EVOLVING FAMILIES AND THE CONTINUING JUSTIFICATION FOR RULES PARTICULAR TO THE REGULATION OF FAMILIES

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1. Let's start at the very beginning. The statute that contains the rules particular to the regulation of families in this country is '*An Act relating to Marriage and to Divorce and Matrimonial Causes and, in relation thereto and otherwise, Parental Responsibility for Children, and to financial matters arising out of the breakdown of de facto relationships and to certain other Matters*' – the short title is the *Family Law Act 1975*.

2. The long title, however, tells us some very important things about the particular matters the Act seeks to regulate — marriage, divorce and matrimonial causes; parental responsibility for children whether within a marriage or otherwise, and financial matters arising out of the breakdown of de facto relationships.

3. It will be recalled that the *Act*, which came into force on 5 January 1976, was premised on the need to reform the divorce law to 'eliminate fault, simplify procedures and reduce costs.'[1] It instituted two major changes to Australian divorce law: the introduction of no-fault divorce, (something which is yet to be legislated in the UK with its Divorce, Dissolution and Separation Bill failing to pass before prorogation) and the establishment of a specialist multi-discipline court for the resolution of family disputes. The Act was concerned solely with matters arising within the context of marriage for more than the first three decades of its existence (with the exception of conferring jurisdiction in relation to ex-nuptial children in the late eighties). It was not until 2009 that the Act was amended to confer jurisdiction on the family courts in de facto financial causes.[2]

4. We know what a marriage is — it is defined in the *Marriage Act 1961* (Cth) as 'the union between two people to the exclusion of all others, voluntarily entered into for life.'[3]

5. Nevertheless, for the purposes of proceedings under the *Family Law Act*, a polygamous union in the nature of a marriage entered into in a place outside Australia is deemed to be a marriage.[4]

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1 Kep Enderby, 'The Family Law Act: Background to the Legislation' (1975) 1 *UNSW Law Journal* 10, 15.
2 *Family Law Act 1975* (Cth) Pt V Div 2.
3 *Marriage Act 1961* (Cth) s 5.
4 *Family Law Act 1975* (Cth) s 6.

6. We are also assisted by a definition of 'de facto relationship'. Section 4AA of the *Family Law Act* defines it as being between two persons who are not legally married to each other and who are not related by family and who 'having regard to all the circumstances … [are] a couple living together on a genuine domestic basis'. The circumstances which are indicators of whether a de facto relationship exists, but which are neither essential nor necessary to the conclusion as to the existence of such a relationship are:
    - the duration of the relationship (which for the purposes of some provisions must be at least two years unless there is a child of the relationship);
    - the nature and extent of their common residence;
    - whether a sexual relationship exists;
    - the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
    - the ownership, use and acquisition of their property;
    - the degree of mutual commitment by them to a shared life;
    - whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
    - the care and support of children;
    - the reputation and public aspects of the relationship.

7. I mention that, in Western Australia, the only State to make provision for de facto couples in state legislation, a de facto relationship is defined as 'two persons who live together in a marriage-like relationship'.[5]

8. Both the federal and the Western Australian statutes provide that it does not matter whether either person is legally married to someone else or in another de facto relationship.[6]

9. Despite the statutory definitions, and the jurisprudence that has developed in relation to them, determining whether or not a de facto relationship in fact exists at a relevant point in time is not easy.[7] I will return to this issue.

10. Significantly, there is no definition of 'family' in the *Family Law Act*, although there is a definition of 'family member'. The definition covers a range of relationships based on legal marriage and cohabitation and adoption involving inter-generational (grandparent, parent (including step-parent), child/aunt, uncle, nephew, niece) and intra-generational (siblings (including step-siblings), cousins) relationships.[8]

11. The concept of 'family' in contemporary Australia takes a wide variety of forms. People live together as couples, same-sex or opposite sex, married or not. Some families are comprised of same-sex couples co-parenting with the person or persons who assisted with conception but who are not to be regarded as the legal parent. Some people marry according to the rites of their particular religious faith; others choose civil marriage. Some families are polygamous or polyamorous. Some children are conceived by artificial reproductive technology, some are adopted, others are born of surrogacy arrangements. Aboriginal and Torres Strait Islander notions of family and kinship encompass a wide range of individuals within families. Some families within particular cultural groups live in multi-generational households. Increasingly, some people are 'living together apart'. Adult-siblings may cohabit.

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5 *Interpretation Act 1984* (WA) s 13A(1).

6 *Family Law Act 1975* (Cth) s 4AA(5)(b), *Interpretation Act 1984* (WA) s 13A(3)(b).

7 The complexity is examined by Professors Lisa Young and Robyn Carroll, 'Developments in de facto relationship (family) law in Western Australia' (Paper, Law on the Lounge Conference, Bali, 1–2 June 2019).

8 *Family Law Act 1975* (Cth) ss 4(1AB), 4(1AC).

12. It will be readily observed that not all of these arrangements fall easily into the existing paradigms regulated by the *Family Law Act* with its essential focus on marriage, and those relationships that nevertheless resemble marriage.

13. However, we know that fewer people are marrying. The Australian Bureau of Statistics' (ABS) most recent figures report that Australia's crude marriage rate was 4.6 per 1000 and reveal a steady decline. In 1997, the crude marriage rate was 5.8. The divorce rate is increasing with the crude divorce rate being 2 per 1000. In 2017, there were 49,032 divorces granted in Australia – a 5% increase on the previous year.[9]

14. But although the marriage rate is declining, Australian families are still overwhelmingly constituted by couples. The ABS has recently released its Report on the Australian Labour Force in which it identifies three main types of families:
    - Couple families – based on two people in a couple relationship who usually live together in the same household. Couples can be same-sex or opposite-sex, and their dependants or children may also be members of the couple family if they all reside in the same household.
    - One-parent families – based around a person who is not in a couple relationship with anyone who usually lives in the same household, but has at least one child who usually lives in the household regardless of the age of the child. While couple families can be made up of couples with or without children, one parent families necessarily include children.
    - Other families – defined as a group of other related individuals residing in the same household (eg adult-age siblings). These individuals do not form a couple or parent-child relationship with any other person in the household and are not related to any couple or one-parent families that might also be in the same household. [10]

15. The ABS reports that, in June 2019, there were 7.2 million families, of which 1% of all families are same-sex couples. Of these 7.2 million families, 83% were couple families (of which 43.6% had dependants), 15% were one-parent families (with 83% of those being single mothers), and 2% were classified as 'other families'.[11]

All families				
7,152,600				
Couple families		**One-parent families**		**Other families**
83.1% of all families		14.7% of all families		2.1% of all families
5,946,600		1,053,000		153,000
Couples with dependants	**Couples without dependants**	**One-parent families with dependants**	**One-parent families without dependants**	
43.6% of all couple families	56.4% of all couple families	63.4% of one-parent families	36.6% of one-parent families	
2,594,900	3,351,700	667,800	385,200	

16. In broad terms then, what these numbers show is that there are more families in Australia (54%) without dependent children than those with dependent children.

17. This statistic may, or may not, be important in considering the questions of what it is that family law is trying to achieve in modern society and whether our current law is fit for purpose? As Sir James Munby, the former President of the Family Division of the High Court of England and Wales, has articulated, family law is concerned essentially with three things:

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9 Australian Bureau of Statistics, *Marriages and Divorces, Australia, 2017* (3310.0, 27 November 2018).

10 Australian Bureau of Statistics, *Labour Force, Australia: Labour Force Status and Other Characteristics of Families, June 2019* (6624.0.55.001, 3 October 2019).

11 Ibid.

i. **Status** – it defines the criteria by reference to which, and the circumstances in which a particular status – being married for example – is treated for the purposes of secular law as having been acquired or (in the case of a foreign marriage) is treated as being recognised by our law. It defines the legal attributes of the status, for example, the mutual rights and obligations of a married couple and provides remedies for regulating the relationship of the parties. It defines who are the holders of 'parental responsibility' (whether they be married or not) and provides a mechanism for terminating the status (in the case of marriage, by divorce).
ii. The **consequences of the fracturing** of the family, either because of the breakdown in the relationships within the family or because of the intervention of child protection agencies, and the consequences for the children of the relationship.
iii. The **regulation of the property and finances** of the family, typically following the termination of the relationship whether in life or death.

18. In relation to the consequences of the fracturing of the family, as we are all well aware, they often include allegations of family violence and child abuse, matters that are primarily within the jurisdiction of State and Territory children's courts and criminal courts, although of course the federal family courts have power to grant injunctions and decide allegations of violence within the context of parenting and property disputes. and/or involve the need to exercise jurisdiction. When it comes to regulating that aspect of law with which many families are concerned – namely what happens to property and finances after death, this too is fundamentally a matter of State and Territory succession law – although, again, the federal family courts have power to make orders after death in certain circumstances.

19. These matters highlight further the very narrow scope of the matters regulated by the *Family Law Act*: marriage and divorce; parental responsibility; and financial matters arising out of the breakdown of married and de facto relationships. Against that background, I want to consider whether the manner of that regulation remains appropriate in contemporary Australia.

20. The first question is whether it is time to rethink the issue of the status with which family law (excluding matters of succession for the time-being) should primarily be concerned. At this juncture, it is important to recall s 43 of the *Family Law Act*, which sets out the principles to be applied by the courts. The Family Court, exercising jurisdiction under the Act, is expected to have regard to:

    i. (unless exercising jurisdiction in relation to de facto financial causes), the need to preserve and protect the institution of marriage as the union of two people to the exclusion of all others voluntarily entered into for life;
    ii. 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;
    iii. the need to protect the rights of children and promote their welfare;
    iv. the need to ensure protection from family violence; and
    v. 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.

21. With the exception of the requirement to consider the need to ensure protection from family violence (which was first added to the legislation in 1995 as 'the need to ensure safety from' and found its current legislative form only in 2011), one might observe that the legislative objectives of Australian family law remain focussed squarely on families formed through marriage and which include children. The inclusion of de facto couples within the family law regime a decade ago does not really negate this observation. Indeed, in the course of the current parliamentary debates in the UK in relation to the Cohabitation Rights Bill, one of the most strident objections to the Bill is that cohabiting couples, who have chosen not to marry or enter

into a registered civil partnership, 'will be snared unaware in a trap of laws from which there is no escape...making cohabitation as expensive and legalistic as divorce'.[12]

22. Similar sentiments were expressed by the Family Court of Australia in its submission to the ALRC Inquiry in relation to whether a more prescriptive property settlement regime should be considered. The Court observed that 'many people choose not to get married to avoid the consequences of that status'.[13]

23. Given we know that fewer people are marrying, and that families are evolving in ways that no longer resemble 'marriage-like' relationships, should the relevant 'status' of parties who have children, for the purpose of property division be 'joint parenthood', rather than whether parties are married or in de facto relationships? This is not a novel question. The Law Commission of England and Wales raised it in its 2007 Report, *Cohabitation: The Financial Consequences of Relationship Breakdown,*[14] and there is academic commentary positing such an approach.[15] Such an approach would, arguably, better reflect the paramount importance of the child's best interests.

24. It is with the primacy of the child's best interests that the ALRC made its recommendations in relation to the simplification of Pt VIII of the *Family Law Act*. The approach recommended is to:

    i. ascertain the existing legal and equitable rights and interests, and liabilities, of the parties in their property;
    ii. presume equality of contributions unless a statutory exception applies; and
    iii. determine what adjustment should be made in favour of either party having regard to any matter that is relevant to the particular circumstances of the parties, including:
        a. the caring responsibilities for any children of the relationship;
        b. the income earning capacity of each of the parties;
        c. the age and state of health of the parties; and
        d. the effect of any adjustment on the ability of the creditor of a party to recover the creditor's debt, so far as that effect is relevant.

25. If the primary status with which family law were concerned shifted from marriage (or 'marriage-like') to parenthood, two questions arise in relation to property disputes that do not involve children:

    First, is there any justification for particular rules for the division of the property interests of married or de facto couples different from those that apply in other domestic relationships not of that status, for example co-habiting siblings or polyamorous relationships?

    Secondly, what is the continuing rationale for treating those who choose deliberately not to marry in exactly the same way as those who do marry for the purposes of the division of their property?

26. This is especially so in cases where parties to a relationship choose to keep their finances separate. As Parkinson asks,

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12 UK Parliament, *Hansard*, House of Lords, 15 March 2019, 1267 (Lord Northbrook).

13 Australian Law Reform Commission, *Family Law for the Future*, Report No 135 (2019) [6.35].

14 The Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com No 307 (July 2007) [4.9].

15 Patrick Parkinson AM, 'Family property division and the principle of judicial restraint' (2018) 41 *UNSW Law Journal* 380, 399.

> If parties have freely chosen not to hold everything in common; they have not promised to endow all their worldly goods upon each other, and nor to share everything they have…what equity needs to be satisfied by an alteration of property rights?[16]

27. The answer to these questions, at first blush, seems fraught from a social and political policy point of view. There certainly seems no logical rationale for there being different rules for domestic relationships that fall within the statutory definition of de facto relationships and those that do not. There is also the theoretical injustice to parties who are treated for all intents and purposes as married when they themselves would not be certain of whether or not they fell within the statutory definition of a de facto relationship. But, as we will see, perhaps it makes no difference as a matter of legal principle, whether couples are married, in de facto relationships, or in any other form of domestic relationship. The proper application of equitable principles will decide property disputes in all such cases on a basis that is likely to be different from that which applies to dealings between strangers because,

> the law must adopt different values when it comes to family property cases. For the values which society expects to characterise the dealings between parties to an emotional partnership are not those of individual autonomy and discrete responsibility, but those of trust and collaboration.[17]

28. Part VIII of the *Family Law Act* provides the family courts with broad powers to adjust property interests and make orders for spousal maintenance between current or formerly married couples, and between former partners from de facto relationships.[18]

29. It provides two key powers in relation to parties to a current or former marriage and parties to a former de facto relationship: a power to declare the title or rights that a party has in respect of property;[19] and a power to alter the interests of the parties in property.[20] Orders may be made that affect third parties in certain circumstances.[21] 'Property' is interpreted broadly to include all the property of the parties, including both legal and equitable interests, and tangible property as well as intangible property such as shares.[22] The *Family Law Act* also provides detailed provisions allowing for the division of superannuation interests.[23]

30. The High Court has made clear that neither in respect of marriages, nor de facto relationship, are the property rights of parties to be altered unless the court is satisfied that, in all the circumstances, it is just and equitable to do so.[24] This is the threshold question prescribed in sections 79 and 90SM of the *Family Law Act*.

31. It is a recognition of the principle that the law should not impinge upon individual autonomy in adult decision-making as to how those adults organise the relationships within their private lives and their autonomy in deciding upon the financial consequences when they bring those relationships to an end.

32. The threshold question is to be answered first, by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the property. Secondly,

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16 Ibid 398-399.
17 Simon Gardner, 'Rethinking family property' (1993) 109 *Law Quarterly Review* 263, 286.
18 Compare *Family Law Act 1975* (Cth) Pt VIII in respect of married couples and Pt VIIIAB in respect of de facto couples.
19 *Family Law Act 1975* (Cth) ss78, 90SL.
20 Ibid ss 79, 90SM.
21 Ibid ss 90AE, 90TA.
22 *Re Duff* (1977) 15 ALR 476, 483-5.
23 *Family Law Act 1975* (Cth) Pt VIIIB Div 3.
24 *Stanford v Stanford* (2012) 247 CLR 108.

the court is not to assume that parties' rights or interests should be altered, particularly bearing in mind that 'community of ownership arising from marriage has no place in the common law'; questions about the ownership of property are to be 'decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses'.[25]

33. So much is clear. But it has been argued, that the underlying equitable doctrines and principles (unconscionability, reasonable expectations, common intention, proprietary estoppel, unjust enrichment) leave a gap between the articulated doctrines and the manner in which the cases are actually decided. Simon Gardner has argued that, on the whole, the doctrines do not, when coupled with the true the facts, produce remedies as they are claimed to do.[26] He identifies that the gap lies in the area of the parties thinking.

> All the doctrine discussed make reference to the parties' own ideas. Under *Gissing v Gissing* there is a search for their common intention [where none could objectively be found]. Proprietary estoppel demands an expectation on the part of the plaintiff and at least constructive awareness of that belief on the part of the defendant. Expectation and awareness are similarly required in order to establish unjust enrichment…[or] that an act was done as part of a joint venture [*Baumgartner v Baumgartner*] … In reality, there is very often no such thinking on the part of the parties. According to the articulated analyses, the claim should therefore fail.[27]

34. So what is important post-*Stanford v Stanford* is a clear articulation of the true equitable basis on which courts will determine the rights and interests of both parties so that parties have clarity as to the basis upon which a court will divide their property, assuming they need to resort to the courts processes.

35. Where parties are married, there will likely be less difficulty in articulating the equitable basis for the alteration of property rights – the 'joint venture' of the marriage is perhaps self-evident, particularly if both parties have indeed vowed to 'endow all their worldly goods'. The line of cases (culminating in *Baumgartner v Baumgartner*) prohibiting unconscionable retention of a benefit where the substratum of a joint relationship or joint endeavour is removed without attributable blame[28] is likely to provide the basis for adjustment of property interests in most cases concerned with married couples. That line of cases is based on the failure of a 'joint endeavour'. In contrast to the English approach, it does not require proof of a 'common intention' held by the parties.[29] But this brings us back to the question of whether there should be one rule for married couples, and a different one for other domestic relationships?

36. An alternative approach then is to consider whether a 'modified' unjust enrichment approach, as suggested by Gardner,[30] may emerge and provide a more satisfactory and unifying approach. Unjust enrichment usually requires that a benefit is conferred, but to a person who did not ask for that benefit, or who would have valued that benefit at its objective value. In other words, benefits may be subjectively devalued by the recipient and the enrichment of the recipient of the benefits will only be considered 'unjust' if the person conferring the benefit did so, for example, under a mistake, or duress[31] or if the recipient blameworthily procures the benefit, eg

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25 Ibid [39].
26 Gardner (n 17) 279.
27 Ibid.
28 *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.
29 JD Heydon, MJ Leeming and PLG Turner, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) [13-54]; Mark Pawlowski and Nicola Grout, 'Common intention and unconscionability: A comparative study of English and Australian constructive trusts' (2012) 2 *Family Law Review* 164, 172-3.
30 Ibid 283-286.
31 Due to mistake, duress or failure of consideration, for example: Gardner (n 17) 284.

where the recipient knows that the other party expects a return for conferring the benefit but does not intend to meet that expectation and fails to prevent the conferral of the benefit.[32] Gardner suggests that, in the English context, the use of unjust enrichment would require a modification to the notion that benefits may be subjectively devalued[33] and that an enrichment is only unjust if the plaintiff's consent to the transfer is vitiated or the defendant blameworthily procures it.

37. Thus, applying the 'modification' in the context of a domestic relationship, one party (for the sake of simplicity let's call that party the 'breadwinner') should not be allowed to subjectively devalue the benefits conferred on the relationship by the other party (who we will call for present purposes the 'homemaker'), as that party could if comparable benefits had been rendered by a stranger. The homemaker offered such services within the relationship collaboratively, and in the trust that they would be received as such, and, as the partner to the relationship, the breadwinner is committed to receiving those benefits in that spirit.

38. It being proper in this context for the law to react to these values, the breadwinner would therefore be unable to disclaim their benefit. Moving then to the question of whether the enrichment is unjust, if the parties had agreed that the homemaker conferred the benefits on the basis that the breadwinner would give a return for them, there would have been a claim for failure of consideration. But of course, they did not so agree. However, that basis is supplied instead by the fact that the services are rendered and received under the rubric of trust and collaboration.[34]

39. Might there be a scope for such an analysis in Australia? Recently, in *Mann v Paterson Constructions Pty Ltd*[35] – which itself concerned construction of townhouses, rather than the breakdown of personal relationships – three judges of the High Court[36] evinced renewed enthusiasm for the concept of unjust enrichment, albeit in a slightly different form to how this concept is understood in England. Justices Nettle, Gordon and Edelman used the language of unjust enrichment in determining a claim for restitution consequent upon a total failure of consideration.

40. Their Honours observed that the law of restitution in Australia and England may be less different than has previously been assumed.[37] The judges cautioned, however, that '[w]hether or not that is so … in this country restitution arises in recognised categories of case and is not necessarily available whenever, and to the extent that, a defendant is enriched at the plaintiff's expense in circumstances that render the enrichment unjust'.[38]

41. As a consequence, Nettle, Gordon and Edelman JJ considered that it 'has not been found necessary to resort to a generalised approach of so-called subjective devaluation'.[39] What might this mean in this context?

42. The rubric of modified unjust enrichment seems to answer the question of the whether there is a continuing justification for rules particular to the regulation of families. Indeed, there is – but in relation to matters involving division of property, in circumstances where there is no need to

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32 Such as 'where he knows that the plaintiff expects a return for his benefit, but does not intend to meet that expectation, and yet fails to prevent the plaintiff conferring the benefit': Gardner (n 17) 284.

33 *Benedetti v Sawiris* [2014] AC 938 [18]–[21] (Lord Clarke, Lords Kerr and Wilson agreeing) cf [100]–[119] (Lord Reed).

34 Gardner (n 17) 286.

35 [2019] HCA 32.

36 Nettle, Gordon and Edelman JJ.

37 In part due to changes to the law in England, as much as in Australia: *Mann* (n 35) [212].

38 Ibid [213].

39 Ibid [214].

consider the interests of children, it is suggested that it does not require statutory articulation. The general law provides sufficient guidance. And the general law would answer the question in the same way for all relationships; be they marriages, de facto relationships, or any other form of domestic relationship, and regardless of the number of parties to that other form of relationship.

43. Given the remarks in *Mann* about unjust enrichment in Australia, Australian law may not even require a modification as such to remove concepts of subjective devaluation if unjust enrichment were to be applied to disputes about the division of property.[40] It may be that an appropriate category of restitutionary claim could simply be recognised in cases involving the division of property consequent upon the breakdown of a domestic relationship, whatever the character or constitution of that relationship. Much of the complexity occasioned by the property provisions of the *Family Law Act* could be avoided, and there would be clarity and coherence in relation to the principles upon which a court is to determine the rights and interests of the parties.

44. Where children are concerned, however, the law must remain flexible and inventive to ensure that their interests are protected and so particular rules for the regulation of 'parenthood' (perhaps as opposed to relationship status) remain justified to ensure that, where the individual autonomy of adults conflicts with the best interests of their children, the interests of the children prevail.

[40] However, despite the support for the concept by Nettle, Gordon and Edelman JJ, the precise role of unjust enrichment in Australian law remains unclear. Kiefel CJ, Bell and Keane JJ dissented in *Mann* and held that a restitutionary remedy was not available in the circumstances of the case. Gageler J adopted a narrower approach that eschewed reliance on unjust enrichment.