

Chapter 1

COMMONWEALTH, STATES, FAMILY LAW LEGISLATION AND COURTS

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Introduction	¶1-000
Jurisdiction and power	¶1-010
Constitutional background	¶1-020
Referral of powers	¶1-030
Constitution difficulties	¶1-040
Family Law Act 1975	¶1-050
Further Commonwealth bases of jurisdiction under the Family Law Act 1975	¶1-060
Accrued jurisdiction	¶1-070
Associated jurisdiction	¶1-080
Implied or inherent power	¶1-090
Cross-vesting	¶1-100
Corporations Act 2001	¶1-110
Welfare jurisdiction and special medical procedures	¶1-120
Connection with the jurisdiction	¶1-130
Marriage Act 1961	¶1-140
Child support	¶1-150
Australian Passports Act 2005	¶1-160
Bankruptcy Act 1966	¶1-170
Adoption	¶1-180
Child protection	¶1-190
Domestic/family violence	¶1-200
Family provision	¶1-210
De facto property and maintenance	¶1-220
Family Court of Western Australia	¶1-230
Federal Circuit Court of Australia	¶1-240
Supreme courts of the states and territories	¶1-250
Courts of summary jurisdiction	¶1-260
Summary of the jurisdiction of courts in Australia in family law (federal and non-federal)	¶1-270

¶1-000 Introduction

“Family law” is a generic term to describe those laws and courts which regulate what may be broadly described as issues arising out of family relationships. With the greater recent involvement of the legislature in many aspects of that relationship, and the greater diversity in what constitutes a family, this area of law has become increasingly complex.

In a perfect world it would be usual to think of family law as having its source in one or two overall pieces of legislation and being administered by the one court or a connected hierarchy of courts; but this is far from the case in Australia. The division of legislative powers in this area between the states (previously colonies) and the new federal parliament brought about by the Constitution in 1901, and the history of the administration of those laws through various courts, creates great complexity. They make it necessary to look at the Constitution, a number of statutes and a number of courts in order to obtain the full picture and to decide which law applies and which court is appropriate. In some cases, the answer to these complexities lies in the Constitution; in others, the answer lies in history.

While one may look primarily at the *Family Law Act 1975* (Cth) (FLA) for the legislation, there are a number of other Commonwealth Acts, and a significant number of state and territory Acts, which have application to some aspects of family law, namely:

- *Federal Circuit Court Act 1999*
- *Child Support (Assessment) Act 1989*
- *Child Support (Registration and Collection) Act 1988*
- *Bankruptcy Act 1966*
- *Marriage Act 1961*
- *Australian Passports Act 2005*
- *Family Court of Australia (Additional Jurisdiction and Exercise of Power) Act 1988*
- *Family Court Act 1975* (WA)
- state and territory adoption legislation
- state and territory child protection legislation
- state and territory domestic violence legislation, and
- state and territory family provision legislation.

A number of courts apply these laws, some concurrently, some exclusively. Those courts are:

- High Court of Australia
- Family Court of Australia
- Federal Court of Australia
- Family Court of Western Australia
- Federal Circuit Court of Australia

- supreme courts of the states and territories
- district or county courts of the states
- courts of summary jurisdiction of the states and territories, and
- children's courts of the states and territories.

¶1-010 Jurisdiction and power

In the discussion contained in this chapter, generally, no distinction is sought to be drawn between the terms "jurisdiction" and "power". They are often used interchangeably even though there are important distinctions between them.

The supreme courts of the states are courts of general jurisdiction. That is, they are presumed to have the jurisdiction and the power to make appropriate orders unless excluded by legislation. Other courts in Australia are courts of limited jurisdiction and have only such jurisdiction as is specifically or by implication given by legislation. This latter circumstance is so even though a number of these courts are referred to in their creating legislation as "superior courts of record", including the Family Court which also has appellate jurisdiction.

"Jurisdiction" concerns the authority that a court has over a particular subject matter of litigation, while "power" concerns the ability of the court to make particular orders. A court of limited jurisdiction has only such jurisdiction and power as are granted to it by legislation or by implication. This may mean that from time to time such a court, although acting within its jurisdiction, does not possess the power to make orders that may otherwise seem to be appropriate.

¶1-020 Constitutional background

In 1901, the Constitution of Australia created the Federal Parliament of Australia, which was to exist side by side with the parliaments of the states (formerly colonies), in a federal system. There were then no separate territories. The Northern Territory was part of South Australia, and the Australian Capital Territory was part of New South Wales. The Constitution made provision for their later inclusion.

Prior to 1901, the legislative powers of the colonies in Australia were vested in the British Parliament and in the parliaments of the colonies, and were administered by the courts created by the colonies, namely, the supreme courts and the courts of summary jurisdiction (usually now referred to as magistrates courts) of each colony.

Under the Constitution, legislative power was divided by authorising the federal parliament to exercise designated powers while the states retained the balance, and, generally speaking, the states continued to be able to exercise areas of potential Commonwealth power until there was Commonwealth legislation that was inconsistent with the state legislation (see s 109 of the Constitution). This latter circumstance was to be of particular significance in family law.

The powers assigned to the Commonwealth are mainly to be found in s 51 of the Constitution. So far as the broad area of family law is concerned, it was empowered to make laws for the peace, order and good government of the Commonwealth with respect to:

- marriage (s 51(xxi)), and
- divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants (s 51(xxii)).

In addition there are a number of less direct heads of power:

- taxation (s 51(ii))
- bankruptcy and insolvency (s 51(xvii))
- service of process through the Commonwealth (s 51(xxiv))
- immigration and emigration (s 51(xxvii))
- external affairs (s 51(xxix))
- matters incidental to the execution of any power vested by the Constitution in the federal judicature (s 51(xxxix)), and
- the territory power (s 122).

Section 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in the High Court, and in such other courts as the parliament creates and invests with federal jurisdiction. Section 77 empowers the federal parliament to make laws defining the jurisdiction of any federal court (other than the High Court whose powers are defined in the Constitution) and investing any court of a state with defined federal jurisdiction.

The federal parliament was slow in exercising the principal areas of family law, namely, divorce and marriage. Subject to some minor exceptions, the marriage and divorce powers were not exercised until the introduction of the *Matrimonial Causes Act 1959* (Cth) and the *Marriage Act 1961* (Cth) respectively. Until then the legislation of the states continued to apply in those areas.

The federal parliament readily invested state courts with various heads of federal judicial power but, putting aside the Bankruptcy Court and industrial courts, no federal courts were established until the Family Court of Australia in 1975 and Federal Court of Australia in 1976, to be followed in 1999 by the Federal Magistrates Court of Australia (now called the Federal Circuit Court of Australia).

Until 1975 jurisdiction under the *Matrimonial Causes Act 1959* and the *Marriage Act 1961* were exercised through vested state courts. Once the Family Court came into existence, it exercised the federal marriage and divorce powers assigned to it in all states and territories except Western Australia where the Family Court of Western Australia was established.

In 1999, the Federal Magistrates Court (now the Federal Circuit Court of Australia) was established to administer most matters dealt with by the Family Court as well as many aspects of the jurisdiction of the Federal Court.

State courts also continued to exercise these powers or some of them. Some state courts have been phased out while others have continued to exercise some of these federal powers.

¶1-030 Referral of powers

A further aspect of the Constitution which is of importance in these areas is s 51(xxxvii). It empowers the federal parliament to exercise legislative power in relation to matters referred to it by the parliaments of the states or any of them. That power was exercised in relation to children by all of the states (except Western Australia) between 1986 and 1990.

The terms of the referral were:

- “(a) the maintenance of children and the payment of expenses in relation to children or child bearing;
- (b) the custody and guardianship of, and access to, children”.

See, for example, *Commonwealth Powers (Family Law — Children) Act 1986* (NSW).

This was done to overcome an acute problem which had developed by that time, namely, that in a series of cases, the High Court had concluded that the Commonwealth marriage and divorce powers applied only to children whose parents were or had been married. This created an unsatisfactory dichotomy, namely, that for children of a marriage, proceedings could only be taken within the federal family law structure; whereas for ex-nuptial children (including stepchildren and other children who may have formed part of a family household), proceedings could only be taken in a state or territory court.

The powers in relation to adoption of children and child protection were not transferred. There remain overlaps between these two state/territory powers and the children powers of the Commonwealth (see ¶1-180–¶1-190) and, in addition, legislation about domestic violence may be enacted by both the Commonwealth and the states/territories, and the latter’s family provision legislation and the Commonwealth’s property and maintenance legislation create further complications (see ¶1-200).

Western Australia did not join in the referral of powers. Those powers are vested in its state Family Court alongside the powers vested in it under the Commonwealth legislation and other Western Australian family law powers. In practical terms this creates no difficulty in Western Australia, except that appeals from the Family Court when it is exercising state jurisdiction go through the state appeal process. When it exercises Commonwealth jurisdiction, the appeal process is provided in the *Family Law Act 1975* (Cth) (FLA). Legislation generally ensures that the Western Australian powers apply only within that state. Otherwise, Western Australia has the closest in Australia to an integrated legislative and court structure.

A further matter relating to the referral of powers should be noted at this stage and is dealt with in more detail at ¶1-120. This relates to the “welfare” powers in respect of children which have always been part of the inherent jurisdiction of the state supreme courts.

More recently, most Australian states referred the power with respect to property settlement, spousal maintenance and financial agreements for de facto couples to the Commonwealth and these matters are now primarily dealt with by Pt VIIIAB FLA.

¶1-040 Constitution difficulties

When the marriage and divorce powers came to be exercised by the Commonwealth difficulties inherent in them became apparent. The marriage power was given a wide interpretation by the High Court in *Attorney-General (Vic) v The Commonwealth (Marriage Act case)*.¹ It rejected the view that that jurisdiction related only to the circumstances of a marriage and adopted the much wider view that it covered all matters sufficiently connected with a marriage. That includes the powers to make laws with respect to the property and maintenance of the parties to a marriage and about the custody, guardianship and maintenance of children of a marriage.

The divorce power created some difficulties, particularly in relation to what was encompassed by the terms “matrimonial cause”, “parental rights” and “infants”. Ultimately a series of decisions of the High Court² has over time created a settled position in relation to the scope of jurisdiction under the *Family Law Act 1975* (Cth). The end result, which is described in more detail at ¶1-050 is unsatisfactory, but is incapable of serious change except by amendment to the Constitution or referral of powers by the states.

¶1-050 Family Law Act 1975

The *Family Law Act 1975* (Cth) (FLA) is the central legislative provision in Australia relating to family law. Enacted in 1975, it sets out in detail its wide jurisdiction. It provides for the establishment of the Family Court of Australia and for the establishment of state family courts (taken up only by Western Australia), and provides that those courts, and some state courts, and the Federal Circuit Court, with jurisdiction in relation to some or all of its provisions.

It also makes provision for non-court-based services, including the extensive use of reconciliation, mediation, arbitration and family dispute resolution, and the use of family consultants.

Jurisdiction under the FLA is delineated by the definitions of “matrimonial cause” and “de facto financial cause” in s 4 to cover the following:

- divorce and nullity of marriage
- a declaration as to the validity of a marriage, divorce or annulment

¹ *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529.

² *Russell v Russell*; *Farrelly v Farrelly* (1976) FLC ¶90-039; *Fountain v Alexander* (1982) FLC ¶91-218 and *Re F*; *Ex parte F* (1986) FLC ¶91-739.

- property adjustment
- maintenance of a party
- injunctions, and
- enforcement.

Part VII of the FLA separately confers jurisdiction to make parenting orders and child maintenance orders in cases where the child support legislation is excluded. Part XIII AA of the FLA confers jurisdiction in proceedings under the Hague Convention on child abduction and other international conventions and agreements.

The courts which may exercise some or all of this jurisdiction are:

- Family Court of Australia
- Family Court of Western Australia
- the Supreme Court of the Northern Territory
- the Federal Circuit Court of Australia, and
- state and territory courts of summary jurisdiction.

The details of the jurisdiction of each court is set out below.

Principles to be applied

Section 43 of the FLA provides that courts exercising jurisdiction under the FLA shall have regard to:

- “(a) the need to 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;
- (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;
- (c) the need to protect the rights of children and to promote their welfare;
- (ca) the need to ensure protection from family violence; and
- (d) 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.”

In addition, Pt VII provides detailed provisions relating to the objects and principles to be applied in proceedings relating to children.

Delegation

The Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia have extensive powers to delegate most of their powers to registrars.

¶1-060 Further Commonwealth bases of jurisdiction under the Family Law Act 1975

Further bases of jurisdiction under the *Family Law Act 1975* (Cth) (FLA) are or were:

- accrued jurisdiction
- associated jurisdiction
- implied or inherent jurisdiction
- cross-vesting, and
- corporations power.

¶1-070 Accrued jurisdiction

This jurisdiction (at times referred to as the “pendent” jurisdiction) arises from the term “matter” (a justiciable controversy) in s 76 and 77 of the Constitution, relating to the jurisdiction of courts, and the use of that term in the *Family Law Act 1975* (Cth) (FLA) provisions that confer jurisdiction on the Family Court and on the Federal Circuit Court.

The effect is that, if the Family Court has jurisdiction in a matter, that jurisdiction extends to the resolution of the whole matter embraced by the controversy. It covers matters otherwise outside federal jurisdiction but the resolution of which form an integral part of the resolution of the federal matter. They are usually issues which are not severable in practical terms and arise out of the same sub-stratum of facts.

The essential element is that there is a sufficiently close connection between the two controversies, this being ultimately a matter of “impression and practical judgment”.³ This jurisdiction is to be contrasted with the associated jurisdiction (referred to at ¶1-080), in that accrued jurisdiction relates to an inclusion of a non-federal matter whereas the associated jurisdiction relates to the inclusion of a federal matter.

The decision whether to exercise the power is a matter of discretion involving a number of factors, including the closeness of the issues and the more convenient forum. Where the court takes up accrued jurisdiction it may make such orders as are appropriate and necessary to determine both the family law issues and the accrued issues.

In practical terms, this jurisdiction is largely confined to family law property issues in which a third party has or is claimed to have an interest (a state matter). The determination of both issues is usually necessary in order to adequately deal with the family law proceedings.

Between 1986 and 1999, this jurisdiction was largely overshadowed by the cross-vesting scheme which was much wider (see ¶1-100). It is important to note, that while the accrued jurisdiction fills part of the void left by the demise of cross-vesting, it is not a substitute for it and is more confined. It should also

³ *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) ATPR ¶40-197.

be noted that it is not a freestanding jurisdiction. There must be a genuine FLA proceeding in existence in the court before a state issue can be attracted.

¶1-080 Associated jurisdiction

Section 33 of the *Family Law Act 1975* (Cth) (FLA) gives to the Family Court (and the Federal Circuit Court) jurisdiction in relation to federal matters not within the FLA, but which are sufficiently associated with that court's jurisdiction.⁴

The jurisdiction is limited in a number of respects. First, it is limited to matters which arise under other Commonwealth laws. It does not apply to state laws (which may be picked up by the accrued jurisdiction) and probably not to areas where the Commonwealth could have but has not legislated.

Secondly, the two matters must be sufficiently associated. This is a question of degree depending upon the matters arising out of substantially the same or closely connected facts.

Thirdly, it is not a freestanding jurisdiction. There must be a genuine FLA proceeding in existence which attracts the associated federal matter.

¶1-090 Implied or inherent power

All courts, including courts of limited jurisdiction, have, in addition to the powers expressly given to them by statute, powers which are to be implied from their existence as a court or which are inherent in the circumstance that it is a court. The terms "implied" and "inherent" are largely used interchangeably, although it may be that the former is more appropriate to courts of limited jurisdiction.

This jurisdiction involves powers which are incidental to or necessary for the proper functioning of the court as a court, to protect itself from abuse of its procedures, to avoid injustice, or to make its express powers more effective.

It is not possible to define its ambit in absolute terms but the following examples are illustrative (a number of them are now to be found in express provisions in the rules of the courts):

- granting an adjournment
- granting amendments to an application or pleadings
- setting aside a subpoena
- setting aside ex parte or default orders or orders otherwise obtained in breach of natural justice
- correcting an error in an order which arises from a slip or accidental omission
- dismissing or staying an action as frivolous or vexatious or as not disclosing a reasonable cause of action, or where there is a want of prosecution or a failure to comply with the rules or previous orders

4 Ibid.

- having regard to pending proceedings in a court in another country where the proceedings in the Australian court constitute a “clearly inappropriate forum” (see ¶1-130), and
- establishing costs, including lawyer and client costs.

Example

***Re Colina; Ex parte Torney* (1999) FLC ¶92-872**

Proceedings for contempt of court, often referred to as part of the implied or inherent power of a court may, so far as federal courts are concerned, have a more specific source. In *Re Colina; Ex parte Torney*, several members of the High Court in that appeal, after referring to express statutory provisions in the FLA relating to contempt, said that those provisions “should be read as clarifying an attribute of the judicial power of the Commonwealth which is vested in [the relevant courts] by s 71 of the Constitution.”

¶1-100 Cross-vesting

The cross-vesting scheme between the states, territories and the Commonwealth came into operation in July 1988. The problem which it was directed to was that, with the establishment of federal courts alongside state courts and the increased intrusion by Commonwealth legislation into, in particular, commercial areas, there were issues as to which legislation applied and to what extent and also which court, state or federal, was appropriate. The latter circumstance led at times to proceedings being instituted in both sets of courts.

The problems were mainly in commercial areas but it also had relevance in family law, for example, the circumstance that proceedings by non-married couples relating to their children had to be heard under the *Family Law Act 1975* (Cth) (FLA), whereas proceedings relating to their property had to be heard in a state court. In addition, there were significant forum conflicts between the FLA and state and territory child protection legislation.

The Constitution permits the federal government to invest state courts with federal jurisdiction, and there are no particular difficulties about the transfer of proceedings as between federal courts. The problem was whether federal courts could be invested with state jurisdiction. If so, a decision could readily be made as to which was the appropriate law and forum in these problem areas.

The cross-vesting legislation proved very beneficial. In family law it enabled the Family Court to hear not only the ex-nuptial child proceedings but, by transfer from the state courts, the property proceedings at the same time. It also enabled state child protection proceedings to be transferred to the Family Court where that latter court already had proceedings before it relating to the child (although this arrangement was not utilised frequently).

The High Court in *Re Wakim; Ex parte McNally*,⁵ held unconstitutional that part of the scheme which provided cross-vesting of state jurisdiction to federal courts. This took away the main thrust of the legislation. However, a number of aspects of cross-vesting remain, namely:

- cross-vesting of the jurisdiction of the Federal Court and the Family Court to the supreme courts of each state and territory and to each other
- cross-vesting of jurisdiction between the supreme courts of the states and territories
- cross-vesting of the jurisdiction of the supreme courts of the states and territories to the Family Court of Western Australia, and
- cross-vesting of the jurisdiction of the supreme courts of the territories to the Federal Court and the Family Court.

Given much court business under the FLA is conducted in the Federal Circuit Court, it is important to note that the cross-vesting legislation does not refer the Federal Circuit Court as a court to which proceedings can be transferred. This means that while proceedings in the Federal Circuit Court can be transferred to state supreme courts, the reverse does not apply.

The enactment of the *Corporations Act 2001* (Cth) (see ¶1-110), which vested jurisdiction in both federal and state courts directly, has largely overcome the difficulties in the commercial area.

In addition, the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* (Cth) was passed about the same time as the cross-vesting legislation. It provides for the transfer of proceedings from the Federal Court to the Family Court. However, this legislation has rarely been used.

¶1-110 Corporations Act 2001

This legislation followed the decision of the High Court in *Re Wakim; Ex parte McNally*,⁶ which held invalid important aspects of the cross-vesting scheme and the *Corporations Act 2001* (Cth) (CA) (see ¶1-100). Following a referral of these powers by the states/territories, the CA created a uniform national scheme of federal legislation in that area.

That is, the jurisdiction in respect of civil matters arising out of the CA is conferred on the Federal Court, supreme courts of the states, (and lower courts of each state), the Northern Territory and the Australian Capital Territory, the Family Court of Australia and the Family Court of Western Australia.

Under the cross-vesting scheme and the CA, there are quite specific provisions relating to the transfer of these proceedings between various courts. A matter which is pending in the Federal Court or in a supreme court may be transferred to another court, including the Family Court, where it appears that, having regard to the interests of justice, it is more appropriate for the proceedings to be determined by that latter court.

5 *Re Wakim; ex parte McNally* [1999] HCA 27.

6 *Ibid.*

However, where there are relevant pending proceedings in the Family Court, those proceedings must be transferred to the Federal Court or to a supreme court where the Family Court is satisfied of certain criteria.

Thus, it would be unusual for a CA issue to go ahead in the Family Court; although it does occur from time to time, particularly where the corporations issue forms a small but important part of the overall litigation in that court.

¶1-120 Welfare jurisdiction and special medical procedures

The supreme courts of the states, as courts of general jurisdiction, have always been able to exercise the welfare jurisdiction in relation to children and other persons with a disability. This arose from the prerogative power of the Crown to intervene to protect a person with a disability. Gradually that power evolved in England to the chancellors and chancery courts and later in Australia to the supreme courts.

This is a wide-ranging jurisdiction, which is difficult to define with precision. Originally, the *Family Law Act 1975* (Cth) (FLA) contained no welfare power, and it would seem that the state courts continued to have this power over all children. However, the 1983 amendments to the FLA provided that, in addition to its powers in relation to guardianship and custody, the Family Court had jurisdiction in relation to the “welfare” of a child.⁷ This was regarded as granting to that court power similar to the welfare power of the supreme courts, except that it only applied to children of a marriage or former marriage. From 1986, the various states (except Western Australia) referred their powers in relation to children to the Commonwealth but in terms confined to “the custody and guardianship of and access, to children” without reference to “welfare”.

The consequence was that the Family Court’s welfare power continues to be confined to children of a marriage or former marriage. The states’ supreme courts continue to have this power in relation to ex-nuptial children, and it remains an uncertain question whether they continue to possess that jurisdiction in relation to children of a marriage or former marriage.

The decision of the High Court in *Minister for Immigration & Ethnic Affairs, Multicultural & Indigenous Affairs v B*⁸ (a migration case) made clear that the operation of the Family Court’s welfare power is confined to areas involving the parental responsibilities of the parents for that child. This is so because the ambit of the jurisdiction that the legislation can provide is defined by the Constitution, namely marriage and divorce. There is no separate welfare head of power. It does not bind third parties, and, in particular, that decision made

7 *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s case)* (1992) FLC ¶92-293 and *P v P* (1994) FLC ¶92-462.

8 *Minister for Immigration & Ethnic Affairs, Multicultural & Indigenous Affairs v B* (2004) FLC ¶93-174.

clear that in that case the jurisdiction did not extend to the Family Court determining the validity of the detention of a child of marriage or to make orders directed to third parties exercising their duties under the *Migration Act 1958* (Cth).

An important aspect of the court's welfare jurisdiction is the authorisation of special medical procedures. The early cases in Australia related to the specific issue of the sterilisation of intellectually handicapped children,⁹ but the power can apply to a wide range of complex medical questions, including gender reassignment of a teenage child, cardiac surgery on a child in the absence of parental consent, and, as UK cases show, surgery to separate conjoined twins.

It seems probable that the major developments in the welfare jurisdiction of the Family Court will be in these areas, although it is subject to the limitations referred to above and does not correspond fully with the ambit of the original welfare jurisdiction.

¶1-130 Connection with the jurisdiction

As a matter of comity between nations, the laws of most countries require a connection between that country and litigation in its courts. This is particularly important in family law because decisions in this field can affect the status of the parties and the children, and need to attract recognition in other countries.

The *Family Law Act 1975* (Cth) (FLA) has different criteria for proceedings as follows:

- Proceedings for divorce require that the applicant be:
 - an Australian citizen
 - domiciled in Australia, or
 - ordinarily resident in Australia and been so resident for one year immediately preceding the institution of the proceedings.
- Proceedings for a declaration as to the validity of a marriage, divorce or annulment require:
 - either party to the marriage to be an Australian citizen
 - either party to be ordinarily resident in Australia, or
 - either party to be present in Australia.

At the time a declaration of the existence of a de facto relationship is made, the court must be satisfied that one or both of the parties were ordinarily resident in a participating jurisdiction when the primary proceedings were commenced (s 90RG). A declaration as to property rights or an order as to the alteration of property interests requires the geographical requirements of s 90SK(1) to be met. A maintenance order can only be made if the court is satisfied that the

⁹ *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) FLC ¶92-293 and *P v P* (1994) FLC ¶92-462.

geographical requirements of s 90SD (repetitive of s 90SK) are met (s 90SD(1)). The requirements are:

- either party was ordinarily resident in a participating jurisdiction when the declaration or order was made, and
- that either both parties were ordinarily resident in participating jurisdictions during at least a third of the relationship or the applicant made substantial contributions in relation to the de facto relationship under s 90SM(4)(a) to (c).

Two or more people can make a Pt VIIIAB financial agreement as long as the parties are ordinarily resident in a participating jurisdiction when they make the agreement (s 90UA).

In proceedings relating to children, the FLA has particular requirements, namely that:

- the child is present in Australia
- the child is an Australian citizen or ordinarily resident in Australia
- a parent of the child is an Australian citizen or is ordinarily resident in Australia or is present in Australia
- a party to the proceedings is an Australian citizen, is ordinarily resident in Australia and is present in Australia, or
- where in accordance with a treaty, arrangement or the common law rules of private international law, it is appropriate for a court to exercise jurisdiction.

Thus, the connection with the jurisdiction for proceedings relating to children is wide. But a particular limitation is that a court of the Northern Territory must not hear such proceedings unless at least one of the parties was ordinarily resident in the territory at the time the proceedings were instituted. The Family Court of Western Australia is confined to hearing proceedings involving children located within that state.

Any other proceedings (other than some ancillary proceedings) require a party to be:

- an Australian citizen
- ordinarily resident in Australia, or
- present in Australia.

However, the above is subject to the following:

- Parenting orders may be made in favour of a person who is not a party to the proceedings.
- Proceedings under the Hague Convention on Child Abduction are instituted in Australia by the Central Authority which is in effect acting for the relevant parent but who is not a party to those proceedings and is usually overseas.
- There is a “clearly inappropriate forum” principle. This relates to proceedings that have been validly instituted in Australia, but where there are existing or anticipated proceedings on the same subject matter

in the court of another country. If the Australian court considers that it is a clearly inappropriate forum (essentially because the proceedings have a much closer connection with the court of the other country), it may stay or dismiss its proceedings. The decision of the High Court in *Henry v Henry*¹⁰ is a striking example. The High Court ordered the stay of Australian divorce proceedings instituted by the husband who was domiciled in Australia because there were anticipated proceedings relating to divorce and property in European courts to which the parties were more closely connected.

- A court may decline to exercise jurisdiction where it considers that it would be futile to act. Common examples include proceedings relating to property which is, or a child (other than a convention child) who is, in another country and where Australian orders will not be efficacious.
- The FLA gives power to courts under the FLA to transfer proceedings to another Australian court having jurisdiction under that Act where there is a pending proceeding relating to the same subject matter.
- A court has power to stay or dismiss proceedings that it considers to be frivolous or vexatious or which disclose no reasonable cause of action or where there has been a want of prosecution or a failure to comply with rules or previous orders.

¶1-140 Marriage Act 1961

The *Marriage Act 1961* (Cth) (MA) is largely directed to uniformity in relation to marriages in Australia. Up to the time of the MA's enactment in 1961, each state and territory had its own legislation. In addition, the MA covers the following:

- marriageable age
- void marriages
- legitimation of children, and
- offences.

Certain judges and magistrates are empowered to exercise powers within these areas — judges of the Family Court of Australia and the Family Court of a state, a judge of the supreme court of a territory and certain state/territory magistrates.

Their jurisdiction involves the following:

- A person who has attained the age of 16 years but has not attained the age of 18 years may apply for an order authorising him or her to marry a person of marriageable age. The circumstances must be exceptional or unusual.
- A minor may apply for consent to marry in place of the consent of a relevant person.
- A person may apply for a declaration as to the legitimacy.

¹⁰ *Henry v Henry* (1996) FLC ¶92-685.

In addition:

- The MA defines the grounds upon which a marriage is a nullity. It abolishes the previous distinction between a void and a voidable marriage. The proceedings are brought under the *Family Law Act 1975* (Cth) (FLA).
- The FLA also provides for applications for a declaration of the validity of a marriage, divorce or annulment.

¶1-150 Child support

A major aspect of family law is the maintenance of children (more recently referred to as “child support”). Historically this jurisdiction was regulated by the laws of the colonies or states and administered by the courts of summary jurisdiction (except when associated with a divorce of that child’s parents).

The *Family Law Act 1975* (Cth) (FLA) made provision for child support, but that jurisdiction was confined to children of a marriage or former marriage. It is only with the referral of powers relating to children by the states to the Commonwealth (except Western Australia), from 1986, that the Commonwealth child support legislation can cover all children (subject to the exceptions referred to below).

Shortly after that, the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) (the Assessment Act) were passed and significant amendments were made to the FLA.

The Assessment Act is the major Act. It provides the basis for the determination of child support for most children. The *Child Support (Registration and Collection) Act 1988* (Cth) is largely concerned with the registration of assessments and agreements and their enforcement. The FLA covers those children who do not fall within the scope of the Assessment Act (predominantly the maintenance of stepchildren and adult children. Adult children usually must be students completing a course of tertiary study or adult children with a disability in order to be eligible for adult child maintenance). There is a prohibition at s 66E of the FLA against child maintenance orders being made if an application for an assessment under the Assessment Act can be made.

The Assessment Act provides for the assessment of child support administratively by the application of a formula that has regard to, inter alia, the cost of raising children, the number of children and the income of the parties. It also provides for the acceptance of child support agreements.

Liability under the Assessment Act is confined to the parents of the child, including an adopted child and a child born as a result of an artificial conception procedure. The Assessment Act covers all children other than the following:

- a child over the age of 18 years
- a child who is otherwise not an eligible child (as defined)

- a child making an application for child support, and
- a stepchild.

These categories are picked up by the FLA.

Involvement of courts is limited and confined to the following matters:

- entitlement to assessment
- incorrect assessments
- departure orders
- child support other than by periodic amounts
- setting aside child support agreements
- urgent maintenance in very limited circumstances relating to the process of obtaining an assessment, and
- enforcement, including enforcement of child support agreements, and arrears of child support registered for collection by the Commonwealth.

The courts which may exercise this jurisdiction are:

- Family Court of Australia
- Family Court of Western Australia
- Federal Circuit Court
- Supreme Court of the Northern Territory, and
- state and territory courts of summary jurisdiction.

Application for an assessment must be made by an “eligible carer”. At the time the application is made the child must be present in Australia, an Australian citizen or normally resident in Australia. The liable parent must be resident in Australia.

Family Law Act 1975

Once the child support scheme came into operation, the jurisdiction in relation to child maintenance under the FLA was confined to categories which could not be conveniently catered for by the Assessment Act formula. Those categories are referred to above.

The primary liability relates to the parents of the child; however, the FLA provides a limited category where an order may be made in respect of a stepchild.

An application for child support under the FLA may be made by:

- either or both parents
- the child
- a grandparent, and
- any person concerned with the care, welfare or development of the child.

The jurisdiction may be exercised by:

- Family Court of Australia
- Family Court of Western Australia

- Supreme Court of the Northern Territory
- Federal Circuit Court, and
- the courts of summary jurisdiction of the states/territories.

Child Support (Registration and Collection) Act 1988

The *Child Support (Registration and Collection) Act 1988* (Cth) is mainly concerned with administrative matters — the registration and collection of child support liabilities. The registrar is given a wide range of collection powers and is required to make a wide range of decisions.

The registrar may make a departure prohibition order that prevents a child support payee who is in default in payments from leaving Australia.

Reviews and appeals of child support decisions

The Assessment Act has an internal review process of decisions. If not satisfied with the review by a senior officer, reviews of some decisions go to the Administrative Appeals Tribunal as a hearing *de novo*.

Appeals from administrative review decisions go to the Federal Circuit Court but on a question of law only and, as such, generally cannot address errors in factual findings except in unusual circumstances.

¶1-160 Australian Passports Act 2005

The *Australian Passports Act 2005* (Cth) (the Passports Act) regulates the issue of passports for Australian citizens. In relation to a child, this can intercept with family law in that there may be a family dispute about the child, especially a risk of unlawful removal, or a wrongful refusal by a person to consent to the other parent obtaining a passport.

The Passports Act provides that the minister shall not issue an Australian passport to a child unless:

- “(a) each person who has parental responsibility for the child consents to the child travelling internationally; or
- (b) an order of a court of the Commonwealth, a State or a Territory permits the child to travel internationally” (s 11(1)).

In addition, the *Family Law Act 1975* (Cth) (FLA) empowers courts within its jurisdiction to grant an injunction restraining a child from being taken overseas or obtaining a passport, or it may order a party to consent to the issue of a passport for the child or otherwise provide for that to occur. The FLA also provides that, where there is a possibility or threat that a child may be removed from Australia, a court may make an order that the passport of the child or any other person concerned be delivered to the court.

The FLA also imposes obligations on the owners of aircraft and ships to aid in the prevention of a wrongful removal of a child.

¶1-170 Bankruptcy Act 1966

A number of conflicts arise from the interplay of the *Family Law Act 1975* (Cth) (FLA) and the *Bankruptcy Act 1966* (Cth) (BA) — essentially a clash in priorities for claims on the bankrupt's estate between the bankrupt's creditors and the non-bankrupt spouse.

These include the nature of any claim by the non-bankrupt spouse to an interest in property (which may be in the name of the bankrupt and has, as a result of the bankruptcy, vested in the trustee in bankruptcy), arising out of equitable or other interests or contributions to that property during the marriage whether under the general property law provisions or the FLA or otherwise.

These problems may also include the reverse, namely claims by the trustee in bankruptcy that property had been transferred to the non-bankrupt spouse by the bankrupt so as to defeat the provisions of the BA.

The *Bankruptcy and Family Law Legislation Amendment Act 2005* amended the BA and the FLA to address some of these problems. (These matters are dealt with in more detail in Chapter 15.) Some of the more significant changes include the following:

- An act of bankruptcy is committed if the debtor becomes insolvent as a result of the transfer of property under a financial agreement under the FLA to which that debtor is a party.
- The Family Court of Australia has jurisdiction in bankruptcy where there are family law and bankruptcy proceedings at the same time and involving the same parties. The Federal Circuit Court already had joint jurisdiction with the Federal Court of Australia under the BA.
- The general rule that the property of a bankrupt vests in the official trustee in bankruptcy is subject to any order which a court may make under Pt VIII of the FLA in relation to property settlement or spousal maintenance.
- The definition of “matrimonial cause” and the property provisions have been amended so as to provide that, in property proceedings, the court may make an order altering the interests of parties to the marriage in property and also altering the interests in property vested in the trustee in bankruptcy.
- In property or maintenance proceedings, the bankruptcy trustee has a wider right to be joined as a party.
- In making an order for maintenance or property, the court must have regard to the effect of any proposed order on the ability of a creditor to recover the creditor's debt.

The BA has been further amended by the *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007*, which provides for the recovery of superannuation contributions made with the intention to defeat creditors. This is dealt with in more detail in Chapter 15.

The courts which may exercise jurisdiction in proceedings involving a bankruptcy issue are:

- the Family Court of Australia under the 2005 amendments, or as part of its associated jurisdiction
- the Family Court of Western Australia under the 2005 amendments to the FLA
- the Federal Circuit Court under its general bankruptcy jurisdiction and the 2005 amendments and associated jurisdiction, and
- the Federal Court of Australia under the BA provisions.

¶1-180 Adoption

Legislation relating to the legal adoption of children was introduced into the colonies/states over a number of years from the 1880s. From the 1960s it has largely been uniform. There was never any contemplation at the time of the Constitution that this power would be assigned to the Commonwealth, but there remain important overlaps between state/territory adoption law and Commonwealth family law which need to be noted (see Note box below).

Note

Overlaps between state/territory adoption law and Commonwealth family law

- Section 122 of the Constitution empowers the Commonwealth to make laws about, inter alia, adoption for the territories. It has not exercised that power, and both the Australian Capital Territory and the Northern Territory have their own adoption legislation.
- Section 31 of the *Family Law Act 1975* (Cth) (FLA) confers jurisdiction on the Family Court only with respect to the “adoption of children”.
- The effect of an adoption order is that the child becomes the child of the adoptive parents and ceases to be the child of the birth parents. Other than in exceptional circumstances, an adoption order cannot be discharged. Subject to one exception, referred to hereunder, the effect of the adoption order is to bring to an end any previous parental orders relating to the child. In contrast, parenting orders under the FLA have no effect on the parental relationship, are not final, and are capable of variation or discharge.
- The FLA defines a “child” to include an adopted child. Once adopted, a child attracts the full jurisdiction of the FLA in the same way as would the birth of a natural child to those (adopting) parties. A consequence is that applications for parenting orders for that child must be made under the FLA. Usually this would be between the adoptive parents themselves, but an application can be made by any person having a relevant interest in the child, which may include a birth parent or a relevant state department.
- Side by side with that is the circumstance that, under the state/territory adoption legislation, an adoption order may include rights of contact between the child and the birth parents (or others); or the court may refuse the adoption order but make a guardianship order. Putting aside the

question of the validity of that latter provision, there is obvious scope for conflicts of jurisdiction between those orders and orders made under the FLA.

- Particular provisions in the FLA relate to step-parent adoptions. In such a proposed application (to the relevant state/territory court), the FLA enables (but does not compel) such persons to apply to the Family Court, the Supreme Court of the Northern Territory or the family court of a state for leave to commence those adoption proceedings. If the court grants leave and an adoption order is made, the FLA provides that the child ceases to be a child of the former marriage, and any existing parenting orders cease. If leave has not been granted the child continues to be a child of that former marriage, and any parenting orders continue.

The courts in Australia which may make adoption orders are:

- some of the supreme courts of the states/territories
- county/district courts of most states
- Youth Court of South Australia
- Magistrates courts of Northern Territory and Tasmania, and
- Family Court of Western Australia.

¶1-190 Child protection

Legislation on child protection was first enacted in the colonies in the latter part of the 19th century, but the possibility of the federal parliament being involved was not discussed in the debates leading up to the Constitution.

Section 122 of the Constitution empowers the Commonwealth to make laws about child protection for the territories. It has not exercised that power, and is unlikely to do so, and both the Australian Capital Territory and the Northern Territory have enacted their own child protection legislation.

Once the *Family Law Act 1975* (Cth) (FLA) and the Family Court came into operation, it was inevitable that there would be both legal and practical clashes between the two sets of legislation and courts.

Essentially, the state/territory child protection legislation operates when the relevant department considers that a child is “at risk” with his or her family or other carers. If the relevant court (in most states, a specialised children’s court) is satisfied that this is so, it may order the child’s removal into the guardianship of the department, which in turn may place the child with foster parents or in other forms of care. Alternatively, that court may grant guardianship or make orders in relation to the child to one parent (exclusive of the other) or to a third party. Orders for time and communication between the child and the parents may be made.

That regime will obviously cut across any previous orders under the FLA about that child and may represent a barrier to subsequent FLA orders. In practical terms, this often leads to considerable uncertainty and confusion.

The critical issue is the question of the conflict of jurisdictions. Its resolution is to be found in the Constitution. The states have jurisdiction in relation to this

matter but may be overruled by Commonwealth legislation provided that the Commonwealth legislation is valid — that is, within constitutional power.

The legislation of the states/territories contains no provisions which deal with these difficulties. The Commonwealth, by a series of enactments and amendments to the FLA, sought to give to FLA courts power to make some orders in relation to a protected child. However, each attempt was invalidated by the High Court as not being a law with respect to marriage or divorce but being a general law relating to children. The current position is that a court having jurisdiction under the FLA must not make an order in relation to a child who is under relevant state care unless the order is expressed to come into effect when the child ceases to be under that care or with the written consent of the state/territory department (s 69ZK FLA).

The state/territory child protection legislation contains mandatory reporting provisions — a legal obligation on nominated persons to report their belief that a child is at risk. These provisions apply to persons who are litigants under the FLA as with anybody else but they cannot compel federal courts to provide that information. However, the FLA now requires or allows designated officers of the FLA courts to provide that information to appropriate welfare authorities.

On the other hand, provisions in state/territory legislation dealing with the confidentiality of notifications to the department have usually prevented the FLA courts obtaining that information.¹¹ Amendments to the FLA by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* seek to address that by empowering courts under the FLA in child-related proceedings to require a prescribed state or territory agency to provide a wide range of information and documents, including notifications, assessments and reports. The legislation provides that state or territory laws to the contrary have no effect. If valid, this would enable a much wider transfer of information than has previously been permissible.

¶1-200 Domestic/family violence

There has been a greater recognition in recent times of the pervasiveness of domestic violence, and its impact on families and society.¹² There is both state/territory and federal legislation on this topic, and this can give rise to conflicts of jurisdiction and power.

Each of the states and territories has extensive legislation relating to this topic as part of its general law and order powers. The legislation is generally wide sweeping and encompasses a number of relationships and situations beyond the “family”. Its powers are wide, including restraining a party from being in or approaching the former home or other places.

The provisions of the *Family Law Act 1975* (Cth) (FLA) cover less extensive ground. Section 68B of the FLA empowers the court to grant such injunctions as it considers appropriate for the welfare of a child or a parent of a child,

11 *Northern Territory v GPAO* (1999) FLC ¶92-838.

12 Refer to Chapter 11, Children and Relationship Factors, for detailed commentary.

including an injunction for the personal protection of the child or other relevant person, and an injunction restraining a party from entering upon or remaining at particular places including the place of residence.

Obviously significant areas of conflict can arise out of this dual system. The first is inconsistency between the orders themselves relating to personal protection and the like, and the second is inconsistency between state/territory protection orders and federal orders relating to a child spending time with a party.

Section 109 of the Constitution provides that, in the event of such an inconsistency, the federal legislation prevails. However, there are a number of reasons why the federal parliament has sought to maintain as far as possible the integrity of the state/territory system, and avoid inconsistency. In particular, proceedings under the state/territory legislation are much quicker and less expensive and are more readily available and are much more frequently used. Also, enforcement is easier, more efficient, and cheaper.

The FLA has sought to meet this problem of conflict in two ways. First, s 114AB seeks to avoid any inconsistency with the state/territory legislation and, in particular, to avoid a situation where there are applications under both state and federal legislation.

In relation to child-related injunctions, new provisions were introduced in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments. Their purpose was to resolve inconsistencies between the different legislation and achieve the principles set out in the FLA, namely, ensuring that a child has a meaningful relationship with both parents and ensuring that the child is protected from harm.

This is done in two ways. Where a court makes an order under the FLA providing for a child to spend time with a person, and that order is inconsistent with a state order, obligations are imposed on the court to explain to the parties the effect and consequences of its order and how it will be complied with (s 68P).

Secondly, if an application is made for a state/territory family violence order, that state court is empowered to amend an existing parenting order if it is necessary to do so to give effect to the family violence order (s 69ZW).

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* commenced on 7 June 2012. It amended the FLA to provide better protection for children and families at risk of violence and abuse, including a significant extension of the definition of family violence.

In the 2017 Budget, the government announced a trial of domestic violence units in legal centres. Six new specialist domestic violence units will be set up over two years at a cost of \$3.4m.

¶1-210 Family provision

Each state and territory has family provision legislation. Where a person dies, and an eligible person claims that the deceased's will or the intestacy failed to make adequate provision for that person, a state or territory court may order

further or a different provision. The term “eligible person” (or similar term) has a wide meaning in the various legislative provisions.

In 1983, s 79 of the *Family Law Act 1975* (Cth) (FLA) was amended by the *Family Law Amendment Act 1983* to provide that where property proceedings under s 79 have been instituted, but not completed, and a party to the marriage dies, those proceedings may be continued for or against the legal personal representative of the deceased person. If the court is of the opinion that it would have made an order if the deceased had not died, and that it was still appropriate to make an order, it may do so.

The validity of this provision was upheld by the High Court in *Fisher v Fisher*¹³ and in *Smith v Smith*,¹⁴ where the High Court held that there was no inconsistency between the state/territory and the federal provisions, and that the state/territory provisions could not form part of the accrued jurisdiction of the Family Court.

Thus the two provisions continue to exist side by side. Sections 79 and 90SM of the FLA are confined to proceedings between husband and wife or spouse parties; but, in that case, the surviving spouse may continue the property proceedings or institute family provision proceedings.

¶1-220 De facto property and maintenance

The powers of the Family Court to make orders by way of property settlement have applied from 1 March 2009 to all de facto couples who have separated on or after that date and who meet the various jurisdictional and qualifying conditions (set out in ¶1-120 above), with the exception of de facto couples in South Australia, where the powers have applied from 1 July 2010, and Western Australia. The result is near uniform law across Australia (Western Australia’s *Family Court Act 1997* is for all intents and purposes identical to the *Family Law Act 1975* (Cth) (FLA)).

The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (the amending Act) inserted new provisions into the FLA and unified the law relating to de facto property. The amending Act introduced significant reforms to allow de facto couples access to the federal family law courts on property and spouse maintenance matters upon relationship breakdown. De facto couples now have similar property and maintenance rights to legally married couples under the FLA.

Section 4(1) of the FLA defines “de facto relationship” as having the meaning set out in s 4AA(1). A de facto relationship is defined in s 4AA(1) as:

“A person is in a **de facto relationship** with another person if:

- (a) the persons are not legally married to each other; and
- (b) the persons are not related by family (see subsection (6)); and

¹³ *Fisher v Fisher* (1986) FLC ¶91-767.

¹⁴ *Smith v Smith* (1986) FLC ¶91-732.

- (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.”

The circumstances considered under s 4AA(1)(c) may include any or all of the factors referred to in s 4AA(2):

- “(a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;
- (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- (h) the care and support of children;
- (i) the reputation and public aspects of the relationship.”

No particular finding of any circumstance is necessary in deciding the existence of a de facto relationship (s 4AA(3)). In determining whether a de facto relationship exists, a court is entitled to have regard to, and attach weight to, any matters that seem appropriate to the court in the circumstances of the case (s 4AA(4)). Under s 4AA(2)(g), the registration of a relationship under a state or territory relationship register is not definitive. The relationship must be within the definition of a de facto relationship for Commonwealth purposes and this definition may be narrower than the state or territory requirements.

A de facto relationship can exist between two persons of different sexes or between two persons of the same sex, and can exist even if one person is legally married to someone else or in a concurrent de facto relationship (s 4AA(5)).

Section 4AA(1)(b) excludes persons who are related by family from the definition of a de facto relationship. Persons are related by family if one is the child of the other (including an adopted child), one is the descendant of the other or they have a common parent (s 4AA(6)).

¶1-230 Family Court of Western Australia

The *Family Law Act 1975* (Cth) (FLA) contains provisions enabling the establishment of federally funded state family courts. Western Australia was the only state to take up this invitation. Under the *Family Court Act 1997* (WA) (the WA Act), the Family Court of Western Australia was established. Its jurisdiction covers both federal family law matters and state family law matters. In relation to the former, appeals from that court go to the Family Court of Australia, whereas appeals from the latter go to the Supreme Court of Western Australia.

As a consequence of having a state Family Court, Western Australia did not join the other states in the referral of powers relating to children to the Commonwealth and most of the other states and territories in referring powers with respect to de facto heterosexual property disputes.

The WA Act contains the same provisions as are contained in the FLA in relation to reconciliation, mediation, arbitration, and family dispute resolution. Similarly, there are extensive provisions relating to the transfer of proceedings between it and other relevant courts in relation to federal and non-federal family law. Its federal jurisdiction is confined to Western Australia, and, in the same way, the jurisdiction of the Family Court of Australia and the Federal Circuit Court do not encompass Western Australia.

In federal family law, the Western Australian Family Court's jurisdiction is coextensive with that of the Family Court of Australia under the FLA, the *Marriage Act 1961* (Cth) and the child support legislation, and it also has accrued jurisdiction (but not associated federal jurisdiction).

Its non-federal family law jurisdiction includes:

- ex-nuptial children and de facto property and maintenance
- adoptions, and
- child protection (although rarely exercised).

¶1-240 Federal Circuit Court of Australia

The Federal Circuit Court (FCC) was established by the *Federal Magistrates Court Act 1999* (Cth) (now called the *Federal Circuit Court of Australia Act 1999*) and was named, up to 12 April 2013, the Federal Magistrates Court. Its prior establishment had been delayed by doubts whether the appointment of federal magistrates (now referred to as judges) would comply with Ch III of the Constitution. The jurisdiction of the FCC involves not only family law, but a wide range of federal powers exercised by the Federal Court of Australia.

The initial aim seems to have been to provide a court for the hearing of what may be described as less complex matters. But the FCC has developed rapidly since, and its jurisdiction now is very extensive.

In the area of family law, its jurisdiction under the FLA is co-extensive with that of the Family Court of Australia except for applications as to the validity of a marriage, divorce or annulment, and adoption, including applications for leave to commence step-parent adoptions. It enjoys the same jurisdiction as that court under the *Marriage Act 1961* (Cth) and under the child support legislation, with the addition that it may hear appeals against various AAT decisions made under the child support legislation and departure prohibition orders made under the *Child Support (Registration and Collection) Act 1988* (Cth) (a jurisdiction otherwise vested only in the Federal Court). It also has the same jurisdiction as the Family Court in relation to the amendments to the FLA made by the *Bankruptcy and Family Law Legislation Amendment Act 2005*, as well as otherwise having coextensive bankruptcy jurisdiction with that of the Federal Court.

The FCC's family law jurisdiction applies throughout Australia (except Western Australia).

It also has powers similar to those of the Family Court in relation to reconciliation, mediation, arbitration, and family dispute resolution. It has similar powers to delegate nominated powers to registrars.

Its non-family law jurisdiction is very extensive, including:

- administrative law
- bankruptcy
- copyright
- industrial law
- migration, and
- trade practices/corporations law.

There are also protocols between the Family Court of Australia and the FCC which record agreements between the courts where specific kinds of matters are to be determined in one court. This protocol is available on the court websites. It currently provides that generally proceedings are to be commenced in the Federal Circuit Court but that the following kinds of matters would usually be heard in the Family Court of Australia:

- international child abduction
- international relocation
- disputes as to whether a case should be heard in Australia
- special medical procedures (of the type such as gender reassignment and sterilisation)
- contravention and related applications in parenting cases relating to orders which have been made in Family Court of Australia proceedings; which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing
- serious allegations of sexual abuse of a child warranting transfer to the Magellan list or similar list where applicable, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court
- complex questions of jurisdiction or law, and
- if the matter proceeds to a final hearing, it is likely it would take in excess of four days of hearing time.

¶1-250 Supreme courts of the states and territories

Prior to the *Family Law Act 1975* (Cth) (FLA), the supreme courts exercised extensive federal family law jurisdiction. This was continued under the FLA but was gradually phased out so that none of those courts (except the Supreme Court of the Northern Territory) has any jurisdiction under the FLA, child support legislation or the *Marriage Act 1961* (Cth).

For practical reasons (namely, the absence of a continual presence of the Family Court or Federal Circuit Court in the territory), the jurisdiction of the Supreme Court of the Northern Territory under the FLA has continued (but is usually only exercised in matters of urgency or on an interim basis). Similarly, it has jurisdiction under the child support legislation, but in both cases it is subject to the limitation that one of the parties must be ordinarily resident in the territory.

All state and territory supreme courts have the usual non-federal family law jurisdictions, namely:

- de facto property and maintenance
- family provision
- adoption, and
- welfare jurisdiction, at least in relation to ex-nuptial children.

¶1-260 Courts of summary jurisdiction

These courts (now usually designated magistrates courts) have traditionally exercised federal jurisdiction in a large number of areas including family law. This has continued in relation to family law subject to a number of restrictions. They continue to exercise jurisdiction under the *Family Law Act 1975* (Cth) except:

- divorce (other than designated courts of summary jurisdiction in the Australian Capital Territory and Western Australia in respect of undefended divorce proceedings)
- nullity
- declaration as to the validity of a marriage, divorce or annulment, and
- step-parent adoptions.

In reality, these extensive powers are not readily exercised, especially since the expanding presence of the Federal Circuit Court; and, in any event, they are subject to a number of important limitations, such as:

- the property jurisdiction is limited to property not exceeding \$20,000 in value (except by consent)
- jurisdiction in relation to children is limited to non-contested proceedings (except by consent), and
- in territory matters, the parties must be ordinarily resident in that territory.

Courts of summary jurisdiction also have important areas in non-federal family law jurisdiction, namely, domestic violence and child protection (the latter through children's courts).

¶1-270 Summary of the jurisdiction of courts in Australia in family law (federal and non-federal)

No one court in Australia has what might be described as jurisdiction in family law generally. A substantial number of courts, both state and federal, have jurisdiction in respect of one or more aspects of family law. This creates an unsatisfactory situation of overlapping and, at times, conflicting legislation and jurisdictions.

This has largely been brought about by the initial constitutional limitations together with historic developments since. The former has meant that legislative power in this area was divided between the Commonwealth and states/territories. The latter has meant that the Commonwealth's powers were not exercised for a long period of time, and both before and after that state courts had been used. Finally, there is the more recent development of federal family law courts — the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court.

Summary

Family law jurisdiction of each court

In summary form, the jurisdiction of each court having jurisdiction in a significant aspect of family law is as follows.

High Court of Australia

The High Court of Australia is the final court of appeal in relation to all litigation in Australia. However, appeals to that court require the special leave of the High Court and that is normally confined to constitutional issues and issues of general public importance.

Family Court of Australia

- *Family Law Act 1975*
- *Marriage Act 1961*
- child support legislation (other than appeals against departure prohibition orders), and
- *Bankruptcy Act 1966*.

Family Court of Western Australia

Its federal jurisdiction is the same as that of the Family Court of Australia. Its non-federal family law jurisdiction includes:

- ex-nuptial children and de facto property and maintenance
- adoptions, and
- child protection.

Federal Court of Australia

- appeals from departure prohibition orders under the *Child Support (Registration and Collection) Act 1988*, and
- *Bankruptcy Act 1966*.

Federal Circuit Court of Australia

- *Family Law Act 1975*
- child support legislation (including appeals from departure prohibition orders)
- *Marriage Act 1961*, and
- *Bankruptcy Act 1966*.

Supreme courts of the states and territories (other than the Northern Territory)

- family provision
- adoption
- welfare jurisdiction at least in relation to ex-nuptial children, and
- appeals in relation to courts of summary jurisdiction relating to domestic violence and child protection.

Supreme Court of the Northern Territory

In addition to the above, it has jurisdiction (usually only exercised in cases of urgency on an interim basis):

- under the *Family Law Act 1975*
- under the *Marriage Act 1961*
- in child support (but not appeals from departure prohibition orders), and
- in bankruptcy.

Courts of summary jurisdiction

- *Family Law Act 1975* (subject to a number of exceptions and limitations)
- child support (other than departure prohibition orders), and
- *Marriage Act 1961*.

In the non-federal family law field jurisdiction includes:

- domestic violence, and
- child protection (usually through a specialised children's court).

County court — district courts

The original jurisdiction of most of these state courts includes:

- adoption, and
- financial provision.

In addition, they usually have appellate jurisdiction by way of rehearing from decisions of courts of summary jurisdiction in family law matters, namely, domestic violence and child protection.