

1

STUDYING FAMILY
LAW

1.1	Introduction to family law	2
1.2	Structure of the book	4
1.3	Methodology	5
1.4	The relationship between the law and family	6
1.4.1	What is a family?	6
1.4.2	The choices law makes in determining what is a family	9
1.4.3	Concepts of the family in law	13
1.5	Justice in the family	21
1.6	Family law in theory	25

1.1 Introduction to family law

Family law is a ubiquitous area of law. It is an area that touches all of our lives in a way probably not paralleled by any other area of law. If this statement seems startling, it may be because of the association we usually make between family law and dispute settlement. We wish to take this as the starting point of this book and argue that family law is more than a dispute settlement mechanism. It determines many of the legal aspects of our relationships with our parents, spouse or partner, and children. It thus has much wider implications and is a significant factor that shapes our conventional understandings of what is a family. It is the constitutive role of family law that makes it a subject that should be of interest to everyone, and not only to legal scholars and practitioners.

Once it is accepted that it is the legal discourse of family law that informs or influences the wider understandings of ‘what is family’, it is important for judges, the legal profession, policy-makers and family law scholars to also be aware of how their conceptualisations of ‘family’ have a bearing on how we as a society think about family and its regulation by the law. They are after all the people who are most actively engaged in the making of ‘Family Law’. Our book aims to increase awareness of this function of family law and how the law is actively engaged in the construction of ideas about the family and familial relationships.

This is not the usual approach to the study of family law, or any other area of law for that matter. The positivist conception of law, especially the understanding of law as objective and value-neutral, continues to prevail in legal study. In this regard our book challenges this positivist view of legal knowledge by developing the understanding of law as constructed knowledge. As we analyse family law throughout the book, it will become apparent that it is necessary to emphasise that family law is not value-free, but invokes particular understandings of ‘the family’ that have corresponding effects on broader society. For that matter, it is also important not to simply assume that family law is merely reflecting social realities, and to the extent that it embodies norms through its construction of the family, it is important to identify what these are and how they impact on society.

The claim that ‘legal knowledge is constructed knowledge’ is not novel, but our emphasis is to uncover how family law functions to entrench a particular conception of ‘the family’. In particular, and central to the thesis of the book, is the reliance of the law on the construct of the nuclear family, traditionally conforming to the marriage model and comprising a union between a man and a woman, and their dependent children.¹ This approach in law is supported by the ‘conventional wisdom’ found in sociology that ‘[i]n Australia, the nuclear form of the family has predominated throughout this century. As the dictionary of sociology tells us, the nuclear family is a small group composed of husband, wife and immature children which constitutes a unit apart from the rest of the community’.² This is despite the

-
- 1 Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 145.
 - 2 Peter McDonald, ‘Extended Family in Australia: The Family Beyond the Household’ (1992) 32 *Family Matters* 4.

evidence in the research which suggests that there are many different kinds of families in existence in Australian society.³

The law's reliance on the nuclear family construct as the norm against which all other family structures are measured continues to reproduce certain assumptions about the family in law – namely, that it is predominantly a private institution whose main function is to provide economic and emotional support for its members, who are defined by their affective and biological ties to one another. We aim to explore the legal effects of this construct on the individuals who find themselves in the family law system and the continuing effects of this construct on the relations between them and with the state, even after their familial relationships have broken down.

In developing our argument we will use an interdisciplinary framework. Thus, the book gives an overview of the legal doctrine relating to the conventional key areas of family law – marriage, divorce, children and property matters, and extends the coverage to the legal regulation of abortion, assisted reproductive technologies, child protection and adoption. However, in our analysis of these areas we will develop a jurisprudential analysis of family law that connects the sociological, historical and economic analyses of the institution of family and the doctrinal discourses of law. The nature of interdisciplinary studies is a contentious area but, rather than engage in that debate, we will explain our approach. It is common for the interdisciplinary study of law to invoke the concepts and emphases of other disciplines, be they sociology, economics or cultural studies. We will also draw on other disciplines in our analysis of family law, and extend our analysis primarily to aspects of the judicial method in the case law, in order to demonstrate how the construction of legal meaning takes place. In approaching family law in this way, our aim is twofold.

First, our broader aim is to critique the law by drawing on the relevant sociological, historical and economic literature on the family to demonstrate how family law functions in ways that preserve the nuclear family and continue to perpetuate heterosexual normativity, cultural bias, age, sex and class hierarchies, and the sexual division of labour within and outside the family. In identifying these ideological functions of family law in supporting the nuclear family, we will provide the foundation for readers to explore how Australian family law may engender a fairer and more equitable society. Our aim in this regard is to inspire readers to consider whether family law could be different in view of the different ways 'family' can be conceived.

Second, in critiquing the doctrinal analysis within an interdisciplinary theoretical framework, our more immediate aim is to challenge the conventional boundaries of family law as found in the main texts on family law in Australia. For example, our approach extends further than the understanding of family law as reflecting the assumptions made about the family in other disciplines and explores how the law makes explicit choices in regulating family life. In this way family law can be understood as a site in which knowledge about the family is constructed. In each chapter these choices will be exposed as we examine the way in which law understands the family, constructs its own legal knowledge about the

3 See generally David de Vaus, *Diversity and Change in Australian Families: Statistical Profiles* (AIFS, 2004); Robyn Hartley and Peter McDonald, 'The Many Faces of Families: Diversity Among Australian Families and its Implications' (1994) 37 *Family Matters* 6.

family and the values to be pursued in law, and how these legal assumptions affect those seeking relief in the various jurisdictions in Australia that deal with family-related matters. In exposing the choices made in the field, we aim to enable readers to understand how they could make their own valuable contribution to the area of family law through their research and scholarship.

We are not suggesting that family law is coherent and without any contradictions in its various aspects.⁴ Nevertheless, our analysis of the various aspects of family law demonstrates how family law broadly constructs discourses about families in a way that hierarchies found in contemporary society are maintained rather than challenged.⁵ Thus, our overall aim is to deepen awareness and understanding of this dynamic area of law by critically examining the assumptions about family relations that are present in the law, and also to demonstrate how the construction of legal meaning is an ongoing process and can therefore change. Judicial interpretations of the relevant legislation will be the main focus of our analysis, as they remain the authoritative pronouncements of the law. We all are involved in questioning or accepting these pronouncements and therefore share the responsibility for the construction of family law.

1.2 Structure of the book

The book is divided into 12 chapters. Each chapter provides an overview of the key provisions and case law relevant to each topic and analyses the legal developments within an interdisciplinary framework.

This chapter sets out the interdisciplinary framework for our study of family law. Chapter 2 examines the history of family law and provides an overview of the constitutional arrangements and institutional structures of family law. This includes coverage of the court system and alternative dispute resolution mechanisms, and the treatment of violence within the family law system. Chapter 3 focuses on the legal requirements for marriage, the legal regulation of non-married couples, and the same-sex marriage debate. Chapter 4 looks at the legal requirements for divorce and the regulation of violence in family law. Chapter 5 provides an overview of the legal treatment of family property in the event of relationship breakdown. Chapter 6 looks at spousal maintenance. Chapter 7 considers private ordering in family law property and maintenance proceedings and the status of financial agreements in family law. Chapter 8 examines the treatment of children in the family law system. It examines the concepts of childhood and parental responsibility, as well as the court process and alternative dispute resolution mechanisms used in child-related proceedings. The broad range of factors used in determining these disputes are covered, with particular focus on the treatment of violence and child abuse. Chapter 9 expands the scope of enquiry to examine how other factors, such as wishes of the child, parent relocation and Aboriginal and Torres Strait Islander culture, are treated

4 See John Dewar, 'The Normal Chaos of Family Law' (1998) 61(4) *Modern Law Review* 467.

5 The hierarchies of contemporary liberal market economies extend beyond gender, race and sexual differences. Rather than focus on the existence of such hierarchies, we shall focus on how family law helps maintain or challenge them.

in these cases. Chapter 10 is divided into two parts: the first provides an overview of child-maintenance and support provisions and child-maintenance agreements; the second broadens the scope of the study by examining the main themes arising in the chapters on financial relations and children in the context of social-welfare policy and law. Chapters 11 and 12 consider the legal regulation of family life in the broader contexts of abortion law and child-protection regimes; and adoption and reproductive technologies.

1.3 Methodology

The analysis of family law in these chapters relies on three interconnected concepts related to the family: the nuclear family, the sexual division of labour, and the public/private divide. Focusing on these concepts will help to develop understanding of how the legal regulation of the family promotes the heterosexual nuclear family as the norm; reinforces certain assumptions about the family, and the roles of men and women and their place in society; maintains the sexual division of labour in families and in the marketplace; and perpetuates the economic dependency of the more vulnerable members of families.⁶

An obvious response to the assertion that family law supports the nuclear family is the claim that this family is not the only one upheld in law. This is true and our overview of the range of sociological and philosophical theories of family will illustrate the influence in this area of law of the liberal conception of individualism, which emphasises individual autonomy and freedom in family formation. We also include a discussion of the influence of feminist discourse in raising awareness of violence and oppression in the family. But in accepting the influence of liberalism in the legal recognition of other family structures (like *de facto* relationships), or feminism in acknowledging violence in the family (especially in cases involving children), we maintain that family law continues to uphold the nuclear model as the norm.

In developing our theoretical framework, we argue that family law moves between conceptions of the nuclear family as a union between two autonomous and equal partners and as a union that generates dependencies. It thus uses the discourse of individual autonomy on the one hand, and paternalistic concern to protect more vulnerable family members, usually women and children, on the other. Whether this approach can provide a framework for the development of a fair and equitable family law will be explored throughout the book. Family law doctrine, when analysed within an interdisciplinary framework, will illuminate the choices that are made in family law about whether to promote autonomy or maintain dependency, and will provide a source for critique of the preference given to the nuclear family structure in view of the disadvantageous effects it can have for the more vulnerable family members.

6 For instance, family law tries to preserve the social and economic support families provide despite the breakdown of these relationships through, eg, property settlement, child support, and the presumption of equally shared parental responsibility. However, these legal provisions cumulatively function so that the more economically vulnerable members of the family are expected to bear the costs of family breakdown in the attempts of the law to contain these costs on the state. This assertion will be substantiated in the following chapters.

1.4 The relationship between the law and family

As mentioned above, the proposition around which this book is structured is that family law chooses one kind of family, the nuclear family, and privileges it as ‘the family’. Two immediate questions arise – how does the law incorporate a particular notion of family, and why does it matter? Preliminary answers to these questions are that law does so by portraying itself as a value-neutral dispute resolution mechanism; and it matters because in the process family law functions to legitimise the hierarchies that exist in families and in broader society. But we can only begin to appreciate these questions and answers if we understand that legal knowledge is constructed rather than discovered. This helps explain why legal developments in the area of family law cannot be understood in isolation from the social, economic and political developments in the wider society, and implicates everyone engaged in the legal process in the construction of legal knowledge.

But is the nuclear family the only family? In the following sections we briefly discuss the existence of plural views of family; the choices made in law to adopt certain definitions of the family and not others; the reluctance in positivist thinking about law to acknowledge that such choices are made; and the possibility of making these choices visible by understanding the law as constructed knowledge.

1.4.1 What is a family?

Family law incorporates not only a conception of law but also a conception of family. It is therefore important to explore the concept of family. The institution of family has existed in different forms in all societies throughout history. In the European context, the conventional story is that the extended family has morphed into the modern nuclear family owing to various factors, most notably the transformation of feudal and agrarian societies into modern and industrialised societies. Historians and sociologists generally support this explanation for changes in the family in Europe. For example, Stone, a well-known family historian, argues that increasing industrialisation and urbanisation in Europe meant that the structure of family changed from an extended family to an affective unit comprising the husband and wife and their biological children.⁷

Without going into the details of these debates at this stage, it is worth noting that the legal regulation of the family has similarly transformed and family law has come to focus on the man and the woman and their children as its subjects. The history of family law usually tells a story of progressive development where the formerly patriarchal institution of marriage has been transformed into an egalitarian institution.⁸ Moreover, it is now commonly

7 Lawrence Stone, ‘The Rise of the Nuclear Family in Early Modern England; The Patriarchal Stage’ in Charles Rosenberg (ed), *The Family in History* (University of Pennsylvania Press, 1975) 13.
 8 Extensive literature exists on this issue, but for an introduction see Martha Minow, ‘Forming Underneath Everything that Grows’: Toward a History of Family Law’ [1985] *Wisconsin Law Review* 819.

claimed that law accommodates a plurality of families and is at least trying to be non-discriminatory even if this is an aspiration rather than an achieved goal.⁹

In examining the question ‘what is a family?’, let us begin by asking ourselves how we understand an arrangement to be ‘a family’. One answer that everyone can agree with is that there is a basic lack of agreement on the matter. White and Klein provide a brief introduction to the different ways in which we understand family and its importance.¹⁰ They illustrate this diversity by asking: which of these is a family?¹¹

- A husband and wife and their child.
- A single woman and her three children.
- A 52-year-old woman and her adoptive mother.
- A man, his daughter, and the daughter’s son.
- An 84-year-old widow and her dog.
- Two lesbians in an intimate relationship with children from previous relationships.
- Two children, their divorced parents, the current partners of their divorced parents and children of step-parents from previous marriages.
- A child, his stepfather and the stepfather’s wife subsequent to his divorce from the child’s mother.
- Two adult male cousins living together.
- A childless husband and wife who live 1000 miles apart.
- A married couple, one son and his wife and the children of this latter couple, living together.
- Six adults and their 12 children all living together in a communal home.

How we determine if any of these are considered ‘a family’, whether it is explicitly informed by a philosophical position or a common sense understanding, invokes certain theoretical assumptions and it is necessary for us to be aware of them. In the laws related to families these assumptions set the aims and content of regulation.

Moreover, it is evident that when discussing ‘the family’ we are not necessarily talking about the same thing. McDonald claims, for example, that ‘family’ is often equated with ‘household’, but that is only one among many ways of conceptualising the family.¹² He explains that changing ideas, rather than structural changes, explain the morphing nature of family. It could be ideas about individual autonomy, romantic love and privacy that shape our views of what constitutes a family. He elaborates on this by presenting how other researchers may depict the family as a unit of cooperation and exchange. Another approach

9 Various examples that show how both family law principles and process attempt to accommodate family diversity can be found. For a positive review of family law principles on same-sex parenting, see generally Adiva Sifris, ‘Gay and Lesbian Parenting: The Legislative Response’ in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (AIFS, 2014) 89. See also in the same publication (at 169) Helen Rhoades, ‘Children, Families and the Law: A View of the Past with an Eye to the Future’.

10 James M White and David M Klein, *Family Theories* (Sage Publications, 3rd ed, 2008).

11 Ibid 20.

12 Peter McDonald, ‘Extended Family in Australia: The Family Beyond the Household’ (1992) (32) *Family Matters* 4; Sherry Saggers and Margaret Sims, ‘Diversity: Beyond the Nuclear Family’ in Marilyn Poole (ed), *Family: Changing Families, Changing Times* (Allen & Unwin, 2005) 66.

has been to reject the idea that there can be a definitive definition of ‘family’ and to accept that people define their own families according to relationship, purpose and activity, circumstances applying or perceived obligations.¹³ Therefore, it is difficult to say that there is one definition of family or that there is any consensus on the aims the definition should fulfil. Thus, individuals may determine their own families according to societal or personal expectations, notions of reciprocity, the history of their relationship, and altruism. This is amply reflected in the contemporary literature as well as in the common understanding that a plurality of family relations exists and the nuclear family is no longer (if it ever was) the dominant norm.¹⁴

Even so, at the level of ideas and idealised morality the nuclear family maintains a stronghold. The image of the nuclear family constituted by an increasing emphasis on individual autonomy, romantic love, ties of affection between parents and children, and the protection of the privacy of the family by the state continues to permeate the popular consciousness. Thus, in spite of the sustained and varied challenges to this conception (particularly since the 1960s),¹⁵ and the substantial body of research on the plurality of family forms that exist in western societies, the actual decline of the nuclear family as a norm, or even as an aspiration, has been rejected and declared to be a myth.

Bittman and Pixley explain that the significance of the claim that the decline of nuclear family is a myth can be better understood if we follow the argument that the effects of myth have little to do with the truth of the matter.¹⁶ They rely on Luhmann’s two types of expectations – cognitive and normative – to explain that normative expectations are not usually modified even when they are contradicted by events. For example, the belief in an equal partnership between husband and wife in marriage is not shaken by evidence that the domestic division of labour is not an equal division. So too, the contemporary discourses that claim that the nuclear family is in decline, and the postmodern arguments that claim that the family is being replaced by other arrangements, can be seen as normative expectations. The point Bittman and Pixley are making is that the available evidence does not support the claim that the nuclear family is in decline. In fact, they argue that the belief that we live in diverse family structures is not the reality, either empirically or as an idea. The nuclear family continues to be the dominant family form in contemporary life.

So while in the literature on the plural forms of family the nuclear family seems to have lost its monopolistic position, what is not so apparent in this literature is the powerful cultural pre-eminence that the nuclear family has in society. Therefore, the decline of nuclear family at the empirical level is different from the hold of this idea on our imagination. But even the empirical evidence of such a decline is problematic, because evidence does not necessarily support the claim that the nuclear family (traditionally contained within the institution of marriage) is in decline. Instead where there has been an apparent decline in the proportion of ‘nuclear family’ households (such as in Australia), this can be partly explained as resulting from increases in life expectancy and changes in fertility. Thus, any changes to

13 McDonald, above n 12.

14 See de Vaus, above n 3.

15 Michael Bittman, ‘The Nuclear Family in the Twenty First Century’ in Jake M Najmann and John S Western (eds), *A Sociology of Australian Society* (Macmillan, 3rd ed, 2000) 301.

16 Michael Bittman and Jocelyn Pixley, *The Double Life of the Family: Myth, Hope and Experience* (Allen & Unwin, 1997) 1–15.

family structure are not because the nuclear family form has become unpopular. Alternative household structures may be better explained by patterns of fertility, for example baby booms/declines, ageing of the population, and a combination of rising divorce rates and an increasing number of people who will never marry.¹⁷ Moreover, cultural diversity among Australia's Aboriginal and Torres Strait Islander peoples and immigrant populations, as well as social trends, has resulted in more single-parent, step and blended, multiple household and same-sex families, but these families have not replaced the nuclear family as the norm, evidenced by how they have not been provided with the same degree of state assistance and recognition.¹⁸

1.4.2 The choices law makes in determining what is a family

This is an important issue for the law's conception of family.¹⁹ There is no avoiding the task of choosing a conception of family or families that law works with. Even with respect to the nuclear family, how we theorise the family (in law) has repercussions for real people; for example, if the law assumes that the nuclear family has been replaced by an egalitarian partnership, it will take a certain shape – validate the reflexive choices view of family that could make the reality of the dependency that exists in families invisible in law. But if the law upholds the dependency model of family too much, this could be at the expense of facilitating choice in forming and ending our intimate relationships. We will examine this point further by examining the broad contours of family law.

1.4.2.1 The broad contours of family law

Family law is most commonly understood as the law that determines the creation and dissolution of marriages or marriage-like relationships. This area also governs the resolution of disputes about maintenance and property, as well as parenting and child-support disputes that can arise at the end of a relationship. However, it is less clear whether family law extends to the regulation of domestic violence, provision of childcare facilities or social-welfare benefits. Similarly, it is more difficult to answer whether the area extends to the right to abortion or the availability of latest assisted reproductive technologies, for example. In most of the mainstream legal discourse, family law is viewed as boundary marking. It is treated as a specific area of law concerned with the formation of marriage (or similar intimate relationship) and divorce and certain ancillary matters.

The laws and policies that may have an impact on intimate relationships while they remain intact are not usually included in the subject of family law. Indeed the law seems to operate on the assumption that while these relationships remain intact family law does not regulate them, and the parties (usually the adults involved) decide on their mutual roles and obligations free of any state interference. In the case of marriage, only when the marriage relationship ends does the law step in to make divorce orders. In regard to intimate relations

17 Ibid 4.

18 Saggars and Sims, above n 12, 87.

19 For a discussion of some salient issues, see Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (AIFS, 2014).

more generally, it is only when they break down and the partners cannot agree on how to settle their affairs that family law steps in to order their parenting arrangements and finances. The boundary-marking role of the law also depicts it as a value-free mechanism in so far as the law does not define what is a 'good' or an 'ideal' family. This apparent neutrality of family law legitimises it, but it needs to be examined closely.

The legal definitions of 'family' of necessity draw upon other disciplines. Furthermore, many interdisciplinary conceptions of family in turn point to the need to justify the particular contours of family law. However, a cursory acquaintance with family law reveals that it is mostly concerned with monogamous partners and parent-child relations. Moreover, the *Family Law Act 1975* (Cth) ('FLA') contains a specific provision addressed to the courts to consider the need to protect and preserve the institution of marriage.²⁰ Indeed, it would seem that every relationship is regulated according to the marriage model. The influence of the hetero-nuclear family construct is no more obvious than in the marriage provisions that exclude same-sex marriages.²¹ The recent extension of the property provisions for married couples to de facto relationships also demonstrates the primacy of the marriage relationship in law.²² However, if family law chooses the nuclear family and privileges it as the family to uphold and protect in law, this will have uneven consequences for different members of society. In particular, the family law provisions regulating divorce, property division and parenting of children interlink to reinforce the power disparity between men and women (and their children) in our contemporary society.²³ Similarly, the nuclear family upheld as the norm in family law can also work to the disadvantage of other sections of society, such as people of different sexualities or Aboriginal and Torres Strait Islander peoples, who may have different parenting practices.²⁴ Thus, the protection of alternative family structures is lacking in law. Therefore, it is essential for us to identify how the law legitimises these choices. These choices may be explained in the broader historical, sociopolitical and economic context in which the law operates. But in the legal context, the dominance of the positivist conception of law cannot be ignored.

The mainstream conception of law continues to be a positivist conception despite the fact that critical views about law and legal knowledge exist in abundance.²⁵ Among other

20 FLA s 43(1)(a).

21 In the *Marriage Act 1961* (Cth) s 5, "marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.

22 FLA pt VIIIAB.

23 See generally Bruce Smyth and Ruth Weston, 'Financial Living Standards after Divorce' (Research Paper No 23, AIFS, 2000).

24 For recent cases on same-sex parenting and the difficulties facing lesbian co-parents seeking parenting orders under the FLA, see *Flynn v Jaspar* [2008] FMCAfam 106; *Keaton v Aldridge* (2009) [2009] FMCAfam 92; *Snell v Bagley* [2009] FMCAfam 1144. See generally Jenni Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (2008) 22(2) *International Journal of Law, Policy and the Family* 149. In the context of disputes involving Aboriginal and Torres Strait Islander children, the weight a judge gives to the child's right to enjoy his or her own culture under the FLA does not have to be consistent with Aboriginal or Torres Strait Islander parenting practices: *Offer v Wayne* [2012] FMCAfam 912. For more information on Aboriginal and Torres Strait Islander child-rearing practices, see Secretariat of National Aboriginal and Islander Child Care, *Growing Up Our Way: Child Rearing Practices Matrix* (2014) <<http://aboriginalchildrensday.com.au/wp-content/uploads/2014/05/Growing-up-our-way-.pdf>>.

25 For an accessible analysis, see Margaret Davies, *Asking the Law Question* (Law Book Co, 3rd ed, 2008).