



NCEIS FAMILY LAW BASICS

What does it all mean?

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Goals

By the end of this session, you should be able to:

- Appreciate the statistics in relation to marriages and divorces in Australia; and
- Have knowledge about the sources of Family Law in Australia.

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Introduction

- Family law deals with the rights and obligations arising from marriage, informal relationships resembling marriage and relationships involving some form of domestic relationship but not resembling marriage, such as relations between siblings or patient and carer.
- Family law further deals with the civil responsibility of parents towards their children, whether born within or outside any enduring relationship.

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Brief History

- Australian family law has its origins in the Christian religion and English law.
- The terms “ecclesiastical law” means ‘the law of the Church’.
- Under English law, the ecclesiastical courts exclusively exercised jurisdiction in matrimonial cases until the middle of the 20th century.
- The matrimonial jurisdiction concerned both the status of marriage and legitimacy of children.

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Terminology

Before 30th June 2006 there were three main types of orders:

- Residence — who the children lived with;
- Contact — who the children had contact with;
- Specific issues — these orders concerned areas not covered by residence or contact orders, such as education, religious upbringing and medical treatment
- However, as of 1st July 2006 all orders relating to children became **parenting orders**, regardless of what topics they cover. Parenting orders cover all aspects of care and welfare arrangements for children.
- The terms “contact” and “residence” is no longer used and the court use the terms “spends time with” and “lives with” instead.

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Other Types of Orders

- Location Order — to find where a child is living
- Recovery Order — to return a child to a party

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Sources of the Law

- The Australian Constitution: sets out the powers of the Commonwealth Government in relations to marriage, divorce and matrimonial causes and child support.
- The law relating to the rights of the parties to an informal or domestic relationship, adoption, change of name are governed by State and Territory legislation.

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The Court Systems

Family Court of Australia

- Created by Commonwealth Parliament.
- Superior Court of Record.
- Can deal with family law matters.

Federal Magistrates Court

- Created under Chapter III of the Constitution.
- Can deal with most family law matters

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Family Court

- Deals with difficult and complex cases:
- applications regarding nullity or validity of a marriage;
- international child abduction;
- applications regarding special medical procedures relating to a child;
- applications that have been certified by legal practitioners as complex;
- Jurisdictional disputes (eg property disputes where proceedings may be commenced in the court of another country);
- property disputes concerning property worth over \$700,000.

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Federal Magistrates Court

Quicker, cheaper and deals with less complex family law matters:

- all divorce applications
- all parenting orders
- enforcement of orders made by either the Federal Magistrates Court or the Family Court
- location and recovery orders as well as warrants for the apprehension or detention of a child
- child support
- determination of parentage
- recovery of child bearing expenses
- applications concerning spousal maintenance
- property disputes (where the property in dispute is worth less than \$700,000 or property disputes worth more than this with the consent of both parties)

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Principles to be applied by the court

- preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- 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;
- protect the rights of children and to promote their welfare;
- ensure safety from family violence; and
- provide the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.

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Overview- Family Law in Australia

- The Marriage Act 1961 came into full operation on 1 September 1961.
- Under the Act, marriages may be celebrated by a minister of religion registered as an authorised celebrant, by a district registrar or by other persons authorised by the Attorney-General. Notice of the intended marriage must be given to the celebrant within 18 months of the marriage, but no later than one month and one day prior to it.
 - A celebrant must lodge an official certificate of the marriage for registration to a district registrar in the state or territory in which the marriage took place within 14 days.
 - Since 20 June 1973, the minimum age at which a person may marry without parental consent is 18 years. Persons between the age of 16 years and 18 years may marry with parental or guardian consent and an order from a judge or magistrate.
 - Any two persons under the age of 18 years may not marry each other.

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Overview

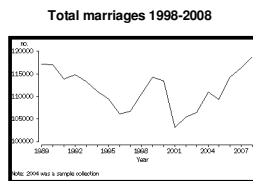
- Under the Family Law Act 1975, the irretrievable breakdown of marriage is the only ground on which a divorce is granted.
- This ground is established by the husband and wife having lived apart for 12 months or more, and there being no reasonable likelihood of reconciliation.
 - Applications for nullity of a marriage under Family Law legislation must be on the ground that the marriage is void because of failure to meet a legal requirement such as that neither party be already lawfully married to another person.
 - There is no provision for judicial separation under Family Law legislation.
 - Successful applicants for a divorce under Family Law are initially granted a decree nisi. This becomes absolute after one month unless it is rescinded, appealed against, or the Court has not declared its satisfaction that proper arrangements having been made for the welfare of children involved.

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ABS - Marriages and Divorces, Australia, 2008

In 2008, there were 118,756 registered marriages in Australia, representing an increase of 2,434 (2.1%) from 2007. This is the highest number of marriages registered in a single year since 1989 when 117,176 marriages were registered and continues the relatively steady increase in marriages since 2001.



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Median Age at Marriage

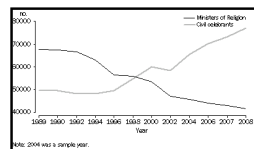
- The median age of people married in 2008 was **31.6 years for males** and **29.3 years for females**.
- The median age of people getting married for the first time is slightly lower than total median age. In 2008, median age of males married for the first time was 29.6 years, and 27.7 years for females.
- For both males and females, the highest age-specific marriage rates were in the 25-29 year age group, with 45.4 marriages per 1,000 males in this age group and 52.5 marriages per 1,000 females in 2008.
- In 2008, 78.2% of people married had not been married previously.
- For males, this applied to 77.3% of all marriages, with a further 1.6% of males having been widowed, and 21.1% having been divorced. For females, 79.0% had not been previously married, with a further 1.8% having been widowed, and 19.2% having been divorced.

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Marriage Celebrants

- Civil marriages have outnumbered religious ceremonies since 1999 when 51.3% of all marriages were performed by civil celebrants.
- In 2008, the trend toward civil ceremonies continued, with 65.0% of marriages performed by civil celebrants.
- Of the 41,545 marriages performed by ministers of religion in 2008, the most common rites used were Catholic (33.5%) followed by Anglican (17.7%).



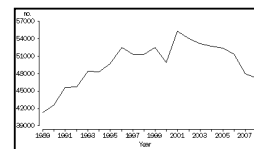
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Divorces

The number of divorces granted in Australia have been decreasing each year since reaching a peak in 2001. In 2008 there were 47,209 divorces granted in comparison to 47,963 in 2007, showing a decrease of 754 or 1.6% over this period.

Divorces granted, Australia - 1989-2008



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Divorces - Age and Length of Marriage

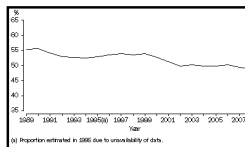
- Of all females granted divorce in 2008, 61.9% were aged under 45 years. In comparison, only 52.4% of males granted a divorce were in this age group .
- Median age for males at separation in 2008 was 40.5 years, compared to 37.8 years for females. Median age for males granted divorce in 2008 was 44.1 years, compared with 41.4 years for females.
- In 2008, median length of marriage to separation was 8.8 years. In comparison, the median length of marriage to separation in 2004 was 8.7 years, and in 1999 it was 7.9 years.
- Median length of marriage to divorce was 12.3 years for divorces granted in 2008. In 2004, it was also 12.3 years, and in 1999 it was 11.3 years.

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Divorces Involving Children

- Over the last twenty years, the proportion of divorces involving children under 18 years has been decreasing, although this decline has slowed in recent years. The proportion of divorces involving children was 48.8% in 2008.



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Questions?

- break for a leg stretch...
- pray...
- cup of tea...
- convenience stop...
- attend to phone calls/sms...
- catch up...

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Marriage

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Training Aim and Objectives

- By the end of this session, you should be able to:
 - Understand the issues concerning marriage in Australia
 - Understand the marriage process

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Discussion About Marriage

- The law regulating marriage in Australia is contained in the Marriage Act 1961 (Cth) which sets out who may marry, who may perform the marriage ceremony, how the ceremony is to be conducted and where and when it may be performed.

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Requirements of valid marriage

- Voluntary union
- Life-long union
- Male-female union
- A monogamous union

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Who may marry?

- Any person over the age of 18 may marry provided that the person:
 - is legally able to consent
 - is not married to someone else
 - is not within a prohibited relationship (such as a parent, brother, sister or grandparent) with the proposed spouse.
- If a person under 18 years of age wishes to marry:
 - they must be at least 16 years of age and the other person over 18 years of age, and
 - must obtain a court order from a judge or magistrate [s12] authorising the marriage, and
 - have the written consent of the parents or guardians [s13] (unless a court has given the consent in place of the parents).
- A marriage can only occur between persons of opposite sex.

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The Ceremony

- To be valid, a marriage must be performed by an authorised celebrant, who may be:
 - a minister of religion registered under the Act;
 - the registrar of marriages for the State or Territory where the marriage is to take place; or
 - a person authorised by the Commonwealth Attorney-General.
- Civil marriage celebrants (listed in the Yellow Pages) charge while ministers of religion usually receive a donation.

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Foreign Marriages

- In general, a marriage celebrated overseas is recognised in Australia as a valid marriage if it is valid according to the laws of the country in which the marriage took place.
- However, the marriage will not be valid in Australia if:
 - either person is still married, ie a polygamous marriage [ss23A(1)(a), 23B(1)(a)]
 - either person is not of marriageable age
 - the parties are within a prohibited relationship
 - there was no real consent, see s23B(1)(d)
- A marriage celebrated outside Australia can be proved with an official extract from the foreign registry. Certificates in a foreign language must be filed with a translation and an affidavit by the translator that he or she is competent to translate it.

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Any questions?

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NCEIS FAMILY LAW SERIES

Divorce

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Training Aim and Objectives

- By the end of this session, you should be able to:
 - Understand the difference between separation and divorce
 - Understand the divorce application process

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Discussion About Divorce

- What does divorce mean?
- Do you have to be separated to apply for a divorce?
- Do you need to have settled property before applying for a divorce?
- Do you need to have reached an agreement in relation to children before applying for a divorce?
- Do you have to apply for a divorce if you are separated?

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Divorce - What Does It Mean?

- Divorce is the official ending of marriage
- Divorce process does not address children's matters
- Divorce process does not address property matters (although there is a link between divorce and property)
- Children and property issues are sorted out separately
- Some people separate and may never get divorced

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Basic Requirements

- The only requirement for a divorce is the "irretrievable breakdown" of the marriage.
- This is proved by the husband and wife having been separated for 12 months with no likelihood of getting back together.
- Fault is not considered. Either party can apply for divorce.
- It does not matter who left the marriage or whether one does not want a divorce.

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Basic requirements continued...

- To apply for a divorce, one of the parties must:
 - Be an Australian citizen, or
 - Live in Australia and regard Australia as his/her permanent home, or
 - Ordinarily live in Australia and have so lived for at least 12 months before applying.

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Applying for a Divorce

- Complete divorce application form
- File application
- Serve other party (if applicable)
- Attend court (if applicable)

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The Court ...

- The Court order for divorce is granted in two steps:
- Step 1: A **decree nisi** is granted if all requirements are met and the court is satisfied that proper arrangements are made for any children of the relationship. This does not make the divorce final.
- Step 2: A **decree absolute** takes effect one month and one day after the decree nisi is granted, unless within that time the court is presented with a valid reason for not granting the divorce. The date of the decree absolute is the actual date of divorce.
- A copy of the divorce certificate is sent to the parties by post.

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Difficulties

- Getting back together
- Living separately under the same roof
- Short marriages
- Not knowing the contact details of the other party
- The other party is avoiding service of divorce documents
- Cannot find marriage certificate
- Marriage certificate in another language

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Getting Back Together For a Short Time

- The parties can get back together for up to three months without re-starting the 12 month separation period
- Example: if you had been separated for 6 months, reconciled for 2 months and then separated for another 10 months, this will be considered a total separation of 16 months (note that even though the 2 month reconciliation does not restart the 12 month separation period, it is not included in the separation period)

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Living Separately Under the Same Roof

- It is possible to apply for a divorce if the parties lived in the same house after separation.
- The court must be satisfied that the parties are separated under the one roof.
- The court will look at whether the parties:
 - Sleep together;
 - Have sexual relations;
 - Share meals and domestic duties;
 - Share money and bank accounts; and
 - Have told friends and family of separation.
- The applicant will provide evidence through affidavits.

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Not Knowing the Contact Details of the Other Party

- The applicant can apply (through affidavit) to the court for dispensation of service (when the court orders that service does not have to occur).
- In application for dispensation of service, applicant must outline attempts made to try to find out contact details of the other party, including through mutual friends and family members.
- Dispensation will be granted if court satisfied that applicant has made all reasonable attempts to find out contact details of other party and that requiring further action to be taken or ordering substituted service not appropriate in the circumstances.

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The Other Party is Avoiding Service

- The applicant can apply (through affidavit) to the court for dispensation of service
- In application for dispensation of service, applicant must outline attempts made to serve other party
- Dispensation will be granted if court satisfied that applicant has made all reasonable attempts to serve other party and that requiring further action to be taken or ordering substituted service not appropriate in the circumstances

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Lost Marriage Certificate

- If married in Australia, contact the Registry for Births Deaths and Marriages and apply for copy of marriage certificate.
- If married in another country:
 - Attempt to obtain copy of marriage certificate for relevant registry
 - In the event that marriage certificate cannot be obtained, apply (through affidavit) for the Court to dispense with having to provide marriage certificate and proving that marriage did take place. Must seek legal advice.

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Marriage Certificate in Another Language

- If the marriage certificate is in a language other than English then the applicant must lodge the following:
 - A translated copy of the application; and,
 - An affidavit by a translator outlining his/her qualifications and that the translation is an accurate translation of the marriage certificate

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Short Marriage

- If parties have been married for **less than two years**, they can only apply for a divorce in the following circumstances:
 - If the parties have attended counselling with an approved family and child counsellor to discuss the possibility of reconciliation. The counsellor must complete and sign a certificate available from the court verifying that counselling has been undertaken or
 - If there are special circumstances why the parties should be allowed to seek a divorce within two years of marriage

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Divorce Implications

- Property
- Wills
- Centrelink?

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Arrangements for Children

- A Registrar will not usually grant a divorce unless suitable arrangements have been made for the future of any children under 18 years of age [s55A].
- What information must be provided on the application?
- Details about the children must be set out on the Application for Divorce, including:
 - where and with whom they will live;
 - how the children are supported;
 - how often they see the other parent;
 - the amount of child support paid; and
 - their health and progress at school.
- Although the Registrar has to approve the arrangements, they do not become orders of the court and are not enforceable by the court. Separate applications must be made for residence, contact and child support orders.

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Annulment

- An application for an annulment (also called a decree of nullity) is an application for an order from the court that the marriage be declared invalid.
- On what grounds can a marriage be declared invalid?
- Invalidity may result from any one of the following:
 - either partner was not of marriageable age;
 - bigamy (that is, either partner was already married at the time of the marriage ceremony);
 - the people were within a prohibited relationship (such as sisters marrying brothers, parents marrying children, half-brothers marrying half-sisters);
 - either or both of the parties did not consent (the marriage took place through fraud, duress, mistake or mental incapacity); or
 - the ceremony was invalid (for example, the celebrant was not properly appointed).

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Questions?

- Any questions

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Property Dispute Settlement

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Training Aim and Objectives

- By the end of this training, you should be able to:
 - Understand the law that applies to property disputes arising out of relationship breakdowns
 - Understand the basic of spousal maintenance

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What Sort of Situation Gives Rise to a Property Dispute?

- My wife just left me and the kids. She says she wants a divorce. She wants to sell the house, I don't but I can't pay the mortgage on my own. What can I do?
- I have just fled the family home due to domestic violence. I am too scared to go back but I left with nothing.
- My husband and I have separated. We own a home. He tells me that I am not entitled to any of the home as he has always worked while I have stayed home to look after the children.

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Which Act Applies?

- Married couples can apply for a property settlement under the Family Law Act 1975.
- Unmarried heterosexual couples who separated *before* 28 June 2001 can apply for a property settlement under the Property Law Act 1958.
- Unmarried heterosexual who separated *after* 28 June 2001 can apply for a property settlement under the Property Law 1958, and if separated since 1 December 2008, can apply for a property settlement under the Relationships Act 2008 (Vic).
- Since 1 March 2009, the Family Court has held exclusive jurisdiction in all States/Territories (except for SA & WA) to determine property and maintenance for s/sex and unmarried couples who separated after 1 March 2009 or agree to 'opt in' to the Family Court (avoids need to apply to State courts).
- Same sex couples (domestic relationship) who separated *since 01 December 2008* can apply for a property settlement under the Relationships Act 2008 (Vic).

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General Process

- If possible, parties, regardless of whether they were/are married, should generally try to reach an agreement about property disputes. If agreement is reached, it is prudent to have it formalised by a lawyer to make it legally binding.
- Resolving property disputes by agreement is less costly, more time efficient and generally enables the parties to have more control over the outcome.
- However, sometimes it is impossible to reach an agreement and an application is filed in the court to enable the court to resolve the dispute.

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Property Settlement

- A divorce does not cover the division of a married couple's property. This must be applied for separately.
- The law regulating property settlements is contained in the Family Law Act 1975 (Cth).

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What is property?

- Property can include almost anything to which a value can be attributed. Commonly, it includes land, money, vehicles, superannuation and household goods, but is it worth bearing in mind other items, such as insurance policies, intellectual property, debts due to the spouses, rights to sue, such as potential compensation claims, long service leave entitlements, partnership interests, entitlements as beneficiaries of a trust or a will, etc.

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Property in Marriage

- Property belonging to a husband or wife before marriage is still that person's property after marriage. This includes furniture, bank accounts, vehicles and other household goods.
- There is no law that it must be transferred into joint (both) names.
- Property acquired after marriage also belongs to the person in whose name it was bought or who paid for it. The same applies for debts in sole names. It is only on the breakdown of a marriage that the court looks behind the legal title, and may make orders about ownership, notwithstanding whose name the property is in.

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Property prior to Marriage

- Where parties have cohabited before marriage and their financial affairs have become mixed together, the Court will take into account the financial arrangements during the period of cohabitation when deciding on the division of property.
- If parties contend that their finances and property remained separate, they may need to produce documentary proof.

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When is property valued for settlement

- Matrimonial property includes anything owned by either spouse at the date of their separation, but does not include property acquired after separation.
- However, the date of valuation of property is the date of trial (or date of negotiation), even though this may be some months or even years after the separation.
- This means that it is in the interests of both spouses to maintain the value of matrimonial property after separation, so as to maximise the value available for distribution between them.

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Married People

- It is best to reach agreement if reasonable (see a lawyer).
- If an agreement is reached, this agreement can be formalised by way of:
 - Consent Orders; or
 - Binding Financial Agreement.
- If an agreement cannot be reached, either party can file an application in the Federal Magistrates Court/Family Court for the court to determine how the property will be split.
- Only people who are married can go to the Family Court for a property settlement.

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Consent Orders

- An application form and a formalised agreement in the form of “Minutes of Consent Orders” signed by parties before a witness and then sent to the court.
- Court will make an order on property (ie, stamp the application and Minutes of Consent Orders) only if it is “just and equitable” according to the factors set out in the Family Law Act.
- Consent Orders are enforceable despite the fact that parties do not attend court.

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Binding Financial Agreements

- Married and unmarried couples (including s/sex) can enter into a financial agreement dealing with their assets.
- This agreement is called a binding financial agreement and can be made before, during or at the end of a marriage/relationships.
- There are strict requirements before a financial agreement can be considered binding.
- It must be signed by both parties and it must state that each party has received legal advice covering specific areas.
- Each party's lawyer must provide a document certifying that independent advice was given.

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Matrimonial Asset Pool

- Matrimonial Asset Pool Includes:
 - Real estate including the family home;
 - Cash;
 - Investments including shares, businesses;
 - Superannuation;
 - Insurance policies;
 - Any other assets (eg car, furniture); and,
 - Debts-mortgages, loans, credit cards, personal debts, other debts.

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Determining Property Allocation (cont.)

- Length of marriage
- Contribution to the marriage:
 - Financial
 - Salary
 - Savings
 - Gifts from family members
 - Non-financial
 - Primary carer
 - Improvements to home
 - Unpaid contribution to business
- Future needs (age, health, supporting or being supported by another person)

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Time Limits

- A married person can apply for a property settlement from the time of separation.
- A divorced person must file an application for property orders **within 12 months of the divorce** becoming final if he/she wants the court to make orders.
- In special circumstances, a divorced person can apply to the court for a property settlement even if more than 12 months have passed since his/her divorce became final.

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True or False?

- The property is in my husband's name so I am not entitled to anything
- I did not work throughout the marriage so I am not entitled to anything
- The court will always make a 50:50 split
- If I leave the family home I will lose all of my entitlements
- Superannuation doesn't count

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Case Studies 1

- Mr and Mrs El Masri separated after ten years of marriage. They had very little property when they got married. During the marriage they saved enough money from Mr El Masri's wages to pay off a house while Mrs El Masri worked in the home to look after her husband and their children now aged six, eight and nine. The children live with Mrs El Masri. She receives Parenting Payment and a small amount of child support. The court would probably consider that Mrs El Masri's indirect contributions as home maker equaled her husband's direct contributions and that she is entitled to half of the house. However, as she has to look after the children in the future and only has a small income, the court may give her more. In a similar case to this the court gave a wife 60% of the property.

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Case Study 2

- Mr and Mrs Ali were married for 20 years. They had nothing when they got married but through Mr Ali's business skills, they became wealthy. Mrs Ali looked after the children, all of whom have since grown up. Mrs Ali receives a pension. The court would probably consider that Mrs Ali's indirect contribution to the home and other property used by the family equaled her husband's direct contributions and that she would be entitled to half of that property. However, her contributions to the business assets may not equal her husband's. In a similar case the wife's overall contribution was assessed at 30%. While Mrs Ali has future needs she may not get more on this account, because there may be so much property to divide up that her share based on contribution is enough to meet her needs.

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Heterosexual and Same-sex Relationships

- A relationship between two people, irrespective of gender, who are not married but who live or who have lived together a couple on a genuine domestic basis is defined as a domestic relationship.
- The terms 'domestic partners' and 'domestic partnerships' apply to heterosexual and same-sex relationships.

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Domestic Relationship

- The Relationships Act 2008 (Vic) came into effect December 2008. Allows people in a 'domestic relationship' to:
- Have their relationship recognised through the Relationship Register as administered by Registry of Births, Deaths and Marriages;
- Enter 'relationship agreement'; and
- Seek maintenance and property in the event of relationship breakdown.

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When does a domestic relationship exist?

The court will look at:

- Duration of the relationship (usually two years cohabitation is required unless there is a child to the relationship)
- Nature and extent of common residence
- Existence of sexual relationship
- Degree of financial dependence
- Ownership, use and acquisition of property
- Care and support of children
- Reputation and public aspects of the relationship

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Property Disputes between Domestic Partners

- It is best to reach agreement.
- If an agreement is reached, this agreement can be formalised as a cohabitation agreement.
- If an agreement cannot be reached, either party can file an application in the the Supreme Court, County Court or Magistrates' Court of Victoria (and since 01 Mar 2009 the Family Court, if jurisdictional requirements are made out e.g. relationship of greater/equal than 2 years or child of relationship – except for SA/WA).
- The choice of court depends mainly on the value of the property in question.

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Cohabitation Agreement

- Cohabitation agreements are agreements made between parties who are living together and who are not married and do not intend to get married
- Cohabitation agreements, unlike binding financial agreements, are persuasive but not binding, ie, court will take them into account when making a decision relating to a property dispute.

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Property

- Anything owned together, separately or jointly as well as debts
- Superannuation, retirement benefits, trusts or any other valuable benefit are not defined as property but can be taken into account by the court.

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Determining Property Allocation

- Court must take into account:
 - Contribution to the relationship:
 - Financial
 - Non-financial
 - Any written agreement made by the parties

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Time Limits

- An application for a property settlement must be made within 2 years after the day on which the relationship ended.
- A court may grant leave to a domestic partner to apply for an order at any time after the end of the two year period if the court is satisfied that greater hardship would be caused to the partner applying if that leave were not granted than would be caused to the other partner if that leave were granted.

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Spousal Maintenance

- A spouse does not automatically get maintenance payments from the other spouse. A separated woman or man who is not caring for children and who is able to work will probably not be awarded maintenance.
- To obtain maintenance a spouse will generally have to show that he or she cannot support him or herself properly because of the following criteria:
 - caring for children, or
 - an inability to obtain work due to old age, sickness, or some other reason.

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Questions

- Any questions

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NCEIS Children's Issues

Family Law Presentation

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By the end of this training

- We should be able to:
 - understand how the law works out who the children live with after their parents split up;
 - understand what is the role of 'significant people' in the children's lives.

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Purpose of laws relating to children in family law

- The law attempts to assist parents to redefine their relationship to accommodate the future needs of their children.
- Laws were recently changed.

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Principles under the FLA

- Children have the right to know and be cared for by both parents
- Children have the right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care welfare and development

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New Principles

- Parents jointly share duties and responsibilities concerning the welfare and development of their children
- Parents should agree about the future parenting of their children

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Determining best interests

- To determine 'best interests of the child' a court can request/appoint:
 - Child Representative
 - Psychological Reports
 - Family Reports
 - Legislative Criteria

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New 'best interests'- s60CC (2)

- Primary Considerations
 - The benefit to the child of having a meaningful relationship with both of the child's parents; &
 - The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

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New 'best interests' - s60CC(3) includes

- Additional Considerations
 - Any views expressed by the child
 - The practical difficulty and expense of a child having contact with a parent
 - The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

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New 'best interests' - s60CC

PLUS

- The willingness and ability of each other child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent

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Presumption of Equal Share Parental Responsibility (ESPR)

- (1) Presumption that it is in the best interests of the child for the child's parent's to have for the child ESPR
- (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of a child) has engaged in:
 - (a) abuse of the child or another child who at the time was a member of the parent's family (or that person's family) or
 - (b) family violence

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Courts to consider equal time arrangements (65DDA)

- Equal time
 - If ESPR the court must consider:
 - (a) equal time is the 'best interests';
 - (b) equal time 'reasonable and practicable';
 - (c) If so the court must consider making an order

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'Reasonable and practicable'

- How far apart parents live from one another;
- Parent's current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time;
- Parent's current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement;
- The impact that an arrangement of that kind would have on the child; and
- Other matters as the court considers relevant.

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'Substantial and significant'

- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekend and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
- (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child's daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
- (c) the time the child spends with the parent allows the child to be involved in occasions and event that are of special significance to the parent

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Common myths

- I pay child support therefore I have a right to see my kids
- I am going to get full custody
- He said that if I left I would never see my kids again

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Parenting Plans

- What are they?
- Are they compulsory?
- What happens if parents don't want to do parenting plans?

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Parenting Plans

- A parenting plan is a written, signed and dated agreement between parents (and others if needed) that sets out arrangements for the care of children. It will not be recognised unless it is made without threats or intimidation from the other parent or people involved. It is not legally enforceable unless it was registered with the Family Court of Australia before 14 January 2004, in which case it will have the same legal effect as a court order.
- If a plan was made after that time it will have no legal force (but a court will look at your most recent parenting plan if you make an application to the court at a later date for orders).
- Parents can also have their parenting plans made into 'consent orders'. Consent orders are orders made by the court, with the agreement of both parents (and other people involved). They have the same legal force as other court orders.

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Questions

- Any questions

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FAMILY LAW SERIES

Child Support and Maintenance

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Training Aim and Objectives

- By the end of this session, you will be able to:
 - Understand the law that applies to child support and maintenance

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Child Support and Child Maintenance

- What is the difference?

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What is Child Maintenance?

- Parents (biological and adoptive) have a duty to maintain their children even after they separate.
- This duty generally continues until a child reaches the age of 18 years, unless the child is able to support him or herself before then, marries or is adopted.
- Child maintenance payments are payments made by one parent to the other to help with the cost of looking after the children after the parents have separated.

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The Law Relating to Child Maintenance

- The law says that both parents have an obligation to financially support their children. How much should be paid depends on the financial circumstances of each parent, economic data on the costs of children, the level of care each parent provides for the child(ren), and whether either parent supports other biological or adopted children.
- In the first instance, the formula assessment uses information from the parents' previous year's taxable incomes to calculate the child support payments. It is important that parents who receive or pay child support, lodge their tax returns promptly.

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Liability of the father if not married to the mother

The father of a child who is not married to the child's mother is liable to make a proper contribution towards:

- (a) the maintenance of the mother for the childbirth maintenance period (2/3 months) in relation to the birth of the child; and
- (b) the mother's reasonable medical expenses in relation to the pregnancy and birth; and
- (c) if the mother dies and the death is as a result of the pregnancy or birth, the reasonable expenses of the mother's funeral; and
- (d) if the child is stillborn, or dies and the death is related to the birth, the reasonable expenses of the child's funeral.

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Child Support Assessments

- The child support assessment can be based on:
 1. the formula set out in the legislation; or
 2. an agreement reached between the parents.
- Formula Assessment - A new formula has been in place since 1 July 2008. It takes into account the incomes of each parent, the number and ages of children, the costs of children, the level of care each parent provides for the children, and whether either parent supports other biological or adopted children.
- The new formula consist of three elements:
 - Parents' Incomes
 - Costs of Children Table
 - Level of Care

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Child Support Agreement

- Gives parents flexibility in the way they arrange child support payments and can be used instead of the CSA making an assessment.
- The amount of child support in the agreement must be at least the amount that would have been payable using the set formula.
- An agreement can only be changed by a new agreement.

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Adult Child Maintenance

- Under s 66L, Adult child maintenance can be ordered by the Family Court if such maintenance required to:
 - (a) to enable the child to complete his or her education; or
 - (b) because of a mental or physical disability of the child.

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An agreement can include:

- Payments of regular amounts;
- Lump sum payments;
- Irregular payments;
- Payments to third parties (eg: school fees, mortgage, health insurance)
- Transfer of property; and
- 'in-kind' provisions (eg: use of the family home)

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Overseas Child Support & Maintenance

- Australia has reciprocal arrangements with many countries for the collection of child support. The Australian Child Support Agency often has a role in collecting and enforcing payments in these matters.
- Even in some cases where Australia does not have reciprocal arrangements with the country where one parent is residing, there may be some options for the carer parent to obtain child support.
- This is a complex area of law and legal advice should be obtained in each individual case.

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Questions

- Any questions

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Family Violence and Family Law

How do the above issues affect our community?

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By the end of this session

- You should:
 - be familiar with different types of family violence
 - be aware of family violence indicators
 - be aware of how family violence laws and family laws interconnect

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What is family violence?

- Emotional, physical, psychological, sexual, social, financial violence.

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Who can be victims/perpetrators of family violence?

- Husbands
- Wives
- Children
- Grand-parents/other family members
- Boyfriends/Girlfriends

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How can you spot a family violence issue?

- Physical injuries- bruising, lacerations or tears, fractures
- Reproductive Health-STD's, terminations of pregnancies, complications of pregnancies
- Mental Health- attempted suicide, self-harming behaviour, depression, anxiety, eating disorders, traumatic/post traumatic symptoms, phobias, somatisation
- Behaviors and practices affecting health- Harmful tobaccos and alcohol use, illicit and licit drug use (ie: tranquilisers and sleeping pills)
- Other-Chronic pain disorders, tummy problems, sleep problems

Information obtained from "The Health Costs of Violence"- Vic Health study- June 2004

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How do family violence issues affect family law matters?

- Emotional
- Psychological
- Procrastination
- Anger

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Does the Family Court take into account family violence issues?

- If there is a family violence order (intervention order) in place, the parties must inform the court of its existence.
- However, no penalties if the court is not informed.
- The order may apply to a child or a member of the child's family (s 60CF)
- The court should make an order that is:
 - a) consistent with family violence orders and
 - b) do not expose a person to an unacceptable risk of violence: Subject to 'best interests' of the child (s 60CF)

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Compulsory family dispute resolution

- Post July 2007, parties must attend family dispute resolution (sometimes called mediation) (s 60I)

BUT

- Exemption re: family violence and child abuse (s 60I)

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Test for family violence exemption...

The test:

- The court must not hear the application unless the applicant has indicated in writing that they have received information from a family counsellor or dispute resolution practitioner about available services (s 60J)
- Unless the court is satisfied on reasonable grounds that there is a risk of child abuse, or family violence by one of the parties to the proceedings (s 60J(2))

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Family Law Order vs Intervention Order

- When a Family law order and Intervention Order are inconsistent:
- the family order is invalid to the extent of any inconsistency (s 68Q)

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Help from the Police

- Police have very wide powers to enter a home and investigate a complaint of family violence. In addition the police can:
 - remove the attacker from the premises
 - charge the attacker with a criminal offence (such as assault or property damage)
 - suggest taking out a restraining order or a private prosecution for an assault
 - reprimand but take no further action.
- The police may also assist a person who has been assaulted to leave the premises unmolested and:
 - assist a woman with children by taking/arranging for her to get to a safe place such as a women's shelter
 - if the person is a man, take him to a men's shelter. However, men's shelters do not generally have facilities for children.

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Restraining Orders

- A restraining order is an order made by a magistrate which prevents a person (the defendant) from behaving in certain ways towards the complainant (the person who made the complaint).
- The magistrate decides which restrictions will apply in each particular case. The order may prohibit the defendant from approaching or entering certain premises. The legislation also provides that firearms must be confiscated and the defendant disqualified from possessing a firearms licence for the duration of the order.
- A restraining order is not a criminal charge although criminal penalties may apply if the order is breached.
- Orders last indefinitely unless they specify a time period. However, the court has the power to change or lift them at any time.

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Family Law Injunction

- Under the Family Law Act 1975 (Cth), the court has the power to grant *injunctions* restraining one party from molesting, assaulting, harassing or interfering with the other party or with the children of the marriage and from entering upon premises occupied by the other party.

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Violence and Family Court Orders

- When considering where a child should reside, with whom a child should have contact or any other relevant issues, the Family Court must consider as *paramount* the **best interests** of a child. This includes:
- any family violence involving the child or a member of the child's family;
- any family violence order that applies to the child or a member of the child's family;
- the need to protect the child from physical and psychological harm that may be caused by abuse or by being directly or indirectly exposed to abuse, ill treatment, violence or other behaviour that is directed towards or may affect another person.

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Any questions?

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Misc Family Law Matter

Adoption, Paternity Testing, Name Change, Location & Recovery Orders...

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By the end of this session

- You should:
 - be familiar with the issues surrounding adoption
 - be aware of paternity testing
 - be aware of how the legal regime around name changing
 - understand the basics of location and recovery orders.

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Adoption

- In Australia adoptions are the responsibility of the State governments. In Victoria, the adoption process is governed by Adoption Act 1984 (Vic)
- All adoptions of children by residents of Victoria are conducted through the Department of Human Service.
- Adoption is a legal process where the rights and responsibilities of the birth parents are transferred to the adoptive parents. There are two types of adoption: local (i.e. from within Australia) and intercountry (i.e. from other countries).
- Private adoptions (i.e. adoptions where a child is placed with adoptive parents without the involvement of an agency) are illegal in Victoria.

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Who can adopt?

- For more information contact the Adoption and Permanent Care Team via the Dept of Human Service (Vic): <http://www.cyf.vic.gov.au/>

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Change of Name

- Many people change their names without taking any formal action, as there is no law to stop people using any name they choose. A change of name may be established by repute or usage, however there may be difficulties when using the name for official purposes.
- It is advisable to have a new name properly registered so as to have proof of the change.

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Registering a Change in Name

- There is no law requiring a woman to take her husband's surname on marriage.
- A woman may choose to keep her husband's name after the marriage has been dissolved or she may go back to using her premarital name.

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Changing a Child's Name

- Ordinarily a child's name is a matter of State law and is provided for under the Births, Deaths and Marriages Registration Act 1996 (Vic).
- A child of any age must *consent* to a change of name unless the child is unable to understand the meaning and implications of the change of name.

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Paternity

- Ordinarily the paternity of a child is acknowledged by both parties. The court will in these circumstances presume paternity (s 69R). A man is assumed to be a child's father if the man:
 - was married to and living with the child's mother when the child was born (s 69P)
 - has signed a document acknowledging he is the child's father (and has not rescinded it (s 69Q)
 - cohabited with the child's mother in the ten months before the child was born (s 69R)
 - is acknowledged on the child's birth certificate as the father (s 69T)

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Location & Recovery Orders

- These orders are provided for by sections 67J and 67Q of the Family Law Act 1975 and cover the situation where a person is prevented from having contact with their children because the other parent has taken the children without disclosing their whereabouts.
- In appropriate circumstances the court can order that any body which may have knowledge of the other parent's whereabouts to disclose this information to the court. Such orders are commonly made to obtain information from Centrelink, the ATO, banks etc

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Children taken overseas

- The 1980 International Child Abduction Hague Convention provides for the return of children from one member country to which they have been taken, to the member country of their origin. These applications are dealt with by a specialist section of the Victorian Crown Solicitor's Office.

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Duration

- All orders cease when the child turns 18 years, marries or is adopted by another person. Where the child is adopted by a step parent, *parenting orders* are not altered unless a family law court approves the adoption.

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Death of residential parent

- A parenting order that specifies that a child is to live with one parent also ceases if that parent or the child dies. If the residential parent dies the remaining parent does not automatically get the residential rights to the child.
- A parent can appoint someone else to take over as *guardian* of the child in the event of their death, but this is not in any way binding and will merely be taken as an expression of the parent's wishes (s 63F).
- In the event of a dispute, a surviving parent or guardian appointed by the deceased residential parent can apply to a family law court for a new order which will be decided on the basis of all of the circumstances at that time.

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Any questions?

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Family Dispute Resolution
Potential Roles for the Muslim
Community

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Family Dispute Resolution

- “a process (other than a judicial process):
- (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- (b) in which the practitioner is independent of all the parties involved in the process.” (FLA s.10F)
- To be required pre-filing. (s.60I)
- Helping and non-adjudicative.

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Mediation

- A form of family dispute resolution.
- Many different models.
- Can be described as
 - “intervention into a dispute or negotiation by an acceptable, impartial and neutral third-party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.” (Moore)
- Consensus bargaining.
- Party control.

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Providing Mediation Preparation

Understanding the mediation process.

- Philosophy of the process.
- Steps in the process.
- Responsibilities of parties in the process.
- The role of the mediator in the process.

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Mediation Process

1. Mediator makes an opening statement:
 - This is to explain the process and the mediator’s role.
 - Features of mediation.
 - Independence of mediator.
 - Judgment about genuine effort.
 - Parties in control of dispute and outcome.
 - Mediator controls process.
 - Setting ground rules.

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Mediation Process

2. Parties’ Statements
 - This is to start the negotiation process.
 - Story-telling.
 - Each party makes a statement about the issues in dispute and their perspective.
 - Mediator summarises each statement and reads it back to the parties.
 - Very important to have prepared your statement ahead of time, identified what the key issues are and some options for agreement.

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Mediation Process

3. Identifying issues and setting an agenda
 - Creating a ‘road-map’ for discussions.
 - Keeping focused.
 - Key issues and discussion points are agreed on.
 - Issues are listed in an agenda.
 - Mediators try to use neutral language, and avoid blame.
 - Violence should be non-negotiable.
 - Issues are sometimes prioritised.
 - First item for discussion is agreed.

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Mediation Process

4. Clarifying and exploring issues.
 - Parties discuss the issues on the agenda.
 - Feelings and perspectives are exchanged.
 - “Roshan, tell Mohammed how it makes you feel when ...”
 - Options are generated.
 - “Mohammed, what do you think you could do differently to ...”
 - Mediators summarise, reframe, repeat, ask questions, ask the parties to talk directly to each other.

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Mediation Process

5. Private sessions
 - Each party meets privately with the mediator.
 - Aim is for the mediator to understand how each party is feeling about the process and the negotiations.
 - Opportunity to develop some options, and reality check ideas.
 - Mediator will challenge entrenched positions and try to encourage compromise.
 - Mediator helps parties to rehearse negotiations.

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Mediation Process

6. Facilitating negotiations.
 - Options for agreement are developed.
 - Option for equal time shared parenting will be raised if reasonably practicable.
 - Options are evaluated, explored and discussed.
 - Mediator wants to help achieve a mutually satisfying agreement, or maybe just any agreement.

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Mediation Process

7. Making an agreement.
 - Mediator will write up agreement.
 - Sometimes not everything is in the agreement – partial agreement.
 - Parties are congratulated!

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Impediments to these approaches?

- Funding.
- Scoping exercise – Government support.
- Training of Muslims in dispute resolution skills.
- Training of Muslims in issues relating to domestic and family violence.
- Negative view in certain parts of the community that this is ‘creeping Shariah’.
- Misunderstanding from many parts of the Muslim community what is mediation.
- Mediation is part of Shariah.

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Any questions?

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