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CONTENTS

Articles

- Discounting the mother–child relationship in parenting orders:
A snapshot in time
— *Patricia Easteel, Alicia Prest and Fanny Thornton* 221

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We look at mothers who have lost parental responsibility and who have been ordered to spend no or at best minimal supervised time with their child(ren). Our case sample included 50 recent interim and final first instance judgments heard in the Federal Circuit Court or the Family Court, as well as 13 judgments from the Family Court of Australia Full Court. We discover that the nature and quality of the pre-existing attachment of mother and child are outweighed by a view that the child(ren) would be at an unacceptable risk of harm in the mother’s care attributable to some sort of maternal dysfunction or an inability to acknowledge (and/or treat) its impact on her parenting capacity. The most common maternal harm identified by judicial officers was emotional and included the mother’s inability to facilitate a meaningful relationship between the father and his child(ren); in some matters this derived from the mother’s concerns about physical or sexual harm perpetrated by the father. In addition, decision-making themes found in our analysis included siblings, children’s views and the important role of the independent children’s lawyer and family consultant. We conclude by highlighting areas of concern and make recommendations to prevent inconsistencies and undue influence in proceedings.

- Separation: Must a spouse or de facto partner communicate
their intention to end the *consortium vitae*?
— *Lisa Young and Jenna Hampton* 249

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The date a couple separates can be a matter of contention in family law proceedings and is important for both married and de facto couples. It is well-established that separation requires both the intention to separate (which can be unilateral) and action on that intention. However, there is confusion in the case law as to whether a party who has formed the intention to separate must always communicate that intention to the other party. This article argues that the confusion has arisen out of a misreading of the case law on separation under one roof, where it may be difficult to prove a party intending to separate has acted on that intention, if their intentions remain hidden from the other spouse. Where there is physical separation, then the evidence may more easily establish action on the intention (including in the case of deceitful desertions, where the left-behind spouse may not have been told the truth of the situation). This article argues that in all cases, and in line with early decisions in the area, there are only two requirements for separation (intention and action). The article also argues the same test should apply to de facto couples and that the case for not requiring communication of intention is even stronger in the case of de facto couples.

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Australia's recent legal changes allowing for same-sex marriage will not mean the end of public discussions around the appropriate scope of marriage recognition. There are strong indications that polygamous marriage will become an increasingly prominent issue in Australia over the coming years. This article seeks to provide these developing discussions about polygamy with a solid grounding in the current law and the relevant policy issues. It sets out how plural relationships are dealt with under marriage law, de facto law and relationship registration schemes. It also offers an overview of the key policy concerns that characterise the burgeoning discussions about polygamy in comparable Western countries. Given the contentious nature of polygamy as a topic, this article proposes four guidelines around which consensus can be built and which can be used to clarify the boundaries of productive discussions about the potential for polygamy in Australia.

Marriage equality in Australia and Ireland:
Separate jurisdictions, similar politics
— *Brian Tobin*

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This article analyses the similar approaches to marriage equality that were adopted in the common law jurisdictions of Australia and Ireland. The article discusses the initial moves in Australia and Ireland to prohibit marriage equality via domestic legislation in response to international judicial activism in the area of same-sex relationship recognition, and then proceeds to critique the politically convenient modes of participative democracy that were ultimately employed in each jurisdiction in order to bring about marriage equality. The article concludes by suggesting that if the Australian Government was so resolutely determined to put the issue of marriage equality to a nationwide public vote, then Australia should have followed the Irish example by holding a constitutional referendum on the matter, as a successful referendum result guarantees the greatest possible level of domestic legal protection for fundamental human rights.