

LLB303: Family Law Exam Notes Seminar Questions and Answers

Week 1: Introduction to Family Law

1. What does 'family law' in Australia deal with? Where does Australia's 'family law' come from?
 - The FLA does not deal with the regulation of families as such but what happens upon relationship breakdown: formal termination, parenting issues, financial issues.
 - There is no definition of family in the FLA.
 - Commentary suggests that perhaps the law favors/assumes/works better for a particular type of family / traditional model / doesn't work as well with non-traditional forms of family.
 - "family law" really developed from "marriage breakdown" law in England
 - Marriage originally less formal - economic imperative then religious.
 - Social support and inheritance - only those born of marriage entitled to inherit. Property protection.
 - Modern divorce didn't really emerge until 1857 in England - Divorce and Matrimonial Causes Act. Adopted by Australian colonies (each colony own legal system).
 - Set grounds for divorce - fault based - adultery etc. Easier for H. than W. Women usually disadvantaged.
 - Federation 1901 - Constitution. Fed Pitt given powers under s. 51 including: 51 xxi marriage power 51 xxii "divorce & matrimonial causes"
 - But Fed parliament left states as they were pre-1901 and did not enact any laws until 1959 - Matrimonial Causes Act 1959 (Cth) (MCA) and then the Marriage Act 1961 (Cth).
 - Family Law Act 1975 (Cth) replaced MCA in 1976.
 - "Family" a fluid concept.
 - Still foundational unit of society ([1.1 text]) but the form of families has changed - de-facto, same sex couples, split families, single parents, no children families, extended families, cross-cultural conceptions of family.
 - Family law NOT really about families at all but really the law governing the formalizing of and the breakdown of relationships - really relationship breakdown law (note comments p. 1 - disputes usually at very stressful time psychologically).
2. What do the ABS statistics quoted on p. 26 suggest about 'family' in Australia?
3. How was obtaining a divorce in Australia different before the commencement of the FLA?
 - Matrimonial Causes Act 1959 (Cth) (MCA) applied (see [1.38-1.39]).
 - MCA provided for 14 separate grounds of divorce including adultery, desertion, cruelty, insanity...and one "no fault ground" - "irretrievable breakdown" evidenced by 5 years' separation.
 - By 1970s, unhappiness with "fault" system - MCA not seen as meeting social needs of the time.
 - FLA did away with the MCA's 14 grounds and has one single ground - "Irretrievable breakdown" evidenced by 12 months' separation (s. 48 FLA).
 - FLA came into force 1976. Major reform of resolution of disputes arising from marriage.
 - "No fault", focus on principles of "welfare".
 - Applies to ALL states (Except WA, which has its own FC)
 - Created Family Court.
 - Will look at marriage, divorce and nullity in more detail in week 2.
 - Traditional common law definition of marriage [1.52] suggests marriage has special status - "the voluntary union for life of one man and one woman to the exclusion of others" -
 - This was, until recently, in s. 5 Marriage Act 1961 (Cth). Now it is 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'.
 - Really 'for life'? - idealised view given easy access to divorce. See by contrast the view expressed in *Seidler v Schallhofer* at [1.53].
 - De-facto couples not originally covered by FLA. Why not?

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