for the land with a view to her partner ultimately paying for the construction of a house and making other improvements. The intention was that she and her partner, Dodds, eventually contribute equally to the total property holding. The land was purchased with Muschinski's money and the pair held it as tenants in common. Two years later, after the local council refused building permission, the relationship finished. Muschinski claimed her greater share of contribution to the land and Dodds asserted his legal entitlement to one-half.

Deane J noted that there was no intention that the parties hold their legal interests on trust in shares corresponding to their contributions. On the contrary, the court held that it was their intention that, from the time of purchase, each should have a full one-half beneficial interest in the property. Therefore, the court could not find a resulting trust for Muschinski in her greater share. His Honour drew analogies with the dissolution of commercial partnerships and the collapse of joint ventures. Deane J pointed to the initial expectation of parties to these commercial relationships to receive equal shares in the proceeds, but, should the venture collapse prematurely (or the partnership dissolve), to receive a proportionate repayment of capital contributions. His Honour found these examples as instances of a more general principle of equity similar to common law counts of money had and received, and continued:

> Like most of the traditional doctrines of equity, it operates upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct…Mrs Muschinski's payment of the purchase price…was made on the basis and for the purpose of their planned venture…it was not specifically intended or specially provided that Mr Dodds should enjoy such a benefit at Mrs Muschinski's expense. In these circumstances, the operation of the relevant principle is to preclude Mr Dodds from asserting or retaining his one-half ownership of the property to the extent that it would be unconscionable to do so.

His Honour significantly went on to note that if the relationship had survived for years and the property served as a mutual home, any assessment would be influenced by considerations of contribution to the establishment of a home. These considerations, his Honour observed, would include indirect contributions 'such as support, homemaking and family care'. An order was made declaring that the property was held on constructive trust The plaintiff, having paid the whole purchase price, was therefore entitled to a contribution as to one-half from Dodds.

Baumgartner (1987) followed *Muschinski* in the High Court. Here, the parties pooled their earnings to pay mortgage instalments on an investment property and outgoings associated with their domestic home. Both properties were in the name of Mr Baumgartner and, at the conclusion of the four year relationship, he argued to retain both.

The court found that his assertion that the home was his beneficially to the exclusion of any interest of his partner's amounted to unconscionable conduct, attracting the intervention of equity and the imposition of a constructive trust.

Hibberson v George (1989) expanded on the developments in *Muschinski* and *Baumgartner* by appearing to allow for indirect contributions by way of general household and children's expenses. In this case, Mr George paid for the home registered in his name and paid the loan repayments himself. There was no direct sense of pooling resources. The appellant, who worked during the period of cohabitation except at the births of the two children, paid for some furniture and renovations and contributed to household expenses. The trial judge dismissed the appellant's claim that the property was held on trust partly for her. On appeal, the NSW Court of Appeal followed *Baumgartner,* holding that equity intervened to impose a constructive trust on the basis of the respondent's unconscionable conduct in denying the appellant's interest in the home. McHugh JA noted:

> However, as [counsel] for the respondent conceded, pooling of resources is not an absolute requirement in every case. Indeed, it is not necessary that there should be a physical pooling. It is probably enough that, by mutual arrangement, the parties have each spent moneys for the purpose of their joint relationship knowing that part of it was to be spent in financing the purchase of the home.

His Honour went on to quote the trial judge's finding (in the de facto relationships claim) that George was relieved of expenses for which he would otherwise have been responsible and, as a result, he was able to increase his assets.

Brown v Manuel (1996) (Qld) relied on the 'unconscionability' ground in granting the female de facto partner's claim against her partner's house and car. The relationship had lasted for 18 years. The man had not created an expectation in the plaintiff that she would acquire a proprietary interest in the property. The court found that, although the plaintiff had made no direct contributions to the property, her contributions towards household expenses made her partner's sole beneficial retention of the property unconscionable.

In *Fuller v Meehan* (1999) (Qld), the parties lived together in a de facto relationship for 15 years, during which time they pooled resources, property, capital and income in acquiring real property and various business interests. The trial judge found a constructive trust in favour of the plaintiff to an amount of $310,000. The Court of Appeal affirmed the trial judge's finding of a constructive trust but allowed the appeal on the issues of tax and interest calculations.

Common intention

In *Green v Green* (1989), the respondent was one of three surviving partners of the deceased. She had been brought from Thailand as a child partner of the deceased and maintained for 11 years with the eventual children of the relationship in one of his properties. The wife and another de facto partner were separately maintained with their families by the deceased in other properties. There was clear evidence of Green's intention to give the respondent one of the properties, including instructions as to the transfer, which were left with his solicitor five years before he died. The trial judge found that the respondent had a proprietary interest in that property based upon the existence of a constructive trust. The Court of Appeal upheld the decision, finding that, at the time of his death, the deceased and the respondent held the property beneficially as joint tenants. Thus, following Green's death, the respondent became entitled to absolute beneficial ownership by survivorship. Gleeson CJ observed:

> It is clear that the mere existence of a matrimonial or de facto relationship, combined with express or implied undertakings to provide support and accommodation, will not form a sufficient basis for concluding that there is a constructive trust by virtue of which a proprietary interest in the home is created…Nevertheless, it is now well settled that there are circumstances in which a court of equity will intervene to declare the existence of a proprietary interest in a family home on the part of spouse or de facto partner and the unifying principle…is that…it would be unconscionable on the part of the person against whom the claim is set up to refuse to recognise the existence of the equitable interest *Baumgartner v Baumgartner*…

His Honour went on to discuss the developments in the case law (since *Grant v Edwards* (1986)) as to finding a constructive trust based on actual intention. First, a common intention must be shown that both should have a beneficial interest. Secondly, the claimant must have acted to his or her detriment on the basis of that common intention. Both elements were found in this case.

3 Child Support and Maintenance

You should be familiar with the following areas:

- eligibility for child support
- presumptions of parentage
- employer withholding arrangements
- departures from child support assessments
- child support assessments and child maintenance under the Family Law Act 1975
- modification of child maintenance under the Family Law Act 1975
- methods of enforcement
- maintenance and financial agreements
- eligibility for spousal maintenance
- eligibility for de facto maintenance under the Property (Relationships) Act 1984 (NSW)

The child support legislation

The scheme

The two Acts comprising the scheme are the Child Support (Registration and Collection) Act (CS(RC)A) 1988 (as amended) and the Child Support (Assessment) Act (CS(A)A) 1989 (as amended). Unless otherwise noted, the sections refer to the CS(A)A.

The CS(RC)A sets up the Child Support Agency within the Taxation Office.The Child Support Registrar is the Commissioner of Taxation. Deputy Child Support Registrars, along with other officers, are delegated to administer the Agency (ss 10–15 of the CS(RC)A). This Act provides for the registration, collection and enforcement of court orders and court registered agreements for child maintenance (s 17 of the CS(RC)A) and spousal maintenance (s 18 of the CS(RC)A).

Registerable maintenance liabilities under ss 17 and 18 of the CS(RC)A are therefore:

- court orders to pay periodic child maintenance;
- court-registered child maintenance agreements;
- court orders to pay periodic spousal maintenance;
- court-registered spousal maintenance agreements;
- child support assessments.

Section 23 of the CS(RC) A requires the payee of a registerable maintenance liability to notify the Child Support Registrar within 14 days after the court order or court-registered agreement of whether or not the payee wishes to have it enforced under the CS(RC)A. However, a child support assessment made upon the application of the 'eligible carer' (see below, p 53) must be registered by the Registrar, unless the payee has elected not to have it enforced under the CS(RC)A (s 24A).

The CS(A)A 1989 commenced on 1 October 1989 and provides for the administrative assessment of child support. All States except Western Australia have referred power to the Commonwealth to legislate for exnuptial children. Hence, the children of de facto relationships are included in the scheme in the remaining States.

Eligible child

A child born on or after 1 October 1989, or a child of parents (married or otherwise) who separate on or after that date, is an 'eligible child' (ss 18–20). If a child is not eligible under these rules, he or she becomes eligible if a brother or sister was born on or after the commencing day (s 21). Application for administrative assessment of child support may be made only if the child is eligible, under 18 years of age, unmarried and an Australian resident or present in Australia on the day of application (s 24).

Under s 151B, if a child turns 18 during a year of full time secondary education, a carer may apply for child support to continue until the last day of school. The applicant must apply when the child is 17 but before the child turns 18, or show exceptional circumstances justifying a late application (s 151C). The application must satisfy the Registrar that the child is likely to be in full time secondary education on the child's 18th birthday. If the application is accepted, then the 'child support terminating event' activates on the last day of school rather than on the child's 18th birthday (s 151D).

Who may apply?

An applicant may be an 'eligible carer' not living with the liable parent on a genuine domestic basis (s 25) or a liable parent not living with the payee on a genuine domestic basis. Under s 26, one only of two or more joint carers may apply for assessment or, if the liable parent applies, he or she must nominate one of the joint carers as payee. If in either case one of the joint carers is the child's parent, that person must apply or, in the case of a liable parent application, be nominated to receive payment.

Section 5 provides 'eligible carer' to mean a person:

- who is the sole or principal provider of ongoing daily care for the child; or
- who has major contact with the child; or
- who shares ongoing daily care of the child substantially equally with another person; or
- who has substantial contact with the child.

Shared care

Section 8 provides the relevant definitions. If one person is the principal provider of ongoing daily care for the child, and another has care of the child for at least 40% of the nights in the 12 months immediately after the start of the 'child support period' (see below, p 54), the second person shares ongoing daily care equally (s 8(1)). But s 8(1) is not to limit the circumstances in which substantially equal sharing can in fact take place (s 8(2)).

Major and substantial contact

If one person is the principal provider of ongoing daily care for a child and another has care for at least 30% but less than 40% of the nights in the 12 months immediately after the start of the child support period concerned (or less than 30% when the principal provider agrees that the second person has substantial contact):

- the first person has major contact (deemed to have the child for 65% of the nights);
- the second person has substantial contact (deemed to have 35%).

Both major and substantial contact give rise to claims for child support. Under ss 47–49 of Pt 5, the deemed percentages are applied in the basic formula (see below, p 57).

In *Abela* (1995), it was argued that, because the husband was unrelieved in his care of the children, the wife not having attempted to exercise access (contact) rights, this fact placed an added financial burden on the husband. Nicholson CJ dealt with this argument by noting:

> …the formula applies whether or not there is no access or access up to 30% of the 'nights of the child support year'. In these circumstances, it seems difficult to take into account the fact that no access occurs in arriving at a proper figure for an assessment of child support.

Child support period

This is calculated pursuant to s 7A. The beginning of the period can be any of the following:

- the day of a proper application for administrative assessment;
- the beginning of a period containing days for which child support is payable under a child support agreement;
- the first day for which a new child support agreement is to affect the rate of child support;
- immediately after the end of the preceding child support period.

The end of the period is whichever of the following occurs soonest after the beginning:

- 15 months;
- the end of the named month during which the Registrar makes a s 34A (taxable income) assessment;
- the time immediately before the beginning of a period for which child support is payable under a child support agreement;
- the end of the day before the first day of a new child support agreement

Section 12 provides for the happening of 'child support terminating events' if the child dies, turns 18, is adopted or becomes a member of a couple (married or living with a partner of the opposite sex on a genuine domestic basis (s 5)). Section 151C adds in the qualification for children who turn 18 while still in full time secondary schooling.

Paragraph 12(1)(f) provides that the child's Australian citizenship, ordinary residence or presence in Australia are no longer relevant for this purpose. However, if the liable parent ceases to be a resident of Australia or dies, these constitute child support terminating events (s 12(3)). A child support terminating event happens in relation to a carer if the carer dies or

ceases to be an eligible carer, but not if the carer ceases to be an Australian resident (s 12(2)).

Parentage

The application to the Registrar of Child Support may only seek payment from a person who is a parent of the child and who is a resident of Australia on the day of application (ss 25 and 25A). The appropriate form must be submitted under s 27 along with documents as specified (s 150A). The Registrar must be satisfied of parentage under s 29 using the following alternatives:

- the child was born during the marriage;
- the child's birth certificate lists the parent;
- a statutory declaration by the father has been executed acknowledging parentage;
- a court finding as to parentage;
- the parent has executed an instrument acknowledging parentage;
- the child has been adopted by the parent;
- presumptions based on recent cohabitation (see Family Law Act 1975 provisions below).

Section 105 of the CS(RC)A and s 100 of the CS(A)A provide for the application of the Family Law Act 1975 to proceedings for child support, subject to the Child Support Acts and to any prescribed modifications. The jurisdiction of the Family Court is given under ss 104 of the CS(RC)A and 99 of the CS(A)A.

Division 12 of the Family Law Act (FLA) 1975 deals with parentage evidence. Section 69W of the FLA gives the court power to make a parentage testing order on its own initiative or on a party's application if the parentage of a child is a question in issue in 'proceedings under this Act'. However, if the order concerns a child under 18, the procedure must not be carried out without the consent of a parent, a guardian or someone responsible for the child's care under a specific issues order (s 69Z of the FLA 1975). Prior to the Reform Act 1995, the section only provided for a 'guardian' to be able to give this consent. Under s 69V of the FLA, the court may order any person to give 'such evidence as is material' to a parentage question arising in proceedings under the Act. If the parent, guardian or carer refuses to consent, then the court may draw such inferences as appear just in the circumstances (s 69Z(3) of the FLA).

Under s 69P of the FLA 1975, a child born to a woman during a marriage is presumed to be a child of the marriage. If the child is born within 44 weeks after the death of the husband or the annulment of the marriage, the child is presumed to be a child of the woman and her husband (or purported husband). If, after parties to a marriage separate, they resume cohabitation on one occasion and within three months of resuming cohabitation they separate again, a child born within 44 weeks after that resumption and after the dissolution of the marriage is also presumed to be a child of the woman and the husband.Under s 69Q of the FLA, if a child is born to a woman and, at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man, the child is presumed to be a child of the man. Section 69U of the FLA provides for presumptions under this subdivision to be rebuttable by proof on a balance of probabilities.

In *F and R* (1992), the Family Court considered the earlier section equivalent of s 69Z of the FLA 1975. In that case, the former husband applied to the court for a parentage test in response to orders increasing his child maintenance payments. Suspecting that he was not the father of the child (now 13) and in view of the child's 'uncanny likeness' to the wife's present husband, F sought to use the DNA method of parentage testing. Butler J found that the wide discretion under the legislation ought not to allow for the court to order parentage tests simply because it is requested to do so. His Honour required the applicant to have an 'honest, *bona fide* and reasonable belief' as to the doubt of parentage. The interests of the child were to be paramount and that factor must supersede the interests of the parties. As to the consent of the guardian being required, his Honour noted:

> In my view, this is poor law and there should be a statutory right in the Court to override the guardian's refusal where it is irresponsibly withheld without proper or adequate reference to the child's wishes where the child is old enough to express a considered wish.

(In fact, the tests revealed F to be the father after all.)

Rate of payment

Part 5 deals with the administrative assessment of child support. Under s 36, the basic formula is:

child support percentage (P) x adjusted income amount (I)

where the 'adjusted income amount' is calculated as:

I = child support income amount (TI) – exempted income amount (EI)

Section 37 gives a table of child support percentages according to the number of children: 18% for one, 27% for two, 32% for three, 34% for four and 36% for five or more children. Under s 38, the 'child support income amount' is defined as the liable parent's taxable income under the Income Tax Assessment Acts of 1936 and 1997 plus any supplementary amounts of exempt foreign income and rental property loss. The 'exempted income amount' under s 39 is either the annual amount of the relevant unpartnered rate of Social Security pension, if the liable parent does not have a dependent child, or if he or she does, twice the annual partnered rate of Social Security plus an additional amount according to whether the child is under or over 13 and 16.

Hence, the starting formula is:

P% x (TI – EI)

Sections 34A–34C provide for the Registrar to make new assessments of child support payable in situations including changes in taxable income of the liable parent of the carer.

Avoidance

Under s 72C of the CS(RC)A, instruments or dispositions reducing the payer's ability to pay child support may be set aside by the court. The court may order costs and that any money or property dealt with by the instrument or disposition may be paid as child support.

The 1998 amendments to the CS(A)A provide for the Registrar to exercise closer scrutiny as to parties' taxable income. In addition to making updated assessments tied to tax assessments (see above) exempt foreign income and rental property losses are added to the child support income amount (ss 38 and 38A).

Collection

The Registrar notifies the liable parent's employer under s 45 of the CS(RC)A. The employer must then automatically withhold a deduction from the salary or wages or risk a fine (s 46). The employer is then required to pay the deductions to the Registrar under s 47 by the seventh day of the month following the month of the deductions. Section 47 imposes a penalty of $5000, or 12 months' imprisonment, or both. Other penalties are

imposed in ss 51–56 of the CS(RC)A. Employers must preserve the employee's privacy (s 58), retain correct records (ss 59–60) and not act prejudicially towards the liable employee (s 57).

Section 44(1) of the CS(RC)A permits a payer under a registerable maintenance liability to elect not to have automatic withholding. This section requires the Registrar to be satisfied that the payer will be likely to make regular and timely payments to the Registrar. If the payer does not make regular and timely payments, the Registrar must vary the particulars of entry in the Register to apply employer withholding.

Under s 44(6), the Registrar may be satisfied that in the special circumstances of the case automatic withholding would not be an efficient method (s 44(6)).

Enforcement by court order

Where the Child Support Agency is unsuccessful in enforcing payment using its administrative avenues, such as recovering from a tax refund, bank account or money owed to the liable parent by a third person, court action may be considered. However, the Agency is required to consider whether there is a reasonable likelihood of success and whether the defaulting parent is likely to pay.

Departures and appeals

Part 6A gives the Child Support Registrar power to make an internal determination that the provisions of the legislation relating to administrative assessment of child support are to be departed from (ss 98A–98ZJ). Section 98C requires the Registrar to be satisfied that a ground for departure as set out under s 117(2) exists, and that it would be just and equitable and otherwise proper to make a determination.

Departures may also be initiated by the Registrar (s 98K) varying the rate of child support and related matters. Sections 98W–98ZJ set out the procedure for internal reconsiderations of the Registrar's decisions and for applications to the Administrative Appeals Tribunal (AAT) in some cases. The Act requires a person who is aggrieved by a decision to pursue the internal procedures for reconsideration before approaching the AAT or a court (s 98W(2) and s 110(1A)).

If, for example, a carer or liable parent applies to the Registrar under s 98B and the Registrar refuses to make a departure, then, under s 98X, an objection in writing must be made within 28 days of service of notice of the refusal (s 98Z). The Registrar must then consider the objection

and either disallow it or allow it in whole or part within 60 days of the objection.

Division 4 (containing s 117) provides for court departure orders. The Registrar may recommend that application be made to a court because the issues are too complex to be dealt with internally (s 98E). A party may seek a review of the Registrar's decision in a court having jurisdiction under the Act (s 110) or where a child support assessment issue is raised in other proceedings (for example, property proceedings), Division 4 provides for the initial departure application. Section 99 confers jurisdiction on the Family Court and Federal Magistrates Courts.

Section 117 provides that the court (or Registrar under s 98C) must be satisfied of three matters:

(a) one or more grounds for departure exist;
(b) the order would be just and equitable with regard to the child, the carer and the liable parent; and
(c) the order would be otherwise proper.

The three grounds for departure all require that in the 'special circumstances of the case' (s 117(2)):

(a) …the capacity of either parent to provide financial support for the child is significantly reduced because of:
    - the duty of the parent to maintain another;
    - special needs of the person whom the parent has a duty to maintain;
    - commitments of the parent necessary to support the parent and the person maintained;
    - high costs in having contact with the person maintained.
(b) …the costs of maintaining the child are significantly affected because of:
    - high costs in enabling contact;
    - special needs of the child;
    - the child being cared for, educated or trained in the manner that was expected by the parents.
(c) …application of the provisions of the administrative assessment provisions of the Act would result in an unjust and inequitable determination of the level of financial support provided by the liable parent because of:

- the income, earning capacity, property and financial resources of either parent or the child;
- any payments and transfer or settlement of property made or due by the liable parent to the child, carer entitled to child support or for the child's benefit.

The second matter required to be considered by the court—whether it would be just and equitable to make the order—is contained in s 117(4). The first factor listed refers to the nature of the parent's duty to maintain a child, as set out in s 3. Under this preliminary section, the duty is described as:

- not of lower priority than the duty to maintain another child or person;
- having priority over all commitments of the parent other than those necessary to enable the parent to support himself or herself and any other person the parent has a duty to maintain;
- not affected by the duty of anyone else to maintain the child;
- not affected by any entitlement of the child or another person to an income tested pension, allowance or benefit.

Other matters listed in s 117(4) include the proper needs of the child; income and assets of the child and each parent who is a party; necessary commitments to maintain themselves and dependents; direct and indirect costs incurred by carer in providing care for the child; and any hardship caused to the child, carer, liable parent and any other child dependent on the liable parent by the making or refusal to make the order.

The final matter—whether it is 'otherwise proper to make the order' lists three factors to be considered (s 117(5)):

- the nature of the duty of a parent to maintain a child in s 3 (as above);
- the primary duty of the parents themselves to maintain the child;
- the effect of the order on the child or custodian's entitlement to and rate of income tested pension, allowance or benefit.

In *Gyselman* (1992), the Full Court emphasised the three step process in s 117 and held that the Court must address each as a separate issue. In discussing the prefaced 'special circumstances of the case', the Full Court found this to mean that the facts of the case must establish something special or out of the ordinary, facts 'peculiar to the case which set it apart' (*per* Kay J in *Savery* (1990), adopting *Phillipe* (1978)).

In *Ross and McDermott* (1998), the Full Court held that special circumstances within s 117(2)(c)(i) are not established merely upon proof of a change in the 'income, earning capacity, property and financial resources' of the party. The change had to be considered in light of the person's financial commitments to arrive at a conclusion that there would be an unjust and inequitable determination of a level of financial support. The trial judge had erred, therefore, in calculating the husband's reduced income and going directly to the statutory formula for assessment without considering the husband's other financial commitments.

Mulvena (1999) concerned the step father of a child of his wife's previous relationship. The husband had a child from a previous relationship with whom he had little contact and sought a departure order under s 117(2)(a)(i) from any liability for child support in relation to that child, in favour of his wish to support his step child. The application was rejected on the basis that he was under no legal duty to maintain his step child. He had assumed this responsibility which was in fact the duty of the natural father—the wife's former husband. There was evidence that the step father wished to structure his work and parenting commitments to receive maximum social security entitlements. The Full Court noted:

> …parents rather than the welfare system are responsible for the support of children and the making of the orders sought by the husband would alter that intention and have significant consequences for the payment of child support.

Agreements

The Child Support Agency also handles the registration of consent agreements. Part 6 applies to require the eligibility of the child, carer and liable parent prior to registration (ss 80–87). Section 95 makes the registered agreement binding and enforceable as a court order.

Child maintenance under the Family Law Act 1975

Section 66E of the Family Law Act 1975 provides that a court must not make, revive or vary a child maintenance order in relation to a child on the application of a person against or in favour of another, if it could properly be made at that time under the CS(A)A for administrative assessment of child support.

The Family Law Act 1975 thus applies to maintenance proceedings for children not covered by the CS(A) A: children born before 1 October 1989 (not having a younger brother or sister born after that date) whose parents separated before 1 October 1989; maintenance of step children (ss 66M–66N); and children claiming maintenance on their own behalf (s66F).

In *Tobin* (1999), the Full Court held that the FLA1975 gives no power to make an order for the maintenance of a child against a person other than a parent, adoptive parent, a person deemed to be a parent because of the carrying out of an artificial conception procedure, or a step parent (a person who is or has been married to a parent of the child). Persons who stand *in loco parentis* but who are otherwise outside the defined class are not liable.

A child maintenance order may be made for a 'child' who is 18 or over where it is necessary for the completion of his or her education or because of a mental or physical disability (s 66L). But unless a maintenance order is expressed to continue beyond the child turning 18, it ceases to apply on the day the child turns 18 (s 66T).

Under ss 66U–66V, a child maintenance order stops being in force:

- on the death of the child;
- on the death of the person liable to pay, unless the order was made before 1983 and it was expressed to continue for a longer period;
- on the death of the person entitled to receive payments, unless the order specifies that it is to continue to be paid to another person;
- when the child is adopted;
- when the child marries;
- when the child enters into a de facto relationship.

Section 66V(4) gives the court power to make a declaration that a child is in a de facto relationship.

Section 66B sets out the objects of Division 7. The principal object is to ensure that children receive a proper level of financial support from their parents. Particular objects are, first, to ensure that children have their proper needs met from reasonable and adequate shares in the income, earning capacity, property and financial resources of both of their parents; and, secondly, to ensure that parents share equitably in the support of their children.

In addition, the principles relevant to the making of child maintenance orders are listed in s 66C, a parallel section to s 3 of the CS(A) A above.

Under s 66D, a step parent will be found to have a duty to maintain a child if the court so determines by an order under s 66M. The step parent's duty is described as secondary and not derogating from the primary duty of the parents. In finding a step parent's liability to pay maintenance the court must have regard to factors including the length and circumstances of the marriage to the parent and the relationship with the child (s 66M). They will not be considered for contribution to the maintenance of the child until the primary duty by the parents has been determined (s 66N).

In *Mulvena* (1999), the husband sought a declaration under s 66M(2) that he was under a duty to support his step daughter. He named the wife as respondent and at the hearing she signified her consent to such an order. He sought the declaration subsequent to an unsuccessful application for departure from child support liability for his natural child from a previous relationship (see above, p 61). The Full Court held:

> …parents are primarily responsible for the financial support of their children, although a secondary duty can be imposed on a step parent by order of the Court where appropriate: ss 66B, 66C and 66M. Although the husband is a step parent…there is no power in s 66M to impose a duty on step parent to provide financial support in the absence of an application for child maintenance…and there was no such application by the wife in this case.

Generally, the court is given power to make such orders as it thinks proper (s 66G). This is subject to considerations which the court must make as to the necessary financial support for the maintenance of the child, and financial contributions to be made by the parties (ss 66G–66H).

In considering the financial support necessary for the maintenance of a child, the court must disregard any entitlement of the child or any other person to an income tested pension, allowance or benefit. Section 66J expressly states that the following and no other matters are to be taken into account:

- the objects of the Division under s 66B;
- the proper needs of the child (age, special needs, type of education or training as parents expect and where relevant the findings of published research as to child maintenance);
- income, earning capacity, property and financial resources of the child (and not of any other person unless in the special circumstances of the case, the court considers it appropriate).

In determining contributions of the parties towards the financial support necessary for the maintenance of the child, the court is again expressly required to consider only the matters listed. As with financial support, the court must disregard income tested payments. The matters to be taken into account are:

- the objects and principles of the Division under ss 66B–66D;
- the income, earning capacity, property and financial resources of the parties, having regard to the capacity of each to earn and derive income, as well as any assets capable of producing income;
- commitments necessary to support themselves and any other child or person they have a duty to maintain;
- the direct and indirect costs incurred in providing care for the child including the income and earning capacity foregone by the care giver;
- any special circumstances which if not taken into account in the particular case would result in injustice or undue hardship to any person.

The court must disregard the income, earning capacity, property and financial resources of any person who does not have a duty to maintain the child (or who has a duty but is not a party to the proceedings), unless in the special circumstances of the case, the court considers it appropriate. In determining the financial contributions, the court must consider the capacity of the parties to make periodic payments before it considers possible lump sums, property transfers and settlements or any other method of payment (s 66K).

Under s 66P, the Family Court is permitted a wide range of orders and may order any document or instrument to be produced or executed to carry them out. Payments may be periodic or lump sums with instalments, property may be transferred by way of maintenance and terms may be imposed.

Modifications

In order to vary orders previously made, the court must be satisfied of one or more of the following (s 66S):

- the circumstances of the child, person liable to pay or person entitled to receive have changed so as to justify the variation;

- the cost of living has changed to such an extent as to justify the variation where at least 12 months has elapsed since the order was last varied on this basis;
- where a consent order is made, the amount is not proper or adequate having regard to any financial provision for the child or person for the benefit of the child by the party under the order;
- that material facts were withheld or material evidence given was false.

In *Carpenter* (1995), the Court considered the forerunner of s 66S in an application by the husband to review the variation of consent orders, the variation having increased the husband's child maintenance obligations. Chisholm J interpreted the section in its application to consent orders as follows:

> - The applicant bears the onus of enabling the court to be satisfied that the amount ordered to be paid is not proper or adequate.
> - The question whether the amount is 'not proper or adequate' is to be determined as at the date of the hearing, not as at the date of the making of the orders which are sought to be varied.
> - The determination of whether the amount is 'not proper or adequate' involves the court in determining whether the amount is too large or too small having regard to the other provisions of the Division…

In finding for the wife, Chisholm J noted that, in view of the wealth of the parties in such a case, the child support legislation formula was of no assistance. The proper needs of the child are to be considered (under s 66J(2)(a)(ii)) in the context of the parents' expectations.

Enforcement

Order 33 of the FLA 1975 provides for enforcement of maintenance orders and registered agreements under the Act and child support debts under the CS(RC)A. This includes spousal maintenance orders (see below, p 66 *et seq*). It also applies to overseas maintenance orders enforceable in Australia, as well as to other orders, such as the recovery of money overpaid after a spouse remarries (see, now, s 82A(3)).

Enforcement may be effected by garnishment (r 4), seizure and sale of personal property, sequestration of estate and sale of real property (rr 5–7). The provision gives a person entitled to payment of maintenance or entitled to take proceedings to enforce payment the ability to apply for a notice and summons to be issued to the person liable to pay maintenance (Ord 33 r 3, Forms 45 and 46). Parallel notices are available for enforcing

child support orders (Forms 45A–B). In that case, it is the Child Support Registrar who instigates the procedure with costs borne by the Commonwealth. Although the application for a Form 45 notice must be acted on by the (Family Court) Registrar, a discretion is given to issue a Child Support Notice in accordance with Form 45 A. Both kinds of summons, however, are discretionary.

If a person fails to attend before the court, the court may issue a warrant for his or her arrest under Ord 33 r 3(7). Again, this is discretionary, as are each of the orders available under sub-r 3(9). Under Ord 33 r 4(20), a garnishee will be fined $5,000 if, without reasonable excuse, it dismisses a person from employment, injures him or her in relation to employment or alters the person's position prejudicially, by reason of a garnishment order made under the rule. In making an order under Ord 33 r 5 for seizure of personal property, the Marshal or other court officer must not seize and realise 'prescribed personal property'. This includes clothes, bedding, bed and kitchen furniture such as stove, oven and refrigerator, except washing machine or dishwasher. In addition, up to $1,000 worth of ordinary tools of trade, plant and equipment and professional instruments and reference books are protected. Rule 6 sequestrations of estate similarly exclude prescribed personal property. Here the process is unlike bankruptcy proceedings where receivers can the property in order to pay the debts. The liable party retains title to property but the sequestrator determines the use of profits and income.

Part C—spousal maintenance

Section 72 of the FLA 1975 provides:

> A party to a marriage is liable to maintain the other party, to the extent that the…party is reasonably able to do so, if and only if, that other party is unable to support herself or himself adequately whether:
>
> (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
>
> (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
>
> (c) for any other adequate reason,
>
> having regard to any relevant matter referred to in s 75(2).

Each of these matters must be considered at the threshold stage of determining whether or not there is a right to maintenance. The Full Family

Court in *Stein* (2000) noted that there is 'no right to maintenance unless there is a capacity to meet it and inability by the claimant to meet the claimant's own self support'.

If the court finds that s 72 has been met, then it may make any order for maintenance it considers 'proper' (s 74). In doing so, the court uses the s 75(2) matters to construct the maintenance order. Section 75(1) requires the court to take into account only those matters listed. (These matters are also discussed above, p 27 *et seq*, as they are used by the court in making in property orders. In the context of spousal maintenance, their treatment differs. Hence, a separate discussion is given here.)

According to s 75(2), the matters to be taken into account are:

(a) the age and state of health of each party;

(b) the income, property and financial resources of each, and their capacity for 'appropriate gainful employment';

(c) the fact of having the care and control of a child of the marriage under 18 years;

(d) commitments necessary for the support of themselves and others they have a duty to support;

(e) responsibilities to support any other person;

(f) pension, allowance and superannuation entitlements (except if income tested: s 75(3));

(g) a reasonable standard of living;

(h) likelihood of maintenance payments increasing the recipient's earning capacity by supporting education, training or business options;

(j) the extent to which a party being considered for maintenance has contributed to income, earning capacity, property and financial resources of the other;

(k) the duration of the marriage and the effect on earning capacity of the party being considered for maintenance;

(l) the need to protect a party who wishes to continue in role of parent;

(m) financial circumstances relating to cohabitation;

(n) orders under s 79;

(na) child support;

(o) any fact or circumstance the justice of the case requires to be taken into account.

In *Mitchell* (1995), the Full Court noted that the threshold question whether a party can support herself adequately is not to be determined by reference to any fixed or absolute standard but having regard to the matters referred to in s 75(2). The Court cited Lindenmayer J in *Nutting* (1978), who observed:

> By s 72 of the Act, the husband is liable to maintain the wife only to the extent that she is incapable of supporting herself adequately, and again 'adequately' imports a standard of living which is reasonable in the circumstances, including the circumstance that the parties are no longer husband and wife and that the assets and resources which were formerly available to them both in common have now been divided between them.

See, also, *Wilson* (1989) and *Bevan* (1995) on the definition of 'adequately'.

Capacity for 'appropriate gainful employment'

The applicant wife in *Mitchell's* case was successful in her appeal against the trial judge's decision not to award maintenance in addition to a 90% property settlement in her favour. Significant facts were the wife's age and limited earning capacity. As the court observed:

> …there is a significant gap between theory and reality for employment, especially for people in middle age, lacking experience and confidence, and who have been out of the skilled workforce for many years, and in the context of current high unemployment. Loss of security, missed promotion opportunities, loss of retraining in developing skills in an increasingly skilled work-force with the loss of confidence which this brings, particularly in times of high unemployment, are notorious circumstances of which the court must take notice and apply in a realistic way.

Similarly, in *Gould* (1996), where the applicant wife had not worked outside the home since 1980, the Full Court applied the reasoning in *Mitchell* and made reference to the extreme difficulty of the wife finding part time employment during school hours in a time of high national unemployment.

Commitments necessary for the support of oneself and others whom one has a duty to support, and responsibilities to support anyone else

Paragraph (d) covers those to whom the party has a more formal or legal duty to support, for example, a child not of the marriage; and para (e) embraces a wider class of (reasonably included) dependants, such as an elderly relative. The word 'necessary' in (d) was added in 1987 to qualify the nature of the party's self-support.

In *Stein* (2000), the Full Family Court upheld the husband's appeal on the basis of the trial judge's error in taking into account what his Honour had described as (the wife's) 'obligation to maintain the children pursuant to s 75(2)(d)' in the context of a spousal maintenance order. The Full Court held this paragraph to be of assistance in determining 'the capacity of the payer to provide support rather than in determining the extent to which the other party requires support'. The trial judge had erred by including a sum required by the wife to enable her to provide support for the four children of the marriage. The Full Court observed:

> In a maintenance case, if…a husband is called upon to pay maintenance for his wife, the Court must determine his capacity to pay that maintenance having regard to his obligation to support his children. The level of support that the wife needs for herself is not dependent upon the level of support she must give to others.

A reasonable standard of living

This factor, covered by para (g), is linked to the definition of 'adequately', mentioned above. It is not the court's intention to impose a subsistence level but a reasonable standard in the circumstances. However, some reduction in what the court considers a lavish lifestyle will usually be imposed (see *Wilson* (1989)).

Increasing the recipient's earning capacity by supporting education, training or business options

Paragraph (h) contemplates, for example, a middle aged woman re-entering the workforce after a long period as homemaker. The main function of spousal maintenance orders is underlined here as not being a retrospective reward for domestic duties, but a prospective measure designed for future support.

The need to protect a party who wishes to continue in their role of parent

Here, the court will not insist that the parent enters the workforce even if childcare arrangements are financially possible (para 1). In *Nixon* (1992), the court pointed to the intention of the legislature to permit a parent to choose the continuing role of full time parent and thereby require support.

Financial circumstances relating to cohabitation

Under para (m), the financial circumstances do not need to extend to actual contribution for that paragraph to be activated. In *F and F* (1982), the wife's new partner made no financial contribution. In this case, the court found it inappropriate for the former husband to pay for the wife's maintenance in view of the new relationship being more than merely transitory, and where the new partner was able to contribute financially.

Orders under s 79

The Full Court in *Mitchell* (1995) stated that it is not necessary for an applicant for maintenance to use up all of her assets and capital in order to satisfy the requirement that she is unable to support herself adequately. The court found that the amount which the wife was to receive from the property order would not disqualify her from obtaining maintenance (para (m)).

Similarly, in *Gould* (1996), the Full Court ruled it inappropriate for the trial judge to have refused maintenance on the basis of the property order. In that decision, as in many cases before the court, the order comprised little more than the matrimonial home.

These cases are to be compared with the decision of the Full Court in *Clauson* (1995), where the wife was not entitled to periodic maintenance because of the quantum of the property settlement.

Any fact or circumstance the justice of the case requires to be taken into account

This is dealt with under para (o). In *Soblusky* (1976), the court confined the facts or circumstances to those of a financial nature. Hence, conduct during the marriage was not relevant unless it had financial implications. See, also, *Fisher* (1990), where the court confirmed this approach, and the discussion above, p 30.

Time limit

An application for spousal maintenance (as with a property application) must be brought within 12 months of a decree absolute, of a decree of nullity (s 44(3)) or of the revocation of a maintenance agreement (s 44(3A)). The time limit can be waived by leave of the court in which the proceedings are to be instituted, in the circumstances set out in s 44(4):

- if hardship would be caused to a party to the relevant marriage or a child if leave were not granted; or
- in spousal maintenance proceedings if, at the end of the period in which proceedings could have been instituted without leave, the circumstances of the applicant were such that the applicant could not have supported himself or herself without an income tested pension, allowance or benefit.

The Family Law Amendment Act 2000 amends this section by enabling parties to consent to proceedings being instituted outside the time limit (see above, p 21).

Orders

Under s 80, the court may order, in addition to a wide range of terms and conditions, a lump sum payment in one amount or by instalments, periodical payments, or a transfer of property by way of maintenance.

In *Vautin* (1998), the Full Court noted that a judge is not confined to one only of the categories of orders listed in s 80. Further, the Court held that lump sum orders are not to be confined to cases of capitalisation of periodic maintenance or where periodic maintenance is unlikely to be paid.

Section 81 embodies the 'clean break' principle. As a governing principle, the court must make orders that will as far as possible finally determine the financial relationship between the parties and avoid the need for further proceedings between them.

Modification

Modification of spousal maintenance orders is structured, as with child maintenance orders (see above). Under s 83, the four alternative factors to be considered by the court are:

(a) the circumstances of the recipient, liable party or estate have changed so as to justify the variation;

(b) the cost of living has changed to such an extent as to justify the variation where at least 12 months has elapsed since the order was last varied on this basis;
(c) where a consent order is made, the amount is not proper or adequate having regard to any payments, transfer or settlement of property previously made by a party to the marriage to the other;
(d) that material facts were withheld or material evidence given was false.

Cessation

Under s 82(1), the maintenance order ceases to have effect on the death of the party in whose favour the order was made.

The order ceases to have effect on the death of the person liable to pay (s 82(2)). However, if the order was made prior to the commencement of s 38 of the 1983 Amendment Act, and either the time limit specified in the order continues, or the order was expressed to be for the life of the other party, the legal personal representative of the deceased remains liable (s 82(3)).

Remarriage of the party in whose favour the order was made causes the order to cease unless in special circumstances the court otherwise orders (s 82(4)) and money paid after this time may be recovered.

De facto maintenance

As with de facto property schemes, the States have variously legislated to provide de facto spouses with maintenance relief (see above, p 41). The provisions of the Property (Relationships) Act 1984 (NSW) (as amended) are discussed below.

Childbirth maintenance

Under ss 67B–67G of the FLA 1975, a father of an ex-nuptial child is liable to contribute maintenance for the 'childbirth maintenance period'. This is the period commencing two months before the birth of the child or, where the mother is working, from the date she is advised by a medical practitioner to stop working for medical reasons related to her pregnancy. In either case, the childbirth maintenance period ends three months after the birth of the child (s 60D). In addition to maintenance, the father is liable for contribution to the mother's reasonable medical expenses in

relation to the pregnancy and birth, and any funeral expenses should the mother or baby die.

In determining contributions, the court must consider income, earning capacity, property and financial resources of both parents, commitments to supporting themselves and any dependants. In addition, the court must consider any special circumstances required to be taken into account to avoid injustice or undue hardship (s 67C). The court must have regard to any assets of either party capable of producing but which do not produce income but the mother's entitlement to an income tested pension or allowance is not to be taken into account (s 67C(2)–(3)).

The mother can institute these proceedings up to 12 months after the birth and later, with leave of the court, if the court is satisfied that refusal to grant leave would cause hardship (s 67G).

Apart from childbirth maintenance, spousal maintenance under the Family Law Act 1975 is limited to parties to a marriage.

De facto provisions

Under the Property (Relationships) Act 1984 (NSW) (as amended), the applicant must satisfy the court that the parties have lived together in a domestic relationship for no less than two years (s 17(1)), or any of the following alternative qualifications:

- there is a child of the relationship;
- the applicant has made substantial contributions under s 20 for which the applicant would otherwise not be adequately compensated;
- the applicant has the care and control of a child of the respondent's from another relationship and serious injustice would result if the court fails to order.

Note the definition of 'domestic relationship', which includes same sex relationships and close cohabitation relationships other than de facto relationships (see above, p 41).

Unless the court grants leave to an applicant extending time, the parties must bring the application for a maintenance or property order within two years of the date on which the relationship ceased (s 18).

Section 27 of the Act provides for court to make an order for maintenance where it is satisfied as to either or both of the following:

(a) that the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the parties or a child of the respondent. The child is to be under 12 years at the

date of application or if physically or mentally handicapped, under 16 years;
(b) that the applicant is unable to support himself or herself adequately because the applicant's earning capacity has been adversely affected by the circumstances of the relationship; *and* the order for maintenance would increase the applicant's earning capacity by enabling the applicant to undertake a course of training or education; *and* it is reasonable to make the order in the circumstances of the case.

Section 27(2) lists the five matters to be taken into account in making an order for maintenance:

(a) income, property and financial resources of each party (including pensions and allowances) and the physical and mental capacity of each party for appropriate gainful employment;
(b) the financial needs and obligations of each;
(c) the responsibilities of either party to support any other person;
(d) the terms of an order made under s 20 (see above, pp 42–45);
(e) any payment made in respect of the maintenance of a child in the care and control of the applicant.

An application for maintenance may not be made by a party who has entered into another domestic relationship or who is married at the time of application (s 29). The maintenance period lasts according to whether the order is made under s 27(1)(a) or (b). The duration is calculated under s 30, where the court is satisfied:

- solely as to s 27(1)(a) matters—the period ends when the youngest child turns 12 or when the physically or mentally handicapped child turns 16;
- solely as to s 27(1)(b) matters—the period ends *either* three years after the day on which the order is made *or* four years after the day on which the partners ceased to live together, whichever is the shorter;
- as to matters in both s 27(1)(a) and (b), whichever period is longer.

In each case, the court may determine that a shorter period ought to apply. The period ends on the death of either party or the marriage of the applicant (s 32). It does not end on the parties entering into new relationships, but this fact will provide changed circumstances for the purposes of variation. An order made under s 27(1)(a) will end when the applicant ceases to have care and control of the child (s 33).

4 Children—Part 1

You should be familiar with the following areas:

- eligibility for parenting orders
- s 65F compulsory counselling
- obligations of residence, contact and specific issues orders
- the paramountcy of the best interests of the child
- considerations in determining the best interests of the child
- residence issues: separation from siblings; capacity to provide for needs and relocation
- problems of contact
- characteristics of parenting plans
- functions of family reports
- s 62F optional counselling

Introduction

As a signatory to the United Nations Convention on the Rights of the Child since 1990, Australia committed itself to a period of implementing the substantial measures agreed upon within that Convention. The articles of the international agreement cover all aspects of children's rights, education, care and opportunities. Significantly, in the context of family law, the following are noted:

> Art 9
>
> 1 …a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary…where the parents are living separately and a decision must be made as to the child's place of residence.
>
> …

3 States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Art 12

1 States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child…being given due weight in accordance with age and maturity.

Art 18

1 States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Art 19

1 States Parties shall take all…measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect… maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Art 21

States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorised only by competent authorities…

…

Australia's ratification of this Convention led to the changed terminology and reconceptualised orders awarding responsibilities in the Family Court. 'Residence' and 'contact' orders derived from this framework, as did the references to 'best interests'.

The Australian Law Reform Commission's (ALRC) Issues Paper 14 'Parent child contact and the Family Court' summed up the types of orders affecting children as the law in Australia stood in December 1994, prior to the passing of the Family Law Reform Act 1995:

2.16 Types of orders affecting children

> Under the [Family Law Act 1975], both parents are joint guardians and joint custodians of their children unless the court rules otherwise. A guardian has responsibility for the long term welfare of the child and has all the powers and duties in relation to the child other than day to day care. When parents separate, the Family Court may be asked by one or both parents to make orders for custody of the children, that is, who should have day to day care and control, and access, that is whether a non-custodial parent should have access to the child and on what terms. (The court may be also be asked to determine whether one party should be given sole guardianship.) An application for custody or access can be made at the same time as or independently of an application for dissolution of the marriage and can be made any time after separation. Counselling is a pre-condition of the making of any orders. In many cases, the primary order is the custody order and the access order is a subsequent order which is not contested. The court may make orders granting any person rights of access to the child. Joint custody means both parents share parental responsibilities equally, although the time spent with the child may be divided unequally.

Since February 19%, with the coming into force of the Family Law Reform Act 1995, these orders were radically changed. The concept of guardianship (at least in the family law sense) was abolished. Parental 'control' and 'rights' were made largely redundant terms in awarding parental responsibilities. The emphasis under Pt VII of the Family Law Act 1975 (as amended) is on parental responsibilities, duties and, particularly, agreement, in the context of meeting the best interests of the child. Although, in the development of the law relating to children, the 'welfare of the child' had long been stated as the paramount consideration, since June 1996 the terminology of the court orders reflects this.

In *B v B: Family Law Reform Act 1995* (1997), the Full Court (Nicholson CJ, Fogarty and Lindenmayer JJ) held that, by the substitution of the term 'best interests of the child', no difference was intended from the use of 'welfare of the child' in the previous legislation. 'Custody' and 'access', terms implying ownership of property, gave way to 'residence', 'specific issues' and 'contact' orders. Instead of child agreements, there are now 'parenting plans'.

Schedule 2 to the Family Law Reform Act 1995 provided for transitional arrangements where existing orders and pending applications were to be translated.

An order for:

- custody so far as it deals (expressly or impliedly) with the question of the person with whom the child is to live, has effect as—a residence order;
- custody so far as it deals (expressly or impliedly) with other aspects of parental responsibility for the child, has effect as—a specific issues order;
- access to a child, has effect as—a contact order;
- maintenance of a child, has effect as—a child maintenance order;
- guardianship so far as it deals (expressly or impliedly) with the question of the person with whom the child is to live, has effect as—a residence order;
- guardianship so far as it deals (expressly or impliedly) with other aspects of parental responsibility for the child, has effect as—a specific issues order.

Similarly, a child agreement has effect as a parenting plan under ss 63A–H of Division 4. In *B v B: Family Law Reform Act 1995* (1997), the Full Court stated:

> The custody order carried with it not only residence but also powers in relation to the day to day care of the children. Now the structure of the Act is that the norm is residence and contact orders which deal only with the matters described above, leaving all other powers, authority and responsibilities in relation to children to be shared between the parents. If either parent desires to alter that position it is necessary for that person to apply for a specific issues order. Residence is not custody by another name. It has a more constrained meaning, being limited to identifying the person or persons with whom a child is to live.

Under the Constitution (s 51(xxii)), Federal Parliament has power to legislate for children of a marriage. The right to make laws for the children of de facto parents and of single parents remained a State power until the States referred those powers to the Commonwealth. All States except Western Australia have done so.

The object and principles of Pt VII are set out in s 60B:

> (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development [CWD] of their children.
> (2) The principles underlying this object are that:
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their [CWD]; and
(c) parents share duties and responsibilities concerning the [CWD] of their children; and
(d) parents should agree about the future parenting of their children.

The term 'parental responsibility' is defined as meaning the duties, powers, responsibilities and authority which, by law, parents have in relation to children (s 61B). Each parent of a child under 18 has parental responsibility, despite any changes in their relationships, but subject to a court order made under any Act (s 61C). This is to emphasise the continuing duties of parents, whatever their relationship with the child, until otherwise restructured with the sanction of the court. Section 61D makes it clear that a parenting order confers parental responsibility on a person to the extent it confers duties, powers, responsibilities or authority in relation to the child. The remaining bundle of responsibilities attaching to parents is left unaltered, except where expressly provided for in the order or necessary to give effect to the order.

Parenting orders

In making a parenting order, the court may make an order as it thinks proper (s 65D) but having the best interests of the child as the paramount consideration (s 65E). Before the court makes a parenting order (other than a consent or interim order), the parties must have attended a conference with a family and child counsellor or a welfare officer to discuss the matter. Alternatively, the court may dispense with counselling if there is an urgent need for a parenting order, a special circumstance, or if it is not practicable to require the parties to attend counselling (s65F).

Who can apply?

Either or both of the child's parents, the child or any other person concerned with the child's care, welfare or development may apply for a parenting order (s 65C). Under s 65H, the order cannot be made for a child 18 or over, married or living in a de facto relationship. As a safeguard, the court may make a declaration as to the de facto relationship (s 65H(3)).

In *Rice v Miller* (1993) and *Re Evelyn* (1998), the Full Court held that the biological parent does not stand in any preferred position. In *C and D* (1998), the Full Court reaffirmed the standing of non-parent applicants for parenting orders and cited with approval the trial judge's statement that:

> Persons significant to the life of a child are not confined to those who are biologically related to the child, in the same way that the existence of a family is not determined by biological considerations.

In *M and R and G* (1998), Ms M had conducted a sexual relationship with Ms R, the mother of a child born after a brief relationship with the child's father. Ms M was entrusted with the care of the child on frequent occasions. Later, the child's mother entered a de facto relationship with the child's father and Ms M's contact with the child continued but on a more limited basis. The child's mother argued that Ms M was not a carer but rather in the nature of a nanny or babysitter. The Court held that Ms M could file an application for a parenting order.

In *Re Lynette* (1999), the trial judge had made parenting orders in favour of a woman who cared for the mother during the mother's terminal illness and to whom the mother entrusted care of the child prior to dying. The father who had not had contact with the child for five years prior to the mother's death appealed against the orders. The Full Court held 'to the extent that the appellant's argument relied upon his status as a biological parent, it is against the weight of authority'.

Types of orders

Types of parenting orders are set out in s 64B according to their subject matter. Residence (that is, with whom the child is to live), contact, child maintenance or any other aspect of parental responsibility for the child can be dealt with. Where the parenting order deals with residence, it is a residence order; where it deals with the child's contact with another person, it is a contact order, and similarly as to child maintenance. Where other aspects are dealt with, such as responsibility for long term care, welfare and development (once guardianship matters) or the day to day CWD (once custody matters), it is a specific issues order.

Clearly, matters of residence and contact are limited without further responsibilities added to them. The goal is to exclude the notions of ownership as far as possible and focus on responsibilities. Hence, where the child's residence may once have carried with it a sense exclusivity of parenting, and contact (access) an apportioning of that right to the non-

custodial parent, both concepts are now subordinate to care, welfare and development.

Sections 65M, 65N and 65P spell out the general obligations created by residence orders, contact orders and specific issues orders respectively.

If a residence order is in force a person must not, contrary to the order:

- remove the child from the care of a person;
- refuse or fail to deliver or return the child; or
- interfere with the exercise or performance of any of the powers, duties or responsibilities given under the order.

If a contact order is in force, a person must not:

- hinder or prevent a person and the child having contact in accordance with the order; or
- interfere with the contact order that a person and the child are supposed to have with each other under the order.

If a specific issues order is in force and confers responsibility on a person (the 'carer') for the child's long term or day-to-day care, welfare and development, a person must not:

- hinder the carer in, or prevent the carer from discharging that responsibility.

Best interests of the child

The court is given a list of matters which it must consider in determining what is in the best interests of the child for the purposes of proceedings under Pt VII, where this is a consideration.

Section 68F(2) provides that the court must consider:

(a) any wishes expressed by the child, as well as factors affecting the weight to be given to the child's wishes, such as maturity and level of understanding (s 68G elaborates on how the court may inform itself of a child's wishes: by family reports given under s 62G(2) or, subject to the Rules of Court, by any other means the court thinks appropriate);
(b) the nature of the relationship of the child with parents and others;
(c) the likely effect of any changes in the child's circumstances, such as separation from a parent or both or from anyone with whom the child has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
(e) the capacity of each parent (or anyone else) to provide for the needs of the child, including emotional and intellectual needs;
(f) the child's maturity, sex, background (including any need to maintain a connection with lifestyle, culture and tradition of Aboriginal peoples or Torres Strait Islanders (see below, p 119 *et seq*) and other characteristics of the child the court thinks are relevant;
(g) the need to protect the child from physical or psychological harm caused or that may be caused by: subjection or exposure to abuse, ill-treatment, violence or other behaviour, or being directly or indirectly exposed to such behaviour directed towards or which may affect another person;
(h) the attitude to the child and to the responsibilities of parenthood demonstrated by each of the child's parents;
(i) any family violence including the child or a member of the child's family;
(j) any family violence order that applies to the child or a member of the child's family:
    - 'family violence' is defined in s 60D(1) as conduct, actual or threatened by a person towards or towards the property of, a member of the person's 'family' (de facto partner or relative) that causes any member of the person's family to fear for or be apprehensive about his or her well being or safety;
    - s 68K provides that the court must avoid making an order inconsistent with a family violence order or an order that exposes a person to family violence, as far as this is possible consistently with the best interests of the child being paramount (see below, pp 89–91);
(k) whether or not to make an order least likely to lead to further proceedings in relation to the child;
(1) any other fact or circumstance the court thinks relevant.

In *Smith and Smith* (1994), the Full Court stared that the preferable approach to considering these matters (under s 64(1) of the old Act) is to deal with each separately and make findings in relation to each having regard to the evidence. The trial judge is to 'consider, weigh and assess' the evidence touching each, then indicate to which of them he or she attaches greatest significance and how all of the matters 'balance out'.

In *B v B: Family Law Reform Act 1995* (1997), the Full Court found para (1) underlined the circumstance that the facts in individual cases vary 'almost infinitely'. Their Honours observed that the court's inquiry must be tailored to the particular children, taking into account all factors it perceives as important to the issue. As a matter of practice, the court stated:

> A judge in deciding a case would be expected to clearly identify s 65E as the paramount consideration, and then go through each of the relevant paragraphs in s 68F(2), discussing their significance and weight. The judge would further be expected to perform the same task in relation to the matters in s 60B which appear relevant. Finally, the judge would be required to evaluate all relevant issues in order to reach a conclusion which would be in that child's best interests.

In *ZP v PS* (1994), the High Court considered orders made by the Family Court to return the child to Greece for the custody hearing to take place in a Greek court. The wife had breached a consent order made while the family was in Greece and had brought the child back to Australia without the husband's knowledge. In allowing the appeal and in setting aside the orders of the Family Court, the High Court reminded courts of their duty to focus on the present case and the particular child in assessing the child's best interests. Hence, decisions in previous cases are not to be used in building general presumptions on this matter. However, for the purposes of consistency in application of the legislation, previous cases dealing with closely similar circumstances will naturally provide guidance for courts in structuring future orders. The High Court insists that the court direct its mind to the welfare of the particular child. When this is done, according to Brennan and Dawson JJ:

> It is only if welfare factors be evenly balanced that secondary considerations—such as the policy of discouraging the abduction of children across national borders or the desirability of the determination of permanent custody being made in the child's ordinary place of residence—can have any weight in guiding the exercise of the Family Court's powers.

In *B v B: Family Law Reform Act 1995* (1997), the Full Court cited the High Court in ZP i? PS and observed that the new Pt VII should not be seen as changing this position. Their Honours found that previous decisions which 'eschewed the application of fixed or general rules as the solution' remained consistent with the new legislation.

On this basis, then, the following illustrative decisions are given concerning the best interests of the child.

Separation from siblings

In *H and H* (1995), the eldest child, L, resided with the husband for six weeks while the two younger children remained with the wife. On the husband's application for custody of L, Nicholson CJ ordered that the wife have custody of all three children. The Chief Justice stated the law's requirement that he regard the welfare of the child as paramount. His Honour regarded as useful some published family law research findings as to the benefits of keeping siblings together. Significant factors in the research included the supportive role of the older child towards the younger in the context of parental divorce. In the instant case, it was found that the younger children met up with L at school and showed signs of affection during these meetings. His Honour noted:

> …the fact is that the effect of the order that the husband seeks will be, to a large extent, to deprive the two younger children of the benefit of a relationship with their elder brother, and also to deprive him of the benefits of a relationship with them. The fact that siblings fight from time to time does not seem to me to be a proper reason for separating them. In fact, it may well be part of the learning of living skills which is very important to them in later life.

Wishes of the child

In *R and R: Children's Wishes* (2000), the two boys had spent two years without effective contact with the father while he had been in a relationship overseas. The wife had facilitated frequent contact with the boys' father after he left the matrimonial home prior to his departure from the country. In expressing their wish to be with their father (his having returned to Australia), the boys added that this was because they had not seen much of him. They also expressed the condition that they wanted to be with him only if they could see their mother as often as they wished. It was argued before the court that the case of *H and W* (1995) was authority for the proposition that if the child's wishes are valid then good reason should be shown for departing from them. The Full Court that this did not represent the effect of *H and W* and went on:

> What is required is that [children's wishes] be given appropriate and careful consideration and not simply treated as a factor in the determination of the child's best interests without giving them significance. When validly held reasons are departed from by the trial judge…good reason should be shown for doing so.

In *Re G: Children's Schooling* (2000), the parents disagreed as to which school the children were to attend. The Full Court referred to *R and R: Children's Wishes* and noted:

> While we have carefully considered the expressed wishes of the children in this case we think that these 'wishes' go to a much less significant aspect of their best interests than the more usual issue as to which parent it is with whom the children should live.

The Court found advantages in the children attending a school closer to their residence, finding it 'desirable to enhance the ease with which a parent who assumes the bulk of day-to-day responsibility can meet the multiple associated demands of…a care giver'. The trial judge's decision permitting the wife to enrol the children as day students at a school nearer their residence was affirmed.

Capacity to provide for the needs of the child

In considering the best interests of the child as to who would better provide for the child's needs, the court is concerned to dismiss any overt presumption favouring male or female carers. Whether or not this stance is consistently demonstrated in decisions is open to review. However, the court is keen to eliminate stereotypical evaluations where these conflict with community standards.

In *McMillan and Jackson* (1995), an appeal was allowed by the Full Court against a decision to grant custody to the infant child's maternal great grandmother. In this case, the parents had both been teenagers when the child was born, the mother 17 years of age. The child had been cared for substantially during its first eight months by the mother's grandmother. After the breakdown of the relationship, the father returned to live with his parents, leaving the child with its great grandmother. During an access period, the father retained possession of the child and was then granted interim custody. The child's mother abandoned her application for custody in favour of her grandmother as intervener. The trial judge awarded sole custody to the intervener and the father was ordered to return the child to her care.

In his decision, the trial judge made several references to the father's unemployment as constituting a poor role model for the child. His Honour expressed his concern in phrases such as 'the risk of entrenched welfare dependency' and 'resort to social security'. The father's household example, 'looking after the child and watching videos' presented the child with a 'myopic picture of life'. At the same time the intervener was described as

being 'a highly experienced mother figure having raised a large number of children including three who are not her own'. His Honour also expressed his approval for the intervener as being a 'competent, caring and unsophisticated lady with a sharp tongue and a heart of gold' who 'projected an aura of robust good health'.

Baker, Lindenmayer and Burton JJ found the trial judge correct in his observation that the 'fact of parenthood does not establish a presumption in favour of the natural parent'. However, they went on to state:

> Whilst a trial judge does not, and is not expected to leave his or her common sense and worldly experience outside the door of the court, a judge must leave outside the court any pre-conceived notions which he or she may entertain, as a private individual, about the roles which males and females ought to adopt in society.

The Court adopted the statement of principle by the Court in *Sheridan* (1994):

> Each case must be decided on its merits and it is inappropriate to impose a stereotypical norm of proper parent roles.

In passing, their Honours observed that the Family Court has the obligation and responsibility to reflect community standards subject only to the Act itself. In addition, it was pointed out that Parliament has provided social security benefits to parents who wish to care for their children on a full-time basis and, therefore, the trial judge's views did not reflect general community opinion. It must be noted that, although the appeal by the father of the child succeeded, the status quo of the child having built up in residence at the intervener's for eight over months was enough to persuade the court to allow her to retain custody until the expedited rehearing.

Relocation

B v B: Family Law Reform Act 1995 (1997) concerned the proposed relocation of the former wife with the children from Northern Queensland to Victoria, five years after separation of the parties. The wife's new husband was compelled to remain in Victoria for business reasons and the wife would not relocate without the children. The former husband opposed the children leaving Northern Queensland where his legal practice was established. The trial judge was satisfied that the proposed move was *bona fide* and made orders accordingly, varying the husband's contact from weekends to school holidays and like periods. The husband appealed, and

the Full Court in dismissing the appeal handed down an extensive decision in the context of the amendments to the Family Law Act 1975. In affirming the decision to permit the wife to relocate, the Court asserted the paramountcy of considering the best interests of the child (see earlier) and continued:

> To freeze both parents at the location to which they went after separation so that the children may continue to have that contact with each of them is most unlikely to serve the long term best interests of the children. It would inevitably mean that one or both parents may be forced to forego personal or economic opportunities which are advantageous to all members of that family or continue to live in circumstances which are no longer suitable or appropriate.

The court found that the amendments did not affect the position outlined in *Fragomeli* (1993), *I v I* (1995) and *Skeates-Udy* (1995), in that the 'dominating consideration' must be the children's best interests. Further, any residual interest on the part of the custodial parent must be fitted into a consideration of being a factor which is in the best interests of the child. The three-tiered test in *Holmes* (1988) was affirmed by the court as a valid guide.

In weighing up the factors for and against the children relocating, the court set out a range of possible considerations. Primarily, the importance of remaining with the parent in relocated circumstances must be weighed against changes in the children's environment, in particular against any loss in contact with the contact parent. In this context, with the children's best interests as the goal, the following are to be assessed:

- the degree and quality of the existing relationship between the children and the residence parent;
- the degree and quality of the existing contact between the children and the contact parent;
- the reason for relocating (such as: to improve the economic position of the family unit, to change from being dependent upon welfare to earning a more substantial income, and re-partnering);
- the distance and permanency of the proposed change;
- other considerations which vary from case to case, such as:
    - dislocation from children's school, friends, extended family;
    - the wishes of the children;
    - the ages of the children;
    - the feasibility and costs of travel;
    - alternate forms of contact.

The court observed that arguments as to the happiness of the relocating parent are also relevant as far as they affect the best interests of the children:

> Ordinary common experience indicates that long-term unhappiness by a residence parent is likely to impinge in a negative way upon the happiness and therefore the best interests of children who are part of that household. Similarly, where the parent is able to live a more fulfilling life, this may reflect in a positive way on the children. However, the ultimate determinant is the best interests of children; the wishes and desires of the parent per se give way to that.

The High Court case of *AMS v AIF; AIF v AMS* (1999) concerned questions of whether the mother of the child had been appropriately restrained from changing the place of residence of the child from Perth to Darwin. The court found the trial judge had imposed upon the mother an impermissible onus of establishing 'compelling reasons' before she could be allowed to remove the child. Kirby J noted:

> While the legislation…give[s] the highest priority to the child's…best interests, that consideration does not expel every other relevant interest from receiving its due weight.

Martin and Matruglio (1999) paralleled *AMS v AIF.* The Full Family Court added to the views expressed by Kirby J in observing:

> Further, we live in a society which attaches high importance to the freedom of movement and the rights of adults to decide where they will live. Parties from broken relationships are entitled to start new lives for themselves and to form new relationships…although we do not seek to differ from the Full Court in *B v B*…[in that] it is a right that cannot prevail over what is considered to be in the best interests of the children in a particular case.

Contact

Article 9 of the Convention on the Rights of the Child (see above) sets out the right of the child to have contact with both parents except if contrary to the child's best interests. As we have seen, the law in this area has shifted away from asserting parents' interests and rights, to a primary focus on the welfare of the child.

The ALRC's Report No 73 of 1995 on complex contact cases (*For the Sake of the Kids: Complex Contact Cases and the Family Court*)

contained recommendations as to the management of difficult contact cases. The main purpose of the inquiry was to identify the causes of difficult contact cases and to propose strategies for reducing the harmful effects of conflict on children and families. The cost of repeated litigation in the Family Court and in terms of strained legal aid resources also prompted the inquiry. The Report recommended (R 2.7) that the Family Court should be 'more robust in refusing to make contact orders where it is not in the best interests of the child to order contact'. It proposed that refusal of contact may be appropriate where there is currently conflict or a history of violence in the parents' relationship, or where the child opposes contact.

In its mainly preventative focus, the Report recommended (R 3) that complex as well as potentially complex cases should both be identified as 'complex cases' according to the Family Court's case management guidelines. Relevant Family Court officers including counsellors should be able to identify potentially complex cases as early as possible. Mediation should be offered early in the process before the parties become entrenched in litigation but with proper screening to ensure that inappropriate cases for mediation (such as where there is violence, abuse and power imbalance) are isolated (see below, p 137).

In *B v B: Family Law Reform Act 1995* (1997), the Full Court discussed the effect of the 'right of contact' principle set out in s 60B(2)(b):

> [Section 60B(2)(b)] should not be narrowly interpreted. Fundamentally, it emphasises the desirability of contact, and 'regular' carries with it a clear understanding that it should also be as frequent as is appropriate and by the various means which are considered to be in the child's best interests.

In *Brown and Pedersen* (1992), the trial judge discharged all access orders relating to the husband's contact with the child of the marriage. It was significant to the decision that the child had expressed very strong wishes not to see his father again. The parties had separated when the child was two years of age and the mother had repartnered when the child was four. Although initially access arrangements were enjoyed by the child, at six years of age he began to resist his father's company. After that the conflict escalated and the husband engaged in aggressive behaviour and outbursts of anger. It was the husband's contention that the child had been schooled in his antipathy by the wife and the child's step father. At the husband's application, the child, at nine years of age, was examined by a series of video-taped evaluations and psychiatric observations. His Honour found the welfare of the child demanded a 'complete cessation

of hostilities which regrettably involve[d] a cessation of contact between himself and his father'.

In dismissing the husband's appeal, the Full Court adopted the position as stated by Lord Oliver of Aylmerton in the English case of *Re KD* (1988) that any 'right' vested in the parent ought to yield to 'the dictates of the welfare of the child'. Their Honours noted that the Family Court in cases such as *Re A* (1982) and *Cotton* (1983) 'has long laid to rest any notion that a parent has a right to access' and that 'the maintenance of access between a child and his or her natural parent is a desirable good, but it is not one to which the welfare of the child should be sacrificed'.

In *Irvine* (1995), the trial judge had granted the husband access in spite of the fact that he had been convicted of arson for setting fire to the children's home, and was currently committed for trial in respect of two counts of threatening to kill the wife. In addition, the separation had arisen after the husband had 'viciously' assaulted the wife. In a later incident prior to the arson, the wife alleged the husband had raped her. Two of the children had expressed a strong wish to have no contact with the father with the third child equivocating. The wife appealed seeking sole guardianship and that the husband's access be denied. It was conceded by Counsel for the husband that the evidence before the trial judge presented 'a clear picture of continual violent, abusive and aggressive behaviour' on the part of the husband towards the wife.

The Full Court found that the evidence led 'irresistibly' to the conclusion that access would not be in the best interests of the children and if granted would seriously alarm the wife. The appeal was upheld and orders made restraining the husband from bringing any further application for access without the leave of a judge, until the conclusion of the criminal proceedings.

Their Honours assessed the authorities on the topic of refusing access. In *M v M* (1988) (see below, p 112), the High Court had stated 'the Court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in a child's interests to maintain the filial relationship with both parents'.

The Full Court pointed out that there would need to be 'compelling' evidence that the welfare of the child required an order for access. In coming to their decision the judges canvassed statements in *Russell v Close* (1993), *S and P* (1990), *B and B* (1993) as to the factor of adverse impact on the custodial parent. These cases regard the effect on the custodial parent as a matter coming within one or several of the following factors (now listed under s 68F(2)):

- relationships of the child with both parents (*Russell v Close*);
- the capacity to provide for the needs of the child (*Russell v Close; B and B*);
- physical or psychological harm caused or that may be caused by being directly or indirectly exposed to abuse, ill-treatment, or violence directed towards or which may affect another person (*Russell v Close; B and B*);
- any other fact or circumstance the court thinks relevant (*S and P*).

If this case were considered now, we would add:

- any family violence or family violence order involving the child or a member of the child's family.

Therefore, their Honours stated, in deciding whether it would be in the (best) interests of the children to grant access in this case, the court had to bear in mind the effect of the husband's conduct upon the custodial parent—the wife.

In *H and H* (1995), Nicholson CJ warned the husband that despite what he had to offer the children in relation to a father's role, his access to the children would be at risk if his obsessive behaviour continued. In this case however, it could be argued the behaviour was considerably less serious than that described in *Irvine* (1995). *In H and H,* the husband had engaged in vexatious complaints to relevant government agencies and demonstrated an obsessive fixation as to the wife's partner. This is to be contrasted with arson, assault and threats to kill. However, it is suggested that the behaviour of the husband in *Irvine* was found by the Full Court to be seriously disqualifying rather than substantially enough to tip the scales. Finally, it must be remembered that there can be no presumptive ranking of behaviour that overrides the duty of the court to consider each case according to the welfare of the particular child.

In *B v B: Family Law Reform Act 1995* (1997), their Honours affirmed the decisions of *M v M* and *H v H* prior to the amendments to the Family Law Act, noting that there may be cases where the best interests of the children require that contact with one and even both parents be curtailed. Nothing in the amendments was found to change that position. The section was found to contain, in the opinion of the court, an 'optimum set of values for children of separated parents' as a goal to which parents, society and the courts should aim.

Enforcement

Section 65N of the Family Law Act 1975 provides in part that no one is to interfere with the contact provided for under a contact order. Section 65Q provides for the issue of a warrant for the arrest of anyone who contravenes contact or residence orders where an application is brought under Division 13A.

The Family Law Amendment Act 2000 institutes a three-tiered parenting compliance regime for children's matters. It limits the existing Pt XIIIA to provide for sanctions not affecting children and sets up Division 13A of Pt VII to cover consequences for failure to comply with orders affecting children. The three stages can be described as:

- stage 1—preventative;
- stage 2—remedial; and
- stage 3—further measures of last resort (see s 65AA).

Stage 1

Section 65DA provides that the court must explain or request the representing legal practitioner to explain the effect of a parenting order to those to whom it is directed, in language likely to be readily understood by them. The explanation must cover the obligations created by the order, availability of parenting programs and consequences of non-compliance. The explanation must also cover the availability and use of location and recovery orders (see below, pp 98–99).

Stage 2

If orders affecting children have been contravened without reasonable excuse, the court may, under s 70NG order that the person participate in a 'post-separation parenting program'. The court may also or alternatively make a further parenting order that compensates for contact foregone as a result of the contravention. 'Reasonable excuse for contravention' is defined in s 70NE as including the following:

- The court is satisfied that the respondent should be excused because he or she did not understand the obligations imposed by the order. In this event the court must explain the obligations and consequences in language likely to be readily understood.
- The respondent believed on reasonable grounds that the actions resulting in a child not living with a person in whose favour a residence order was made, or a person and a child being deprived of contact under a contact order, or the contravention of a specific issues order,

were necessary to protect the health or safety of a person including the respondent or the child.
- The period of contravention must not be longer than necessary to afford this protection.

Post-separation parenting programs are defined in s 70NB as designed to help people to resolve problems that adversely affect the carrying out of parenting responsibilities. If the person is assessed as unsuitable for a program the court must be informed (s 70NH(1)).

Stage 3

Further measures are imposed on a person who fails to comply with an order affecting children. Section 70NJ applies both to first contraventions without reasonable excuse of primary parenting orders, where the person has shown a serious disregard of his or her obligations, and to further contraventions of the primary order. The court may be satisfied that a Stage 2 order may be more appropriate (s 70NJ(2)). Section 70NJ(3) lists orders available to be made by the court:

- community service order;
- bond (the term having been recommended by the Family Law Council to be more readily understood in the community than 'recognisance');
- variation of existing parenting order;
- fine;
- imprisonment (which is not to be imposed in respect of contravention of a child maintenance order unless court is satisfied that the contravention is intentional or fraudulent (s 70NJ(6); nor is it to be imposed in respect of the contravention of a child support obligation (s 70NJ(6A)).

Section 70NO(8) makes it clear that serving a period of imprisonment will not affect the person's liability to make the child maintenance payment. Jail terms are to be for 12 months or less and are not to be imposed unless the court is satisfied that none of the other sanctions are appropriate (s 70NO(1)–(2)).

Parenting plans

Section 63B states that parents are encouraged to agree about matters concerning the child rather than seeking an order from a court In coming

to their agreement, parents are reminded of the need to regard the best interests of the child as paramount.

The characteristics of an agreement that make it a parenting plan are listed in s 63C. It will be:

- in writing;
- made between the parents of a child (and it may also include other parties);
- inclusive of one or more of the following matters: residence, contact, or any other aspect of parental responsibility ('child welfare' provisions) or child maintenance;
- made inside or outside Australia.

If a parenting plan provision deals with child maintenance and the Child Support (Assessment) Act 1989 applies, then those provisions are unenforceable (s 63G(5)). The parties cannot by agreement evade the child support legislation. However, a parenting plan may also operate as a child support agreement if they contain suitable provisions as referred to in s 84(1) of the Child Support (Assessment) Act 1989 (see also s 63 of the CAA).

The parenting plan may be registered in the Family Court (or court having jurisdiction) under s 63E. The court registration requires either a statement that each party has been provided with independent legal advice as to the meaning and effect of the plan or that the plan was developed after consultation with a family and child counsellor (s 63E). The court may vary the child welfare provisions in the plan if it considers the variation is required in the child's best interests (s 63F). Once registered, the plan's provisions take effect according to their content an arrangement as to the child's residence becomes a residence order, contact with any person—a contact order, and any other aspect of parental responsibility becomes a specific issues order. Section 63F(5) disqualifies from being deemed a residence order any provision determining that a child is to live with someone other than a parent.

> The ALRC Issues Paper 14 noted, in relation to parenting plans: [Agreements] should not be ambiguous and should specify the practical working arrangements. At the same time, they should leave room for flexibility to allow for changes in family circumstances…practitioners should systematically devise strategies and office practices to try to reduce the number of settlements that break down. One important addition to agreements could be provisions for effective and fair dispute resolution to cope with changes and conflicts.

Family reports and counselling

Section 68G(2) gives the court the option of informing itself of the wishes of a child by having regard to a report given under s 62G(2). Section 62G applies if proceedings under the Act are in progress where the CWD of a child under 18 is relevant. The court may direct a family and child counsellor or welfare officer to report on relevant matters as the court thinks desirable. The report may then be received in evidence. A 'family and child counsellor' is a court counsellor, a counsellor authorised by an approved organisation or a person authorised under the regulations (s4).

The ALRC's Issues Paper 14 warned that researchers had found family reports not always beneficial in contact cases. The findings pointed to trauma in focusing on the dispute rather than its resolution and cautioned that family reports be used with restraint. In *Hall* (1979), the Full Court had observed:

> (a) There is no magic in a family report. A judge is not bound to accept it and there should never be any suggestion that the counsellor is usurping the role of the court…
>
> (b) Family reports are meant to be, and almost invariably are, valuable and relevant material to assist a judge in forming his ultimate conclusions.

The court cited the decision of *Harris* (1977), where Fogarty J stated:

> Welfare officers attached to the court…are entitled to put forward views or opinions and such views or opinions are admissible in the same way [those] of any expert in his particular field or discipline and are to be accorded such weight as the circumstances justify… The fact that the opinion emanates from a welfare officer or counsellor attached to the court does not give that opinion any greater validity or weight as such.

In *Re Karen and Rita* (1995), Nicholson CJ asked counsellors to 'keep in mind the very positive duty [the court] and its officers have to protect the welfare of children'. His Honour emphasised that if, during the preparation of a report, they form the view that either or both parents is an unsuitable custodian for reasons directly affecting the children's welfare, they have a duty to report to that effect.

Section 62F gives the court the option of making an order at any stage of the proceedings where the care, welfare and development of a child under 18 is relevant, directing the parties to attend counselling. If the parties fail to attend, the counsellor must report this failure to the court (s 62F(5)).

Unlike the family report made under s 62G, evidence of anything said during the s 62F conference is not admissible. As we have seen, where the court is making a parenting order, it must ensure that the parties have attended counselling on the matter to which the proceedings relate. The court may relax this requirement if it is satisfied of special circumstances or impracticability. An example of these circumstances would be in a case of family violence. Where the court makes a parenting order, it may also order supervision or assistance by a counsellor (s 65L).

5 Children—Part 2

You should be familiar with the following areas:

- location and recovery orders
- the elements of wrongful removal or retention of a child
- habitual residence
- reg 16(3) grounds for the court's discretion to refuse a Convention application
- the standard of proof of child sexual abuse and the rule against hearsay
- the role of the Child Representative
- stepparent adoptions and Family Court leave
- Aboriginal child placement principles

Abduction

Domestic abductions

The Family Law Act 1975 sets out the general obligations created by residence, contact and specific issues orders (ss 65M–P). Each of these bundles of obligations include provisions prohibiting anyone from interfering with their performance. Where a residence order is in force, the prohibition is against removing the child from the care of a person; where a contact order is in force, it is against preventing contact in accordance with the order.

If a child is taken from his or her residence, not returned, or withheld from contacting the person who has a right to contact, orders may be sought to facilitate the child's location and recovery. Both location orders and recovery orders in relation to a child may be sought by those having a residence order, contact order or specific issues order, in addition to any

other person concerned with the care, welfare or development of the child (ss 67K and 67T). Both require the court, in deciding whether to make the order (including by consent) to regard the best interests of the child as paramount (ss 67L and 67V). Location and recovery orders were introduced by the 1995 Amendments to the Act.

Location orders

Section 67J defines the nature of a location order as a court order requiring a person to provide the Registrar with information the person has or obtains about the child's location. It also embraces a Commonwealth information order. That is defined as a location order requiring the Secretary of a Department (or appropriate authority of a Commonwealth instrumentality), to provide the Registrar with information about the child's location which is contained in government records.

Location orders (other than Commonwealth information orders) are dealt with in s 67M. A court may make a location order if it is satisfied that the person to whom it applies is likely to have information about the child's location. But if that person holds a position in or in relation to a Commonwealth Department, the order does not apply to information gained due to holding that position. The order lasts for 12 months and the person to whom it applies must provide the information sought as soon as practicable and do so in spite of anything in any other law (such as secrecy provisions).

Commonwealth information orders must be made according to the conditions set out in s 67N. These also last for 12 months and require the official to comply with the order as soon as practicable and in spite of anything in any other law. However, records of that Department are not to be searched for the information more often than once every three months, and the court must not make an order in relation to more than one Department unless it considers exceptional circumstances so require. The order may also be restricted to a particular kind of records if the court considers that the information is only likely to be in records of that kind, and that to apply the order to all Department records would place an unreasonable burden on its resources. But the official must provide any information about actual or threatened violence to the child, a parent or carer of the child contained in the records (s 67N(8)). This information is required whatever the kind of information sought under the order. A penalty of 120 penalty units is imposed for wrongful disclosure of information provided under a location order including a Commonwealth information order. Under s 67P, the Registrar (or anyone else who obtains the information because

of its provision to the Registrar) must not disclose the information to anyone other than:

- another court Registrar or court attached process server; or
- an officer of a court for the purpose of that officer's duties; or
- (with leave of the court making the order) the applicant's legal adviser or engaged process server; or
- if a recovery order is in force which includes an authorisation or direction to stop and search, enter and/or recover (under s 67Q(b)–(c), below) the person so authorised or directed.

Section 67P(2) asserts that nothing in the section authorises the disclosure to the applicant for the location order.

Recovery orders

Under s 67Q, a recovery order is described as a court order which does any or all of the following:

(a) requiring the return of a child to a parent, person who has residence order, contact order or specific issues order;
(b) authorising or directing a person(s), with assistance as required and by force if necessary, to stop and search any vehicle, vessel or aircraft and to enter and search any premises or place for the purpose of finding a child;
(c) authorising or directing a person(s), with assistance as required and by force if necessary, to recover a child;
(d) authorising or directing a person to whom a child is returned or who recovers a child to deliver the child to a person as listed in (a) or on behalf of that person;
(e) giving directions about day to day care of the child until returned or delivered;
(f) prohibiting a person from again removing or taking possession of a child;
(g) authorising the arrest without warrant of a person who again removes or takes possession of a child.

Anyone who prevents or hinders the taking of action under a recovery order is liable to be penalised under s 67X. This requires the prevention or hindering of persons authorised or directed under 67Q(b)–(d). The section does not refer to orders under s 67Q(a) which simply order the child's

return. The court is to be satisfied that the prevention or hindering is intentional and without reasonable excuse; if so, it may fine the person up to AUS$1,000, impose a recognisance or order the person be imprisoned for up to three months.

Enforcement

Apart from the penalties for prevention or hindering, the enforcement options include:

- the court exercising its discretion to issue a warrant under s 65Q, if a residence or contact order is in force and an application under Division 13A is before the court (see above, p 91 *et seq*);
- the court making a recovery order authorising the arrest without a warrant under s 67Q(g).

Where a person is brought before a court under either of these avenues, there must still be a Division 13A application commenced in order to detain the alleged offender (ss 65R–65W).

Special penalties attach where the child to whom a parenting order applies is sent outside Australia. (See below, p 101 *et seq:* the Child Abduction Regulations apply whether or not a parenting order is in force.) If a residence, contact or 'care' (specific issues) order is in force or proceedings as to one or more of these are pending, a party or someone acting on behalf of a party must not intentionally or recklessly take or send or attempt to take or send the child outside Australia. The penalty is three years imprisonment. The prohibition does not apply if the removal or attempt is done with the consent in writing of each person in whose favour a parenting order is made, or of the parties to the proceedings, or under a court order (ss 65Y–65Z). If an appeal against a decision of a court has been instituted, the proceedings are treated as 'pending'.

If travel plans are discovered in advance of the child's removal, a person in whose favour a parenting order has been made, or a party to related pending proceedings may serve a statutory declaration on the captain, owner or charterer of an aircraft or vessel under ss 65ZA–65ZB. The declaration must not have been made more than seven days before service and must contain particulars of the parenting order such as to identify the child and parties. When this declaration is served on the captain, owner or charterer of an aircraft or vessel, the child must not be permitted to leave a port or place in Australia unless in the company of the maker of the declaration or in accordance with a court order. If the captain, owner or charterer intentionally or recklessly and without

reasonable excuse permits the child to leave Australia, the penalty is 60 penalty units.

Section 67ZD provides for court to order the retention of a passport where there is a possibility or threat that a child may be removed from Australia. The court may order the delivery to it of the child's passport or of 'any other person concerned'.

International abductions

The Hague Convention on the Civil Aspects of International Child Abduction was incorporated into Australian law by the passing of the Family Law (Child Abduction Convention Regulations) on 1 January 1987. The Convention's Articles form Sched 1 to the Regulations, and Sched 2 lists the countries who have agreed to be bound by the Convention. Currently, there are over 40 Convention countries involved. The objects of the Convention are set out in Art 1:

- to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other(s).

Article 5 defines 'rights of custody' as including rights relating to the care of the child and in particular the right to determine the child's place of residence. Article 3 adds that these rights may arise by law or judicial or administrative decision or by agreement. Hence where there are no proceedings in place, parental responsibility embraces this 'right' by law in Australia (see s 61C, discussed above, p 79). 'Rights of access' are defined in Art 5 as including the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 3 defines 'wrongful removal or retention' as requiring two elements:

- the removal or retention is in breach of rights of custody under the law of the State in which the child was habitually resident immediately beforehand; and
- at the time of removal or retention, those rights were actually exercised or would have been but for the removal or retention.

The scheme requires Contracting States to designate Central Authorities and (in a federal system) State Authorities for the purpose of receiving applications for assistance in securing the return of children (up to 16 years of age) removed or retained. Applicants may approach the Central

Authority of the child's habitual residence or that of any other Contracting State. The application must be transmitted directly and without delay to the Contracting State where the child is believed to be (Art 9).

Article 12 provides for the judicial or administrative authority of the Contracting State where the child is found, to order the return of the child. Regulation 16(1) repeats this provision and states as follows:

> 16–(1) Subject to sub-regs (2) and (3)…a court must make an order for the return of a child:
>
> (a) if the day on which the application was filed is less than one year after the day on which the child was removed to, or first returned in, Australia; or
> (b) if…at least one year after…unless the court is satisfied that the child is settled in his or her new environment.

Regulation 16(2) requires that the court must refuse to make an order under reg 16(1) if it is satisfied that:

(a) no 'removal or retention' occurred within the meaning of the Regulations; or
(b) the child was not an habitual resident of a convention country immediately before removal or retention; or
(c) the child had attained the age of 16; or
(d) the child was removed to or retained in Australia from a non-convention country; or
(e) the child is not in Australia.

Article 13 gives exceptions to the requirement that the authority order the return of the child. These are repeated in reg 16(3), which provides:

> A court may refuse to make an order under sub-reg (1) if a person opposing return establishes that:
>
> (a) the person, institution or other body making application for return of a child…
>
> (i) was not exercising rights of custody at the time of the removal or retention of the child and those rights would not have been exercised if the child had not been removed or retained; or
>
> (ii) had consented to or acquiesced in the child's removal or retention; or
>
> (b) there is a grave risk that the child's return to the country in which he or she habitually resided immediately before the removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or
(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

In *McCall* (1995), the Full Court, comprising Nicholson CJ, Ellis and Fogarty JJ, discussed the general scheme of the Regulations. Their Honours regarded the Regulations as providing a legislative structure for the application of the Hague Convention to Australian law and noted:

> It is the Regulations themselves that are operative from a domestic law point of view rather than the Convention, although regard can obviously be had to the Convention for the purposes of interpreting the Regulations and for ascertaining the position where the Regulations are silent.

The judges made a number of important observations as to the operation of the scheme. These are summarised as follows:

- The principle of paramountcy of the welfare of the child has no part to play in applications under the Convention. The authorities for this rule include the English case *Re A—a minor* (1988) along with Family Court decisions *Gsponer* (1989), *Davis* (1990) and *Murray* (1993). In *Davis,* Nygh J saw the Convention as directed to two main issues: first to discourage unilateral removal or retention, secondly to ensure that the question of what the welfare of the child requires is determined by the jurisdiction in which the child was habitually resident immediately before removal. Nicholson CJ and Fogarty J in *Murray* added that the issue in a Hague Convention application is purely one of forum, subject to the exceptions listed in reg 16, and the paramountcy principle is therefore not relevant.
- There is no connection between proceedings under the *parens patriae* jurisdiction and those under the Regulations. In their Honours' opinion, proceedings (for parenting orders) and those under the Regulations should be treated as a separate head of jurisdiction:

  > …the purpose of the Convention, and thus the Regulations is not to determine rights of custody…In non-Convention cases such as *ZP v PS*, this can only be achieved by invoking the custody jurisdiction of the court, which is governed by the welfare principle.

- The phrase 'rights of custody' (see Art 5, above, p 101) extends beyond the narrow definition of custody formerly contained in the Family

Law Act to embrace a broader range of rights. The emphasis in Art 5 is on the right to determine a child's place of residence since this is the element most critical in a removal or retention.

Wrongful removal or retention

The action of 'removal' invokes the provisions of the Regulations. This is defined in reg 2(1) as meaning 'the wrongful removal or retention of a child within the meaning of the Convention' (see Art 3, above, p 101). So, in order to qualify for the measures provided, the elements of wrongful removal or retention must be present:

- breach of rights of custody of the State in which the child was habitually resident; and
- at the time those rights were actually exercised.

In *Regino* (1995), the husband was a citizen of the US and the wife Australian. The child was born in Hawaii a year after the couple were married in Australia. Seven months after the birth of the child the family moved to Alabama for the husband's employment. Shortly after settling in Alabama, the wife, to the husband's knowledge, applied for an Australian passport for the child, who was then eight months old. In November 1993, the husband drove the wife and child to the airport to facilitate their departure with a one way ticket to Australia. The wife then returned to the Alabama home with the child and cancelled the trip. A fortnight later, the wife and child again travelled on a one way ticket bound for Australia and again the husband drove them to the airport. Six weeks after the wife and child arrived in Australia, after what was accepted by the court as an unavoidable bureaucratic delay during the holiday season, the husband commenced an application for assistance under the Convention.

The wife's case was that her departure with the child arose from an agreed final separation, the husband consenting to the child being taken to reside permanently in Australia. The husband argued by affidavit that the child was wrongfully retained in Australia within the meaning of Art 3 and therefore 'removed' as defined by reg 2(1). Counsel for the Director General of the Department of Family Services and Aboriginal and Islander Affairs (the Central Authority) conceded that the removal of the child was with the husband's consent. At issue was whether he consented to the wife's retention of the child in Australia permanently. Lindenmayer J found on the evidence before him that the wife's case was to be preferred. His

Honour found that the wife's retention of the child in Australia was not 'wrongful', and thus there was no 'removal' according to reg 2(1).

The *McCall* case (1995) concerned a departure of the wife and child while the husband was at work, the wife leaving behind a note. Both parents were citizens of the UK and the wife also held New Zealand citizenship. The child was born in the UK The wife departed for Melbourne with the child, then aged two years old, from the UK. Treyvaud J dealt with the case as follows:

- breach of rights of custody; and
- at the time those rights were being exercised:

> In the circumstances of this case, where the husband, wife and child were…living in the parties' matrimonial home in London, albeit in strained circumstances, in a situation where each played a part in C's care and upbringing, I am satisfied that when the wife removed C from the United Kingdom the husband was actually exercising rights of custody;

- habitual residence (see below). His Honour regarded habitual residence as a question of fact having two elements—the fact of residence and the intention to reside habitually. Since the child was incapable of having the requisite intention, it was the parents as guardians who could (jointly) form the intention of altering the child's habitual residence. Until then, the child's habitual residence remained in the UK;
- reg 16(3) (see below). The wife raised an exception given under reg 16(3)(a)—that the husband consented to or acquiesced in the child's removal. Treyvaud J found no evidence to support the husband's consent or acquiescence, citing the *Temple* case (1993) as to the rules of acquiescence. His Honour noted that, even if the evidence had shown consent or acquiescence, he would not have exercised his discretion in favour of the child remaining in Australia. Orders were made to return the child to the UK in the care of the wife and the wife's application for custody to be determined in the (UK) High Court of Justice.

Habitual residence

The US Court of Appeal in *Friedrich v Friedrich* (1993) set out the meaning of habitual residence:

> …habitual residence must not be confused with domicile…the court must focus on the child, not the parents, and examine past experience not

> future intentions…A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward.

In *Cooper and Casey* (1995), the husband was born in the US and the wife was Australian. During the six years prior to the wife's departure for Australia on 5 July 1994 with the two children of the marriage, the couple had travelled to and from Australia on frequent trips. Both children were born during trips to Australia. In July 1993, the wife and children went to France from the US with the husband's consent, and remained there for seven months. After this, the wife and children returned to the husband in the US for six months prior to their departure for Australia. The husband brought Convention proceedings seeking the return of the children to the US and orders were made accordingly. The wife appealed on the ground that the children were not habitual residents of the US, as was found by Ellis J. Further, the wife's counsel argued that the children were not habitual residents of any State.

The Full Court dismissed the appeal, finding the children's habitual residence established in the US from the time of their first arrival in that country after their births in Australia. The Court noted the trial judge's finding that in any event, the children acquired habitual residence on their return from France to the US. The relevant principles were found to be as set out in *Re B* (1994):

- Habitual residence of young children of parents who are living together is that of the parents' and neither can change it unilaterally without a court order (see, also, *Artso* (1995), *per* Mushin J).
- It is a term referring to the parents' abode in a particular place which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether of short or long duration.
- 'Settled purposes' means no more than that the parents' shared intentions in living where they do has a sufficient degree of continuity to be properly described as settled.
- Habitual residence can be lost in a single day by leaving a country with a settled intention not to return (see *C v S* (1990)), but the acquisition of an habitual residence requires an appreciable period of time and a settled intention.

Settled in a new environment

Director General, Department of Community Services and M and C and Child Representative (1998) considered the phrase in the light of previous cases. The Full Court concluded that the test of whether children are settled is to be applied either at the time of the application or of trial. English authorities suggesting that a court must look to the future and consider the future stability of the children's position do not represent the law in Australia.

In *Director General, Department of Families, Youth and Community Care and Moore* (1999), the Full Court refused to interfere with a trial judge's decision that the child was settled in his new environment. The Court declined to express a concluded view on the question whether there is in fact a discretion to return a child found to be settled. In that case, it was enough that the trial judge was found to have exercised any such discretion in a considered, reasoned and judicial manner, having relied in part on the Family Report, as well as Progress and Ascertainment Reports prepared by the child's special education teachers.

Grounds for discretion to refuse (reg 16(3))

Consent to or acquiescence in the child's removal

In *Paterson and Casse* (1995), the parents and children came to Australia from Mauritius on visitors' visas in January 1995. In fact, the parties sold off their belongings in Mauritius, and there was substantial evidence to support the wife's case that at the time of their arrival in Australia the parties jointly intended to immigrate. Shortly after the family's arrival in Australia, the marriage broke down and the wife entered into another relationship. She obtained custody orders relating to the three children and the husband then made a Convention application. Counsel for the State Central Authority pointed to the wife's assertion to the husband—that she would not return to Mauritius—as being a wrongful retention. After that time, the parties signed a letter agreeing to continue with their application for permanent residence. However, the husband's participation in this application was found to be conditional upon the parties' reconciliation and not true acquiescence. However, Kay J dismissed the State Central Authority's application to return the children to Mauritius, finding them habitually resident in Australia according to the definition of that term (see above) and thus not wrongfully retained outside Mauritius.

His Honour adopted the view in *Re R* (1995) as to the requirements for a finding of acquiescence. Clear and unequivocal words and conduct were needed on the part of the husband. Where the parties were in a state of confusion and emotional turmoil, his Honour observed, there could not be true acquiescence.

Grave risk of exposure to physical or psychological harm

In *Gsponer* (1989), this exception was found to have a narrow interpretation. The assumption is that by agreeing to be bound by the terms of the Convention, Australia expects other member countries to be equipped to make suitable arrangements for the welfare of the child. Hence, as observed by the court in *Murray's* case, the fact that issues relating to the welfare of the child are not relevant is because in a Convention case the question is as to where those very issues are to be determined. In that case, Nicholson CJ and Fogarty J emphasised:

> It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders which are made by the Courts. In our view and in accordance with…*Gsponer's* case, the circumstances in which regulation 16(3) comes into operation should be largely confined to situations where such protection is not available.

In *Re C (Abduction: Grave Risk of Psychological Harm)* (1999), the Full Court stated:

> The court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.

Director General, Department of Families, Youth and Community Care and Bennett (2000) concerned a four year old child brought to Australia from England by his parents, who were husband and wife. The husband understood that it was to be a short trip to Australia to visit the wife's parents. However, at the airport to return home to England the husband received a letter from the wife's solicitors advising him that his wife and son would be remaining in Australia. The husband was seriously distressed by the news and was admitted to a psychiatric hospital in Australia for several days. He later returned to the UK and commenced proceedings under the Hague Convention seeking the return of the child to the UK. The wife asserted:

- She had overwhelmingly provided for the care of the child who was closely bonded to and psychologically dependent upon her. She was unable for medical reasons to travel to the UK and therefore the child would be separated from her and forced to be in the care of his father who was suffering serious psychological difficulties.
- Because the wife could not travel to the UK therefore she could not effectively prosecute proceedings for a residence order. This would mean the child would be in an intolerable situation as his welfare could not be decided by a court hearing at which both parents could participate (see *SCA v Ardito* (1997)).
- The child had a Torres Strait Islander great-great grandparent and therefore, whereas s 68F(2)(f) of the Family Law Act 1975 compels an Australian court to consider this factor, an English court would not. Hence the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms would prevent the child's return to the UK.

None of these arguments were accepted by the Full Court who allowed the appeal from the trial judge's decision to dismiss an application for return of the child. The Court held, ordering the return of the child to the UK:

- The doctor's evidence did not create a bar to the wife returning to the UK for temporary purposes of residence proceedings,
- Therefore this case was not one of a parent unable to be physically present as in *SCA v Ardito,* where the mother was unable to obtain a visa to return to the USA with a child she had wrongfully removed.
- The child's Torres Strait Islander heritage is not so dominant an element in the child's life that only an Australian court could evaluate the significance of it. The Court observed:

  > Generally, however, it would be presumptuous to believe that a foreign court could not adequately and properly deal with these issues. That said, there may very well be a band of cases where it would be appropriate to give some consideration to the likely special expertise of an Australian court in dealing with issues relating to aboriginality or Torres Strait Islander heritage.

Fundamental principles of human rights

In *McCall*'s case, the Full Court referred to Convention review materials discussing the Art 20 equivalent of reg 16(3)(d). The Report noted that it was inserted as a provision that could be invoked 'on the rare occasion

that the return of a child would utterly shock the conscience of the court or offend all notions of due process'. Their Honours observed that it would be difficult to imagine a situation in which this test could be satisfied.

In *McOwan* (1994), Kay J raised the question of whether appropriate arrangements for the welfare of the child ought to be supervised by the Central Authority in the State to which a child is returned. His Honour expressed his concern in view of the plight of the wife and children in that case who were ordered to return from the UK pursuant to the husband's successful Convention application. The husband had withdrawn his application as soon as the wife was in Australia and refused to honour his undertaking to permit the wife and children to live in the former matrimonial home. The wife was unsuccessful in obtaining legal aid to apply for new court orders, and did not have the funds to return again to England. His Honour noted:

> Unless Contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that contracting States and Courts will become reluctant to order the return of children.

In *Director General Department of Families, Youth and Community Care and Bennett* (2000) (see above, pp 108–09) the Full Court stated:

> The return of a child of Aboriginal or Torres Strait Islander heritage to a foreign country is not per se in breach of any fundamental principle of Australia relating to the protection of human rights and fundamental freedoms. The ability of a foreign court to give proper consideration to such heritage would only arise if an exception to mandatory return was otherwise established… The 16(3)(d) exception is extremely narrow and is limited to circumstances in which the return of the child ought not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

Child sexual abuse

Although more seriously regarded, sexual abuse of children constitutes just one form of abusive treatment relevant in discussing children and family law. It is given a separate treatment here because of the special issues generated by the subject.

The United Nations Convention of the Rights of the Child includes Art 19, which sets out that 'States Parties are to take all…measures to protect

the child from all forms of injury or abuse…including sexual abuse, while in the care of any person having the care of the child'. Article 34 deals with States Parties undertaking to protect the child from all forms of sexual exploitation and sexual abuse, referring in particular to child prostitution and pornography, as well as a more general prohibition on the 'inducement or coercion of a child to engage in any unlawful sexual activity'. On a global level, Australia has responded to some of these obligations in part with enactments such as the Child Sex Tourism Act 1994 dealing with the exploitation of children by Australians abroad.

Within Australia, criminal laws such as the NSW Crimes Act (CA) 1900 make sexual offences against children under 16 and offences where the victim is under the offender's authority—'aggravating circumstances' (s 61J of the CA). Having sexual intercourse with a child under 10, and attempting this offence, carries a maximum penalty of 20 years' imprisonment (s 66A of the CA). Sexual intercourse with a child 10–16 years where the victim is under the authority of the accused results in 10 years' imprisonment. Homosexual acts with children under 18 include penalties of 25 years if the boy is under 10 (s 78H), and 14 years' imprisonment for intercourse by a father with his son aged 10–18 years.

The NSW Crimes Legislation Amendment (Children's Offences) Act 1998 inserted s 66 of the EA, which makes 'persistent sexual abuse' of a child punishable by 25 years' imprisonment. Persistent sexual abuse is defined as occurring when a person on three or more separate occasions on separate days engages in a sexual offence in relation to a child. Other legislation concerning sexual offences against children is pending in the NSW Parliament.

As we saw earlier, s 68F(2) of the Family Law Act 1975 lists as one of the matters the court must consider in determining what is in the child's best interests:

> (g) the need to protect the child from physical or psychological harm caused or that may be caused by:
>
> (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
>
> (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect another person.

Section 60D defines 'abuse' as either:

- an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten in the State it occurs; or

- where a person involves the child in a sexual activity in which the child is used directly or indirectly as a sexual object and where there is unequal power in the relationship.

Hence, the incidence of child sexual abuse is a factor in proceedings involving parenting orders, as well as in State care and protection proceedings (see *Re Karen and Rita* (1995) below, p 114). Because of the forensic difficulties incest presents—its covert nature, the emotional complicity often present and the frequent absence of physical injury—the appropriate standard of proof has arisen for debate.

In the case of *M v M* (1988), the High Court set out the standard of proof required where an allegation of child sexual abuse is made. The case was an appeal by the husband against orders granting the wife custody of the child and denying him access, because of the risk of the child being sexually abused by the husband. The trial judge had found a mere possibility that the allegations against the husband were true; therefore, because his Honour had 'lingering doubts' he discharged the order for the husband's access on the ground that 'no risk or possible risk should be taken which would endanger the welfare of the child'. The Full Family Court dismissed the appeal, Nicholson CJ dissenting. The High Court in turn dismissed the appeal. Their Honours regarded the resolution of an allegation of sexual abuse against a parent to be subservient and ancillary to its decision as to what is in the best interests of a child. The paramount issue the court is enjoined to decide, their Honours observed, cannot be diverted to arrive at a definitive conclusion on the sexual abuse allegation. The court stated:

> The Family Court's wide ranging discretion to decide what is in the child's best interests cannot be qualified by requiring the court to try the case as if it were no more than a contest between the parents decided solely by acceptance or rejection of the allegation of sexual abuse on the balance of probabilities. In considering an allegation of sexual abuse, the court should not make a positive finding that the allegation is true unless the court is so satisfied according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw v Briginshaw* (1938)…[seriousness of the allegation, unlikelihood of occurrence, gravity of consequences of the finding—affect whether the issue has been proved to the reasonable satisfaction of the tribunal, and this is derived not from inexact proofs, indefinite testimony or indirect inferences]… It does not follow that if an allegation of sexual abuse has not been made out…that conclusion determines…the best interests of the child…
>
> To achieve a proper balance, the test (if there is a test) is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

Following on from this important decision, Nicholson CJ set out points of application concerning *M v M* in (1989) 4 (4) Family Lawyer 1. There, his Honour said:

> In my view, the following propositions emerge:
>
> (a) It is no longer necessary to make a positive finding of child abuse and the Court should avoid doing so except in the most obvious cases.
>
> (b) If such a finding is made, the standard of proof to be applied is that provided in *Briginshaw v Briginshaw*…
>
> (c) In resolving the issue as to what form of order is in the best interests of the child, the court must determine whether on the evidence there is a risk of abuse occurring if custody or access is granted and assessing the magnitude of that risk.
>
> (d) If the risk is assessed to be unacceptable, then custody or access should not be granted.

The rules of evidence concerning hearsay have been strictly applied to the receipt of evidence of child sexual abuse during proceedings for parenting orders. In *Gray* (1995), the child remained in the custody of the husband by consent after the parties separated when the child was four years of age. For five years following the separation, the child had regular holiday access with the wife and spoke to her regularly on the telephone. After this period, an adult daughter of the wife from the wife's first marriage, laid a complaint alleging the husband (her step father) had sexually abused her between the ages of seven and 12. As a result of her sister's allegations, the child travelled to reside with the wife who was subsequently granted custody.

In the course of his judgment, the trial judge made it clear that he regarded statements made by the sister to a friend and to her own husband, as evidence of the truth of their contents. Although the statements were admissible as falling within one of the exceptions to the rule against hearsay (that is, to rebut suggestions of recent invention made by counsel for the husband during cross-examination), me judge treated the statements as 'evidence' corroborating the sister's account.

The Full Court regarded the judge's finding of sexual abuse to be dominant reason for his changing custody. Their Honours found that the decision in *M v M* did not relax the rules of evidence: courts exercising jurisdiction under the Family Law Act 1975 must have regard to the Evidence Act 1995 and the rules of evidence if appropriate. Therefore, the appeal succeeded on the basis of inadmissible evidence. A retrial was ordered to take place after the criminal proceedings against the husband

had been determined, the deferral being made to preclude the risk of self incrimination and prejudice.

See, also, *S and R* (1999), which applied *M v M* more recently.

Mandatory reporting

Section 67ZA is expressed to apply to family and child counsellors, mediators and court personnel in the course of carrying out their duties. The provision requires a person in this category who has reasonable grounds for suspecting that a child has been abused or is at risk of being abused to notify a prescribed child welfare authority as soon as practicable. Where the counsellor suspects the child is at risk of a person's behaviour which is other than abuse, such as ill-treatment or psychological harm, he or she is given an option to notify the authority. Mandatory notifications are expressed to override any obligation of confidentiality the counsellor may owe, and are protected from rendering the maker liable in civil or criminal proceedings or in breach of any ethical duty (s 67ZB).

Welfare orders

Section 67ZC recites the expanded sphere under Part VII of the Act to permit the court jurisdiction to make orders relating to the welfare of children. In making these orders, the court must regard the best interests of the child as the paramount consideration.

In *Karen and Rita* (1995), custody and access proceedings included a significant court counsellor report which expressed the opinion that neither parent was a suitable custodian. The Queensland Department of Family Services and Aboriginal and Islander Affairs then intervened, commencing a care and protection application pursuant to the Children's Services Act (Qld) 1965. The Supreme Court action was transferred to the Family Court under the (then) cross-vesting legislation and all matters were heard by Nicholson CJ. The children concerned had been involved in a history of (at best) inadequate treatment at the hands of both parents, who separated when the children were three and two years of age. The husband had four older children from a previous marriage and substantial allegations had been made against two of the boys for sexually abusing their sister. Both parents had criminal records—the husband's relating to drug offences and breaking and entering; the wife's relating to theft, drug offences and working as a receptionist in a brothel. After the separation, the two children of the marriage were abducted by both the husband and the wife successively. In 1994, the husband applied for custody and sought

information orders and the issue of a warrant to take possession of the children. A year later, they were taken from the husband's custody into the care of the Director General.

Departmental reports referred to the husband's consistent neglect of the children's needs at every level, along with his manipulative behaviour and acquiescence in the older siblings' incest. The children were unusually sexually aware for girls of nine and eight years of age and demonstrated evidence of chronic emotional and physical deprivation.

His Honour accepted argument by Counsel for the Department that the High Court in *M v M* did not intend to confine its remarks to sexual abuse but to all forms of abuse. It was submitted that each area of abuse should be considered on the basis of whether the current and future risk is unacceptable.

The Chief Justice accepted the husband had, as Counsel submitted, left a 'trail of dysfunctional children behind him' and that there was a real danger he would produce the same result should these children be left in contact with him. His Honour found the wife's emotional instability sufficient to endanger the welfare of the children in that her inability to cope with the husband's intrusions left the children vulnerable to further abuse. However, his Honour ordered that she have sole guardianship and custody of the children upon their eventual release from care and protection. The judge accepted that these were severely damaged children who had suffered an appalling history of abuse and neglect. In concluding, his Honour pointed to the need for an integrated jurisdiction of family law and child welfare, and in particular that the Departments and Family Court enjoy a similarly 'robust' resolve in refusing to make contact orders where this is demanded in the best interests of the child.

Separate representation of children

Section 68L provides:

> (1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount or a relevant consideration.
>
> (2) If it appears that the child ought to be separately represented, the court may order that the child is to be separately represented, and may also make such other orders as it considers necessary to secure that separate representation.

> (3) A court may make an order for separate representation on its own initiative or on the application of the child, or an organisation concerned with the welfare of children or any other person.

Since the Family Law Reform Act 1995 (which commenced in June 19%), s 68M refers to the 'child's representative' rather than the 'separate representative'. Cases decided prior to the amendments refer to the latter; however, its function is the same.

The Full Court in *Bennett* (1991) referred to the role of the separate representative as being:

> …broadly analogous to that of counsel assisting a royal commission in the sense that his or her duty is to act impartially but, if thought appropriate, to make submissions suggesting the adoption by the court of a particular course of action… What is clear is that the separate representative should act in an independent and unfettered way in the best interests of the child.

In *F and R (No 2)* (1992) (below, p 114), the separate representative sought an order that C attend a counselling conference with her father, F, to discuss their future relationship. In the earlier action, the father had sought parentage testing, claiming C was not his child In the circumstances of the tests confirming F as C's father, the separate representative felt counselling was necessary to assist in establishing a relationship lost over seven years. Fogarty J held that separate representative did have the power to make this application. His Honour observed:

> It appears to me that the Separate Representative is not, and cannot be confined to making submissions limited to the ambit of the orders sought by the other parties but makes submissions consistent with the welfare of the child and may urge upon the Court the making of other and different orders. A Separate Representative may in an appropriate case make an application to the Court for orders and the Court may, if it considers appropriate to do so, make those orders…

In *F and M1 and M2* (1994), the father sought custody of a child whose mother was M1, and access to another of his children whose mother was M2, who in turn sought custody of her child. Both mothers defended his applications, alleging the elder children in their respective households (having different fathers) had been sexually abused by F. The Registrar had ordered separate representation not just for the two children subject to the proceedings, but also for each of their siblings. Kay J referred to the principles set out in s 43.

Section 43 instructs the Family Court to have regard to the preservation of the institution of marriage (s 43(a)) and:

> (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.

The section also recites the need to protect the rights of children and to promote their welfare, and the need for the Court to have regard to reconciliation measures available (s 43(c)–(d)).

Counsel for the mothers argued that 'family' in s 43(b) referred to the respective nuclear groups headed by each mother. His Honour noted that the children spread across the households were as much siblings as the children within each. The judge referred to the House of Lords in *Birmingham CC v H* (1994), where their Lordships considered that the concept of the paramountcy of the welfare of a child relates to the child who is the subject of the proceedings and to no other. Kay J observed that there are many cases where the paramountcy principle requires a balancing act to be undertaken. In this case, his Honour considered the provision of separate representatives was beyond the power of the section. He stated that the circumstances in which it is appropriate to order a child not the subject matter of the proceedings to be separately represented need to be compelling and where the interests of the other children could not properly be cared for in the proceedings. Here, the avenues providing for the other children were:

- a welfare report taking into account the effect on the other children of the disruption of ongoing parenting orders;
- the evidence of the mothers as to the effect on the other children;
- the separate representatives for the subject children considering these matters as affecting their welfare;
- an application for the children to intervene in the proceedings if appropriate.

In *P and P* (1995), the Full Court stated that it was in broad agreement with the following guidelines as to the role of a separate representative:

- act in an independent and unfettered way in the best interests of the child;
- act impartially but suggest courses of action in the best interests of the child;

- must inform the court of the children's expressed wishes although not bound to make submissions on the instructions of the child;
- arrange for collation of expert evidence and place all evidence relevant to the welfare of the child before the court;
- test by cross examination where appropriate the evidence of parties and witnesses;
- keep personal views and opinions out and draw views only from the evidence;
- minimise trauma to the child;
- facilitate an agreed resolution to the proceedings.

The Australian Law Reform Commission's (ALRC) 84: 'Seen and heard: priority for children in the legal process', Chapter 13: 'Legal representation and the litigation status of children', noted as follows:

> …the major criticism of the model is that it effectively denies competent children the right to instruct their advocates even where they are directly involved in a case… Many children feel marginalised by the imposition of best interests advocacy [as practised by the child representative]…. The Inquiry received many complaints about lawyers who did not speak to the child and who did not convey all relevant information…to the court.

Adoption

The adoption of children is a matter for State legislation. The Commonwealth does not have power to legislate with respect to adoption. However, as we will see, the Family Law Act includes provisions related to adoption as it overlaps with the matters within its jurisdiction.

The States Acts are:

ACT:	Adoption Act 1993
NSW:	Adoption of Children Act 1965
NT:	Adoption of Children Act 1994
Qld:	Adoption of Children Act 1964
SA:	Adoption Act 1988
Tas:	Adoption Act 1988
Vic:	Adoption Act 1984
WA:	Adoption Act 1994

The NSW Act provides that adoptions can only be made through the Department of Community Services or a private approved adoption agency.

Private adoptions are permitted only where one of the adopting parties is also a parent or 'relative', that is, aunt, uncle or grandparent. Most States have similar provisions, with the final adoption order being made by a court. In NSW, the Supreme Court makes the adoption order.

Step parents

Step parent adoptions have required the leave of the Family Court since amendments to the Family Law Act in 1991. The relevant sections are as follows:

> 60D–(1) 'prescribed adopting parent' in relation to a child, means:
>
> (a) a parent of the child;
>
> (b) the spouse of, or a person in a de facto relationship with, a parent of the child;
>
> (c) a parent of the child and either his or her spouse or a person in a de facto relationship with the parent;
>
> 60F–(1) A reference in this Act to a child of a marriage includes…a child adopted since the marriage by the husband and wife or by either of them with the consent of the other.
>
> …
>
> (4)…in relation to a child of a marriage who is adopted by a prescribed adopting parent:
>
> (a) if a court granted leave under s 60G for the adoption proceedings to be commenced—the child ceases to be a child of the marriage for the purposes of this Act…
>
> 60G…the Family Court, the Supreme Court of the Northern Territory or the Family Court of a State may grant leave for proceedings to be commenced for the adoption of a child by a prescribed adopting parent.

The leave of the Family Court is obtained so that any past parenting orders relating to the birth parents of the child are extinguished. Although adopting parents assume the bundle of parental responsibilities, in the absence of leave, the adoption is not fully recognised by the court Strictly speaking, the previous parents' rights and duties remain.

Aboriginal child placement

The area of Aboriginal adoptions has tested some of the presumptions in State adoption law. Australia's ratification of the United Nations

Convention on the Rights of the Child in 1990 bound the Commonwealth government to comply with its provisions. Some of these are as follows:

> Art 20
>
> 1 A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
> …
> 3 Such care could include, *inter alia*…adoption or if necessary placement in suitable institutions for the care of the children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.
>
> Art 21
>
> States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (a) Ensure that the adoption of a child is authorised only by competent authorities…
>
> (b) Recognise that inter-country adoption may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.
>
> Art 30
>
> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

The so called 'Aboriginal Child Placement Principle' has found expression to varying degrees in State Acts. For example the Adoption of Children Act 1984 (Vic) includes s 50, which provides:

> (1) The provisions of this section are enacted in recognition of the principle of Aboriginal self-management and self-determination and that adoption is absent in customary Aboriginal child care arrangements.

The section goes on provide for the court to be satisfied that a natural parent who is Aboriginal has been counselled by an Aboriginal agency, and that at least one of the proposed adoptive parents are members of the Aboriginal community to which a parent who gave consent belongs. The child may be adopted by another Aboriginal community member in the absence of any adoptive parents in the first community being available. If neither are available, then persons adopting must be approved by the Director General or an approved officer and by an Aboriginal agency as suitable persons to adopt an Aboriginal child.

The New South Wales Law Reform Commission recommended in 1994 that:

- Aboriginal children not be allowed to be adopted, given that adoption is not part of Aboriginal customary law;
- the NSW Act be amended to contain a Statement of Principle recognised that adoption is foreign to Aboriginal customary law;
- adoptions under Torres Strait Islander customary law be recognised under State adoption laws.

The Northern Territory Adoption of Children Act 1994 states:

> 11–(1) Where an order for the adoption of an Aboriginal child is to be made, the court shall satisfy itself that every effort has been made (including consultation with the child's parents, with other persons who have responsibility for the welfare of the child in accordance with the Aboriginal customary law and with such Aboriginal welfare organisations as are appropriate in the case of the particular child) to arrange appropriate custody:
>
> (a) within the child's extended family; or
>
> (b) where that cannot be arranged, with Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law.

Where this is not possible or not in the interests of the child, the court is to give preference to Aboriginal applicants who are, in the opinion of the Minister, suitable to adopt the child (s 11(2)). Schedule 1 of that Act states that the Minister and the Court must give recognition to the absence of adoption in customary Aboriginal child care arrangements and arrangements for the custody and guardianship of the child which are made within the child's extended family or with other Aboriginal people having the correct relationship under customary Aboriginal law.

Bringing children home: the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) found:

> Aboriginal traditional values and law oppose adoption…[By contrast] customary adoption is reported to occur in the islands of Torres Strait …and among Torres Strait Islander communities on the Australian mainland.

The NSW Children and Young Persons (Care and Protection) Act 1998 sets out the placement principles (s 13) and lists the order of preferences for placement of Aboriginal and Torres Strait Islander children and young people who need to be placed in out-of-home care:

- a member of extended family of kinship group as recognised by the community to which the child belongs.

If this is not practicable for the child or young person or not in their best interests, then:

- a member of the community to which the child belongs.

If this is not practicable for the child or young person or not in their best interests, then:

- a member of some other Aboriginal and Torres Strait Islander family residing in the vicinity of the child or young person's usual place of residence.

If none of the above are practicable or it would be detrimental to the safety, welfare and well being of the child or young person, then:

- a suitable person approved by the Director General after consultation with members of the extended family or kinship group recognised by the community and appropriate welfare organisations.

Account must be taken of whether the child or young person identifies as Aboriginal or Torres Strait Islander and their expressed wishes (s 13(2)). The Family Court has been reluctant in the past to recognise a presumption of Aboriginal placement in decisions involving parenting orders. In *Goudge* (1984), Evatt CJ stated:

> Many cases arising under the Family Law Act involve children who have real connections with two different cultural, racial or religious backgrounds. The principle that emerges from such cases is that while neither culture is to be preferred over the other, both may be of importance to the child… While the principle applicable to children of part Aboriginal descent is no different to that stated there have emerged a number of

> factors regarded as relevant… These include the effects of loss of contact with an Aboriginal parent's traditions and culture, the Aboriginal origins of the child, the extent of discrimination…

In a Northern Territory case, *McL and McL* (1991), the judge awarded sole custody of two boys to their Aboriginal mother, noting as significant to the welfare of the children:

> For reasons associated with their Aboriginality it appears to me that the boys' prospects of growing up as well adjusted individuals will be positively enhanced if they are allowed to live in a community in which they are already accepted as part of a caring extended family.

For the purposes of proceedings under Pt VII of the Family Law Act 1975, matters which the court is to consider in determining the best interests of the child include the need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders (s 68F(2)(f)).

In *B and R and the Separate Representative* (1995), the father was granted custody of the child and the Aboriginal mother granted access. On appeal, the Full Court concluded that the incorrect approach of the trial judge required a retrial and observed:

> It is not just that Aboriginal children should be encouraged to learn about their culture… Evidence which makes reference to [the experiences and struggles of Aboriginal Australians] travels well beyond any broad 'right to know one's culture' assertion. It addresses the reality of Aboriginal experience, relevant…to any consideration of the welfare of the child in the personal case.
>
> …It appears that the trial judge regarded the question of Aboriginality as separate from the issues of the welfare of the child and as inconsistent with the provisions of the Family Law Act. However, it is specifically because the matters to which we have referred may impact on the welfare of the child that they are relevant in cases of this nature… It appears to us that his Honour failed to appreciate the significance of this deeper, unique issue and that his approach was fundamentally wrong in principle and out step with a number of decisions in Australia and overseas.

Who can adopt?

Section 19 of the NSW Act permits the following to adopt:

- married couples, including Aboriginal couples recognised as traditionally married;

- de facto couples having a relationship of at least three years' duration and where the child has been in their care for two years, except in special circumstances;
- single applicants.

The court is unable to make an adoption order for applicants under 21 years of age, or where the male applicant is less than 18 years older than the child, or the female applicant is less than 16 years older (s 20). The age limits can be waived by the court in 'exceptional circumstances'. Prospective adoptive parents must be, where the child is under 18 years, of good repute, fit and proper persons to fulfil the responsibilities of a parent, and otherwise suitable with regard to such matters as age, health, education, religious convictions and any other relevant factor. Where the child is 18 years or over, the applicant need only be of good repute (s 21). The criteria on which the Department assesses applicants' suitability is gazetted, and unsuccessful applicants have a right of review or appeal.

Consent

All jurisdictions provide for consents to be obtained from (generally) 'parents and guardians' (see, for example, s 26 of the NSW Act). Most of the Acts also provide special provisions regarding the consent of the father of an ex-nuptial child. For example, the Queensland Act states that in the case of a child whose parents were not married to each other at the time of conception and who have not married each other since, the appropriate person to give consent (unless being the applicant) is 'every person who is the mother or guardian of the child' (s 19 of the Qld Act). The same section requires every person who is 'a parent or guardian' to give consent where the parents were married to each other at the time of the child's conception or since.

In *Hoye v Neely* (1992), the outcome of the decision was that the exnuptial father's consent was required as a prerequisite to the adoption. However, the facts of the case may have served to distinguish that element of the judgment. The case concerned custody proceedings commenced by the child's maternal grandmother. The child's mother had neither married nor cohabited with the father. A preliminary issue concerned the application of then s 60H (now s 69ZK) of the Family Law Act 1975. This section prevents the court from making an order in relation to a child who is under the care of a person according to a child welfare law, unless certain prerequisites are observed. Welfare laws include adoption laws. In order to be in the care of the Director General of the Department of Community Services by way of adoption, the relevant consents were first required.

One way to be outside the domain of the Director General, thus permitting the unfettered application of the parenting provisions of the Family Law Act 1975, was to show that the required consents had not been given. Mullane J summed up the issue as being:

> Whether the father is a guardian for the purposes of s 26(3) because if he is, then until he consents to the adoption, s 34(1) cannot take effect to vest guardianship of the child in the Director-General and sub-s 60H(1) of the Family Law Act then does not limit the court's custody jurisdiction in respect of [the child].

The father was found to be a guardian mainly on the basis that the (then) Family Law Act 1975 gave each parent the right of guardianship until divested by a court order. Because the father's consent had not been obtained, then the effect was to take the matter out of the adoption process and leave the way clear for the parenting application to proceed. Compare the amended wording of the current Family Law Act 1975, which does not give guardianship 'rights' to parents but refers instead to parental responsibility (s 61C).

If a parent or guardian refuses to give consent or can't be found, the court can dispense with consent in certain circumstances. Section 32 of the NSW legislation includes the following:

- the person cannot be found after reasonable inquiry;
- the person is not physically or mentally capable of giving consent;
- the person abandoned, neglected or ill-treated the child and, in the opinion of the court, is unfit to be a parent or guardian;
- the person has failed to meet the obligations of parent or guardian for a period of not less than one year;
- other circumstances exist whereby the child's welfare and interests will be best served by dispensing with consent.

A mother cannot give consent until three clear days after the birth, unless it can be shown that she was in a condition to do so (s 31 NSW).

Post-adoption information

Rights exist for adopted people and birth parents to contact each other. People under 18 years who have been adopted generally require their adoptive parents' consent. Following the Victorian scheme set up in 1984, other States introduced measures to allow access to adoption information. The NSW Adoption Information Act 1990 followed two major inquiries which produced evidence of overwhelming support for the scheme.

6 Family Violence

You should be familiar with the following areas:

- the definition of 'family violence' under the Family Law Act 1975
- types of injunctions available under the Family Law Act 1975
- obtaining an apprehended violence order
- the definitions of 'intimidation' and 'stalking'
- firearms controls in situations of family violence

Introduction

Chief Justice Alastair Nicholson's Practice Direction of 15 January 1993 defined family violence for the purposes of the Family Court as:

> …conduct by one immediate or extended family member which causes harm to another member to an extent which creates apprehension or fear for that member's well being or safety. This conduct may be threatened. It may take the form of physical or emotional abuse or a combination of both. Family members include spouses, de facto spouses, separated spouses, children and close relatives.

The Direction sets out guidelines for Family Court staff as to the approach in managing cases where there has been a history of family violence. It notes that mediation will not be regarded as appropriate for those in fear of family violence, and conciliation may be terminated where necessary. However, court staff are reminded that in the case of conciliation being terminated, the case may go to a hearing or the person in fear may withdraw from litigation, possibly contrary to their own or the child's best interests.

His Honour directs that information sessions include a section on family violence and clients be invited to inform the court staff if they are in fear of family violence. Court staff are to be committed to identifying family

violence cases as early as possible, and legal practitioners are to advise staff where they have fears of family violence. Finally, copies of this Direction were to be prominently displayed in all Family Court public reception areas. The Family Court's *Family Violence: Statement of Principles* (2000) repeats these guidelines for the benefit of the public.

Chapter 9 of the Australian Law Reform Commission's (ALRC's) Report No 69 Pt 1 *Equality before the Law: Justice for Women* (1994) dealt with the topic of violence and family law. Some of its recommendations included:

- that the (then) Family Law Act be amended to provide for the court to take into account the need to protect children from abuse, ill treatment or exposure to violence or other behaviour causing physical or psychological harm;
- that in making, varying or revoking access orders the court should consider whether the party granted the order will use access as an occasion to expose a child or the other party to violence, threats, harassment or intimidation;
- the court should take into account the existence of State or Territory protection orders when making orders for custody and access to ensure the protection of women and children is not compromised;
- Pt IIIA of the (then) Family Law Act should be amended to provide that mediation should not take place where violence has occurred, unless the woman has made an informed choice about the process;
- the injunction provisions of the Family Law Act should be amended to define the scope of injunctions for personal protection from violence, the definition to include protection from harassment, intimidation, threats and stalking.

Later in this chapter, we will see the legislature's response to these recommendations in the present terms of the Act as amended by the Family Law Reform Act 1995.

In a Family Violence Forum address in Melbourne ('End the Silence') on 21 August 1996, Nicholson CJ noted:

> Although there was a tendency in the past to compartmentalise our thinking about abuse of partners and of children, the correlation between these harms has been found to be high, and one may lead to the other. Increasingly too, attention has been drawn to the suffering caused by children seeing one parent abuse another. Recent research has shown that children growing up in violent households, or who themselves have been abused in some form or another often become abusers themselves when the opportunity presents…

> While legal responses must be effective, educative approaches to family violence are just as necessary in order to deal with the usually gendered mind-sets which encourage perpetrators into believing that their behaviour is acceptable.

In a later address to the Australian and New Zealand Association of Psychiatry, Psychology and Law in Sydney on 17 September 1999, his Honour stated:

> I see the [Family] Court's responsibility as including the protection of its clients wherever and whenever possible and as ensuring that there is nothing in its operations which may exacerbate the situation of vulnerable people, most commonly women and children.

Family Law Act measures

Family violence is defined in s 60D of the Family Law Act 1975 as:

> …conduct, whether actual or threatened, by a person towards or towards the property of a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety.

The same section defines 'family violence orders' as meaning orders made under a prescribed State or Territory law to protect persons from family violence. These prescribed laws are listed under Family Law Regulation 19 and elsewhere (see below, pp 132–34).

Pursuant to the ALRC Report No 69, Pt 1 (1994) recommendations on family violence, the Act requires the court to consider additional matters in determining what is in a child's best interests. Paragraphs (i) and (j) of s 68F(2) add incidents of family violence and family violence orders to these matters. (See above, pp 82, 90, 91, for a discussion of this section.) Part VII, Division 11 of the Act reflects the ALRC's concerns as to the relationship between contact orders and family violence orders.

The stated purposes of Division 11 are to ensure that contact orders do not expose people to family violence, but also to respect the right of a child where it is in the child's best interests, to have contact with both parents (s 68Q). Hence, if a court makes a contact order inconsistent with a family violence order, the contact order invalidates the violence order to the extent of any inconsistency (s 68S). But if a State court having jurisdiction to hear Family Law Act 1975 children's matters hears a State application to make or vary a family violence order, that court can also

make or vary a contact order having regard to the child's best interests (s 68T(1)). (In this case the child's best interests are not paramount but a factor the court must consider.)

Before varying an inconsistent contact order, the court must first be satisfied that the operation of the order has exposed a person to family violence, or is likely to lead to family violence (s 68T(2)). This power does not permit interim family violence proceedings to fully discharge a contact order. Any alterations to contact made by the interim violence order cease after 21 days or at the end of the interim order, whichever is first. In this Division, 'contact order' is given an extended meaning to include any parenting or recovery order or injunction that expressly or impliedly authorises contact.

Family violence and property

Family violence has been taken into account under ss 79(4) and 75(2) of the Family Law Act 1975. In *Kennon* (1997), the Full Court recognised:

> …where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant impact upon that party's contributions to the marriage or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been that is a fact which the trial judge is entitled to take into account in assessing the parties' respective contributions within s 79.

Commentators such as Nygh in (1999) 13 AJFL 32 have seen this decision in 'specifically linking the existence of increased contribution to conduct' as having 'opened the door to a punitive approach which is not the function of the Family Law Act'.

Since the High Court decision in *Re Wakim* (1999), actions in tort (such as the wife's additional claim in *Kennon*) may not be dealt with in the Family Court through cross-vested jurisdiction.

Injunctions

Section 114 gives the court power to make an injunction as it considers 'proper' in proceedings for an injunction relating to circumstances arising out of the marital relationship. The section lists six types of injunctions which, although not exclusive, indicates the range of orders contemplated. Included are injunctions:

- for the personal protection of a party to the marriage;
- restraining a party to the marriage from entering or remaining in the matrimonial home or any area where the other party resides;
- restraining a party to the marriage from entering the workplace of the other party;
- for the protection of the marital relationship;
- in relation to the property of a party to the marriage;
- in relation to the use or occupancy of the matrimonial home.

Section 68B deals with injunctions relating to children. Included in this section are injunctions for children and for parents or persons having parenting orders relating to the child. The types of injunctions listed here include those for personal protection and restraining orders relating to places of residence, employment or education. Since Pt VII applies to ex-nuptial children (except in Western Australia), injunctions covering parents in relation to the welfare of the child are not restricted to parties to a marriage.

Section 68C provides for s 114AA (dealing with powers of arrest) to apply to s 68B child injunctions as if the person had been arrested for breach of s 114. Section 114AA(1) states:

> Where:
>
> (a) an injunction is in force under s 114 for the personal protection of a person; and
>
> (b) a police officer believes, on reasonable grounds, that the person against whom the injunction is directed, breached the injunction by causing, or threatening to cause, bodily harm to the person referred to in para (a) the police officer may arrest the respondent without a warrant.

The Family Law Amendment Act 2000 adds 'harassing, molesting or stalking' the person protected by the injunction.

If there is no application brought to deal with the breach of injunction under Pt 13A, the court must release the person arrested at the end of the holding period (s 114AA(4)). These remain civil enforcement proceedings, hence the party affected by the breach must apply to have them enforced.

Much research has been done on the limitations of the civil remedies given by the Family Law Act. At one end of the process, limitations have attached on constitutional grounds. At the other end has been a practical reluctance by State police to act on a Federal law where the order and its breach are unfamiliar matters.

State measures

State Acts dealing with family violence include:

ACT:	Domestic Violence Act 1986
NSW:	Crimes Act 1900 (NSW) Pt XVA
NT:	Domestic Violence Act 1992
Qld:	Domestic Violence (Family Protection) Act 1989
SA:	Domestic Violence Act 1994
Tas:	Justices Act 1959 Pt XA
Vic:	Crimes (Family Violence) Act 1987
WA:	Restraining Orders Act 1997

In New South Wales, the police or a victim of domestic violence can apply for an apprehended violence order (AVO). Apart from the standard criminal range of assault, grievous bodily harm and similar charges (requiring the criminal standard of proof), AVOs are available where the victim has suffered non-physical abuse such as harassment or intimidation.

The Crimes Amendment (Apprehended Violence) Act 1999 defines 'apprehended violence order' as meaning either an apprehended domestic violence order (ADVO) or an apprehended personal violence order (APVO) (s 562A(1) of the Crimes Act 1900 as amended). The ADVO is used in the context of domestic relationships (see below, p 133). The APVO is used in other situations. Both require a person to have reasonable grounds to fear and fact fear (ss 562AE and 562AI):

- the commission by another person of a personal violence offence against the person (see below); or
- conduct amounting to harassment or molestation, intimidation or stalking sufficient to warrant the making of the order in the opinion of the court.

The requirement for the court to be satisfied that the person in fact fears the offence will be committed is waived if the person is under 16, or of appreciably below average intelligence. Conduct may amount to harassment or molestation even though it does not involve actual or threatened violence or consists only of actual or threatened damage to the person's property.

If a child under 16 at the time of the complaint is the person for whose protection the order would be made, only a police officer can make the

complaint for the order (s 562C(2A) of the Crimes Act 1900). The police officer must make a complaint if he or she suspects that any of the following offences were recently, or are being committed, are imminent or are likely to be committed (s 562C(3)):

- a domestic violence offence;
- as 562AB offence (stalking or intimidation with intent to cause physical or mental harm);
- child abuse under s 25 of the Children (Care and Protection) Act 1987 if the child is under 16.

However, a police officer is given a discretion not to make a complaint in the circumstances listed above if the person is at least 16 years of age at the time and the officer believes (s 562C(3A)):

- that the person intends to make the complaint; or
- that there is good reason not to (and if so, a written record of the reason must be made by the police officer).

'Personal violence offence' is defined at length in s 4(1) as including the commission or attempt to commit criminal offences ranging from manslaughter, sexual assault and poisoning, to setting traps with intent to do grievous bodily harm.

A 'domestic relationship' is defined widely as being with a current or former spouse, current or former de facto partner, a person who lives or formerly lived in the same household, a relative (by blood, marriage or de facto relationship) or a person in or previously in an intimate personal relationship sexual or otherwise with the offender, or a relationship of ongoing paid or unpaid care (s 562A).

'Intimidation' includes harassment or molestation, making repeated phone calls, or conduct that causes a reasonable apprehension of injury or violence or damage to property (s 562A). 'Stalking' is defined as the following of a person about or the watching or frequenting of the vicinity of or an approach to a person's place or residence, business or place frequented for leisure or social activity.

The advantage of obtaining an AVO is that breach of the order is a criminal offence. Section 562I(2A) sets out that 'unless the court otherwise orders, if a person is convicted of an offence against this section, the person must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person'. The police may arrest a suspect without a warrant (s 562I(3)) and the Bail Act 1978 applies. In order to obtain an AVO, the complainant does not have to meet the criminal standard of proof.

Interim orders can be made under s 562BB where the court finds it 'necessary or appropriate in the circumstances' to do so. Telephone orders for interim AVOs are available on police application under s 562H. These may be sought when it is not practicable to make an immediate complaint for an interim order because of the time or place of the incident occurring and where the attending police officer has good reason to believe a person may suffer personal injury. However, the attending police officer or another officer must make a regular complaint for an order as soon as practicable (s 562H(10)) or report the reasons why not.

Under s 562C, a complaint for an AVO order is made by the applicant or a police officer. Sections 562AF and 562AJ provide for an authorised justice (chamber magistrate) to issue a summons or warrant.

If a complaint for an ADVO is made, the authorised justice must issue a summons unless he or she issues a warrant (s 562AF(2)). In APVO matters, if the complaint was made by a police officer the authorised justice must issue a summons or warrant. However, s 562AK gives the authorised justice a discretion to refuse to issue process for an APVO if the complaint was not made by a police officer. A presumption against exercising the discretion exists if the complaint discloses allegations of a personal violence offence, stalking or intimidation with intent to cause fear of physical or mental harm (s 562AB), harassment relating to race, religion, homosexuality, transgender status, HIV/AIDS or other disability.

Firearms

If police are called to an incident suspected of being a domestic violence offence, they must inquire as to the presence of any firearms in the house. If they are informed that there are, the police must search for and seize them (s 357H(1)(a1)). If the police are told there is not a firearm in the house but have reasonable cause to believe that there is, they must apply for a search warrant and seize the guns (s 357I).

In conjunction with these measures, the NSW Firearms Legislation provides for suspension of a gun licence if police have reasonable cause to suspect the holder of having committed, or of threatening to commit, a domestic violence offence. Licences are revoked automatically on the making of an AVO (s 23 of the Firearms Act 19%). Further, licences will not be issued in the first place to a person who is currently the subject of an AVO, or of an AVO made within 10 years before the application which has not been revoked (s 29(3)(c) of the Firearms Act 1996).

7 Primary Dispute Resolution

You should be familiar with the following areas:

- types of primary dispute resolution processes
- conciliation counselling
- mediation
- the structure of the Family Court mediation process
- arbitration

Introduction

Part III of the Family Law Act 1975, as amended, headed 'Primary dispute resolution' (PDR), includes as its objects:

> …to encourage people to use…counselling, mediation, arbitration, or other means of conciliation or reconciliation, to resolve matters in which a court order might otherwise be made under this Act…[s 14(a)].

'Primary dispute resolution methods' are defined in s 14E to mean procedures and services for the resolution of disputes out of court, including counselling, mediation and arbitration services. Obligations are imposed on the court and legal practitioners to consider whether to advise parties to proceedings and (if legal practitioners are consulted beforehand) people considering instituting proceedings, about primary resolution methods available (ss 14F–G).

The Australian Law Reform Commission's (ALRC's) Issues Paper 25, *Review of the Adversarial System of Litigation: ADR—Its Role in Federal Dispute Resolution* (1998) (referred to below as IP 25) found that, because there is no explicit obligation to provide or facilitate the provision of such advice, evidence exists that some lawyers do not advise their clients of PDR options. It asks whether s 14G should be amended to require legal practitioners to facilitate the provision of such advice (Q3.17).

Information sessions

These are included in the category of PDR services. The sessions explain Family Court processes and provide information about parenting issues. In 1996–97, the Family Court provided 1307 hours of information sessions (IP 25, para 3.52). It is believed that information about the difficulties inherent in proceeding to litigation might dissuade potential litigants at this early stage.

Counselling

Voluntary counselling is available from the Family Court Counselling Service or from 'approved' counsellors (s 13). The Counselling Service:

- provides an alternative to litigation in child related disputes;
- assists couples to resolve present and future disputes;
- educates clients about separation and children's interests.

It is available before or after proceedings have commenced. Conciliation counselling is conducted in children's disputes (ss 62F and 65F). It is mandatory prior to the making of parenting orders (s 65F(2)).

In his keynote address to the 4th National Mediation Conference of 7 April 1998 in Melbourne, his Honour the Chief Justice of the Family Court, Nicholson CJ noted:

> Placing PDR services within the court provides…an atmosphere of both legitimacy and reassurance. Well trained and experienced staff can… warn of the disadvantages of the adversarial process where parents and children are concerned.

His Honour cited the following statistics as demonstrating that the further a matter proceeds to litigation, the less likely are parties to settle:

- 78% of couples who attend for voluntary pre-filing conciliation counselling reach full or partial agreement;
- of couples referred for post-filing court ordered counselling, 66% reach full or partial agreement;
- financial matters conciliation conferences produce a 41% settlement rate;
- court mediation produces 75% full or partial agreement.

Mediation

Section 4(1) lists three types of mediator available under the scheme, all of which fall within the wider definition of 'family and child mediator'. These are:

(a) court mediators who are approved under regulations for this purpose;
(b) community mediators authorised by an approved mediation organisation;
(c) private mediators being those not listed in the first two categories.

Section 19P provides for the Regulations to prescribe requirements to be complied with by mediators. Section 19N provides that evidence of any admission made at a meeting with counsellors, or with court, community and private mediators (the last two being subject to regulations), is not admissible in court proceedings.

Under s 19A, anyone not a party to proceedings who is a party to a marriage, the parent of a child, or a child may file a notice asking for a mediator to help settle their dispute. Under s 19AA, anyone may at any time request a family and child mediator directly to help settle a dispute. This section by its terms applies during proceedings and includes persons neither married nor 'parents'. The dispute must be about a matter with respect to which proceedings could be instituted under the Act. The court must advise parties to a dispute before it to seek the help of a mediator if it considers this course may help the parties to resolve the dispute (s 19BA). The duty to advise follows the court's decision that mediation may help the parties. Under s 19B, the court may make an order referring the parties to any proceedings (other than 'prescribed' proceedings) to a court mediator, with the parties' consent.

Order 25A r 5 lists matters which the mediator must take into account. These are:

- the degree of equality or otherwise in bargaining power of the parties;
- the risk of child abuse;
- the risk of family violence;
- the emotional and psychological state of the parties;
- whether one party may be using mediation to gain delay or some other advantage;
- any other relevant matter.

Rule 6 provides for the mediator to decide that the dispute is not one that may be mediated. Considerable research has found the inappropriateness of mediation in contexts of family violence and inequality of bargaining power.

Rule 10 sets out the overall structure of the family mediation process:

> (1) A mediation conference must be conducted:
>
> (a) as a decision making process in which the mediator assists the parties by facilitating discussion between them so that they may:
>
> (i) communicate with each other regarding the matters in dispute; and
>
> (ii) find satisfactory solutions which are fair to each of the parties and (if relevant) the children; and
>
> (iii) reach agreement on matters in dispute; and
>
> (b) in accordance with any general directions given by the Principal Director of Mediation.

Parties may be accompanied by legal representatives (r 11). Whether or not the parties are represented by a legal adviser, the mediator must advise parties at the beginning and prior to signing agreements at the end of the mediation that they should seek legal advice as to their rights, duties and obligations, and at any other time the mediator finds appropriate (r 12).

The Australian Law Reform Commission' Report No 73 of 1995, *For the Sake of the Kids: Complex Contact Cases and the Family Court* (see above, pp 88–89) made recommendations concerning the use of mediation in complex contact cases. For example, recommendation 3.11 stated that mediation should be offered in these cases where appropriate by trained and qualified mediators as early as possible before people become 'entrenched' in litigation. In addition, proper screening procedures must ensure that mediation is not attempted inappropriately, for example in cases of violence, abuse and severe power imbalances. The ALRC recommended that the Family Court should further evaluate the potential scope for mediation in complex contact cases.

In his address to the 4th National Mediation Conference (1998), Nicholson CJ referred to the 'purist' view of mediation as:

> …a non-compulsory and non-directive process in which parties are assisted by a neutral mediator or mediators to a mutually acceptable agreement.

However, his Honour noted that in other Australian and overseas courts it is more common for 'mediation' to be used as an all embracing term which includes processes aimed at dispute resolution which falls short of litigation.

Order 25A has been amended to refer to all counselling, mediation and conciliation interventions as mediation.

Conciliation conferences

These are mandatory prior to the making of property orders (other than consent orders) (see Ord 24). In 1996–97, 7,363 conciliation conferences were conducted (IP 25, para 3.52).

Arbitration

The ALRC's Issues Paper 22, *Rethinking Family Law Proceedings* (1997) defined 'arbitrator' as an 'independent person appointed by the parties or with the consent of the parties who makes a decision intended to be binding on the parties' (para 7.59). It notes that on a continuum of dispute resolution processes, arbitration is nearest to judicial adjudication.

Sub-division 5B of Pt III provides for court ordered arbitration 'with or without consent of the parties' (s 19D(2)). Arbitration is provided for in any Pt VIII proceedings, that is, spousal maintenance or property disputes. The Family Law Amendment Act 2000 repeals s 19D(2) and substitutes the provision for court ordered arbitration only with the consent of all the parties to the proceedings. Sections 19EA and 19EB of the Act provide for referrals by the arbitrator of questions of law to a Family Court or to the Federal Magistrates' Court.

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