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MATRIMONIAL PROPERTY PROCEEDINGS — PROBLEMS OF A DIVIDED JURISDICTION

1. Introduction

"On 7 December, 1971, the Senate referred to this Committee the following matter for inquiry and report:

> 'The law and administration of divorce, custody and family matters with particular regard to oppressive costs, delays, indignities and other injustices.' "[1]

In the three years since the Family Law Act, 1975 (Cth.), came into operation, it has become clear that with regard to matrimonial property disputes in the 12-month period before an application for dissolution of marriage can be filed, most if not all of the injustices described in the general reference continue to perplex the courts and to oppress litigants. This is the direct result of an ill-defined jurisdictional division between State and federal courts stemming from the wording of the Commonwealth of Australia Constitution. The purpose of this article is to examine the difficulties which have arisen in matrimonial property proceedings since the Act came into operation.

Before 5th January, 1976, jurisdiction in family matters in Australia was partly federal and partly State. Property proceedings were brought under the Matrimonial Causes Act, 1959-1966 (Cth.), only when they could be described as "ancillary" to proceedings for "principal relief". The latter term included decrees of dissolution of marriage, nullity of marriage and judicial seperation.[2] Independent property proceedings did not come within federal jurisdiction[3] but could be brought only under State legislation.[4] Some of the limitations of this jurisdictional division were described in a prescient passage by Sackville and Howard:

> "The Federal-State dichotomy creates other difficulties within family law. Since the Federal matrimonial causes jurisdiction arises only on a claim for principal relief, both the Commonwealth Parliament and the Courts have been faced with the difficult task of delineating the precise extent of Federal jurisdiction and the point at which it displaces State jurisdiction in a particular matter. Not only is the administration of the law thereby rendered more complex and less certain than necessary, but the existence of two jurisdictions invites wasteful and costly manoeuvring . . . The only certain beneficiaries of this jockeying for position are the parties' legal advisors."[5]

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1. Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill* (1974), Parl. Paper No. 133 (Cth.), para. 1.
2. Matrimonial Causes Act, 1959-1966 (Cth.), s.5.
3. *Lansell* v. *Lansell* (1964) 110 C.L.R. 353.
4. *E.g.*, Law of Property Act, 1936-1975 (S.A.), s.105.
5. Sackville and Howard, "The Constitutional Power of the Commonwealth to Regulate Family Relationships", (1970) 4 *Fed. L.R.* 30, 37-38. For a recent discussion of the distinctions between State and federal jurisdiction see Crawford, "The New Structure of Australian Courts", (1978) 6 *Adel. L.R.* 201, 205-210.

A principal reason why the Matrimonial Causes Act, 1959-1966 (Cth.), did not provide for a uniform matrimonial property law for the whole of Australia was the cautious approach taken in that Act towards the marriage and divorce powers conferred on the Commonwealth by s.51 (xxi) and (xxii) of the Constitution. Placitum (xxi) gives power to make laws with respect to "Marriage"; placitum (xxii) to make laws with respect to "Divorce and Matrimonial Causes; and in relation thereto, parental rights and the custody and guardianship of infants". Obviously, the drafters of the Matrimonial Causes Act, 1959-1966 (Cth.), considered that independent property proceedings could not be sustained by either placitum. This is in strong contrast to the approach taken in the Family Law Act, 1975 (Cth.), which attempted to bring a wide range of proceedings previously classified as "ancillary" within its ambit. In particular, the Act provided for proceedings for a declaration of proprietary rights to be taken independently.[6] Proceedings for an alteration of proprietary rights were also envisaged as independent proceedings through the apparently simple device of filing a notice seeking counselling in the Family Court.[7] Similar provisions covered independent maintenance and custody proceedings.[8] Taken together, these provisions showed a clear intention to encompass a wide range of family matters in a uniform code. The desired aim of unification has not been achieved. Within three years, the federal-State dichotomy has re-emerged in the important area of matrimonial property disputes in the 12-month period before an application for divorce can be filed.

Under the Act there is only one ground for divorce—a period of 12 months' separation.[9] It is inevitable that disputes as to matrimonial property (and in particular, the use and occupation of the matrimonial home) will arise in this period. The intention of the Act in its original form—made plain in ss.78 and 79—was that such disputes should come within the jurisdiction of the Family Court. S.78, which concerned proceedings for a declaration of proprietary rights, did no more than recapitulate existing State law whereby property rights were determined on a strictly legal basis.[10] S.79, however, confers on the Family Court the power to alter proprietary rights to achieve a just and equitable solution. In its original form, this power could be invoked by either party simply filing a notice of intention to seek the assistance of the counselling facilities of the Family Court.[11] However, s.79 was substantially amended following the decision of the High Court in *Russell* v. *Russell; Farrelly* v. *Farrelly*.[12]

Undaunted by legislative amendments,[13] the Family Court set about formulating devices to increase its jurisdiction in property proceedings in order to close the gap produced by the emasculation of s.79. The two principal devices (the use of the injunction power and proceedings for a declaration of validity[14]) have proved scarcely satisfactory; the jurisdictional problem remains partially unresolved. A recent example is provided by a

6. Family Law Act, 1975 (Cth.), s.78 (hereafter referred to as "the Act").
7. *Id.*, ss.79(3), 15(1).
8. *Id.*, ss.64, 74.
9. *Id.*, s.48.
10. *Wirth* v. *Wirth* (1956) 98 C.L.R. 228; *Martin* v. *Martin* (1959) 110 C.L.R. 297.
11. *Supra*, n.7.
12. (1976) 9 A.L.R. 103 (hereafter referred to as the *Family Law Act Case*).
13. Family Law Amendment Act (No. 1), 1976 (Cth.), ss.3, 25.
14. Family Law Act, 1975 (Cth.), ss.114(1), 113.

case from South Australia.[15] A married couple from Adelaide, estranged but not yet separated, found themselves entangled in a dispute over matrimonial property. They were unable to file for divorce. In an attempt to resolve their dispute, the parties became involved in lengthy litigation in two sets of courts, culminating in costly appearances before the Full Supreme Court of South Australia and the Full Court of the Family Court of Australia.

It would be difficult to construct a more glaring illustration of the unresolved jurisdictional problems inherent in property proceedings. Unnecessary complexity and uncertainty, Byzantine legal manoeuvres and oppressive costs thus continue to characterize property disputes in the important pre-dissolution period. The final outcome of *Tansell's* case shows that compromise is possible, but the more fundamental difficulties remain unresolved.

2. The Constitutional Challenge

In making provision for independent proceedings for maintenance, custody and property matters, the Family Law Act, 1975 (Cth.), was attempting a "unique intrusion" into an area previously governed by State legislation.[16] The constitutional validity of certain sections was soon challenged in the High Court in the *Family Law Act Case.*

The sections of the Family Law Act, 1975 (Cth.), which purported to extend the scope of federal jurisdiction in property proceedings were ss.39, 78, and 79 in conjunction with s.4(1)(c)(ii). In the *Family Law Act Case*, the only section relating to property which was formally in question was s.78. The question before the Court was whether the Commonwealth Parliament could validly create a jurisdiction to deal with property proceedings brought independently of proceedings for principal relief. Could the creation of such a jurisdiction be validated either by the marriage power or the matrimonial causes power? The High Court (Barwick C.J., Gibbs, Stephen, Mason and Jacobs JJ.) held that proceedings under s.78 were valid only when they were ancillary to proceedings for "principal relief" (*i.e.*, in relation to proceedings of the kind referred to in paragraphs (a) and (b) of the definition of "matrimonial cause" in s.4 (1)). The section was validated by applying s.15A of the Acts Interpretation Act, 1901 (Cth.).

There was substantial disagreement between their Honours as to the interpretation of s.51(xxi) and (xxii) of the Constitution. Nonetheless, all were in agreement that s.78 could not be validated under either power.[17]

Barwick C.J. regarded "the presence and the terms" of placitum (xxii) as limiting "the content and ambit" of placitum (xxi).[18] He drew a distinction between rights and obligations flowing from the act of marriage and the creation of a jurisdiction to enforce such rights and obligations. Therefore, a jurisdiction over property matters could not be validated under the marriage power—reference to placitum (xxii) was necessary. But the ambit of placitum (xxii) is delimited by its concluding words and merely confers power upon the Commonwealth Parliament to create a jurisdiction to entertain proceedings for maintenance, custody or the

15. *Tansell* v. *Tansell* (1977) F.L.C. (CCH) 90-280; *Tansell and Tansell* (1977) F.L.C. (CCH) 90-307.
16. *Family Law Act Case* (1976) A.L.R. 103, 144 *per* Jacobs J.
17. Except Jacobs J., who expressed no view on the question.
18. *Family Law Act Case* (1976) 9 A.L.R. 103, 113.

settlement of property when such proceedings are ancillary to proceedings for principal relief. Gibbs J. agreed with the Chief Justice on the interpretation of placitum (xxii). Nor could s.78 be validated under the marriage power because:

> " . . . the Act gives jurisdiction to entertain proceedings brought between persons no longer married and relating to rights of property which did not arise out of the matrimonial relationship."[19]

Mason J. (with whom Stephen J. concurred) placed a much wider interpretation on the marriage power. He rejected the notion that the ambit of placitum (xxi) is limited by the existence of placitum (xxii), and the "arbitrary distinction"[20] between the creation of rights arising out of marriage and the enforcement of those rights. However, s.78 could not be validated under the marriage power because:

> "Paragraph (c)(ii) by reason of its reference to the property of either of the parties to the marriage, presumably comprehending any property howsoever and whensoever acquired, is not susceptible of a reading down under s.51(xxi); I would therefore read it down by reference to s.51(xxii) and treat it, in conjunction with s.39, as conferring jurisdiction to grant ancillary relief in proceedings for annulment or dissolution of marriage."[21]

A curious aspect of their Honours' judgments arises from the definition of "principal relief". In the course of his judgment, Barwick C.J. stated that property proceedings must be ancillary to a proceeding for "dissolution or nullity of marriage".[22] In his formal answer, he said that such proceedings must be ancillary to "principal relief".[23] Gibbs J. used the words "divorce or some other matrimonial cause"[24] in the body of his judgment, but employed the term "principal relief" in his formal answer.[25] Mason J. (Stephen J. concurring) thought that property proceedings were valid if ancillary to proceedings for "annulment or dissolution of marriage."[26] In his formal answer, however, he considered that s.4(1)(c)(ii) was valid to the extent that it related to proceedings of the kind described in s.4(1)(a) and (b).[27] Now "principal relief" is defined in s.4(1):

> " 'proceedings for principal relief' means proceedings under this Act of a kind referred to in paragraph (a) or (b) of the definition of 'matrimonial cause' in this sub-section'."

S.4(1) defined "matrimonial cause", *inter alia*, as follows:

> "(a) proceedings between the parties to a marriage for a decree of—
> (i) dissolution of marriage; or
> (ii) nullity of marriage;
> (b) proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise . . .".

19. *Id.*, 128.
20. *Id.*, 137.
21. *Id.*, 140.
22. *Id.*, 117.
23. *Id.*, 117-118.
24. *Id.*, 128.
25. *Id.*, 130.
26. *Id.*, 140.
27. *Id.*, 140-141.

Prima facie, the inclusion of proceedings for a declaration of validity is unremarkable. However, the subsequent use of such proceedings to attract the powers of the Family Court under s.79 of the Act leads one to pause. Perhaps the inclusion of proceedings for a declaration of validity was an oversight on the part of the High Court but its result was to provide a loophole by which the Family Court could entertain property proceedings in the pre-dissolution period.

Shortly after the *Family Law Act Case*, the Family Law Amendment Act, 1976 (Cth.), was passed in order to bring the principal Act into line with the decision. The definition of "matrimonial cause" in s.4(1) of the principal Act was amended. In particular, s.4(1)(c)(ii) was replaced by a new paragraph—s.4(1)(ca):

> "(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or of either of them, being proceedings in relation to concurrent, pending or completed proceedings for principal relief between those parties."

The amended definition applies to both s.78 and s.79. Although the validity of s.79 of the Family Law Act, 1975 (Cth.) was not in question in the *Family Law Act Case*, it was amended by s.25 of the Family Law Amendment Act, 1976 (Cth.) which removed s.79(3) from the principal Act. Given the tenor of the High Court's decision on s.78, the status of s.79(3) was doubtful and the amendment was obviously a pre-emptive measure.

What effects did the High Court's decision and the amending legislation have upon matrimonial property proceedings? First, the division of jurisdiction between federal and State courts appeared to re-emerge. It seemed that property proceedings instituted before an application for dissolution could be filed had to be taken in State courts under the relevant State legislation. Typically, a State court can do no more than declare existing proprietary rights and make such consequential orders as are necessary for the realisation of such rights. Normally, ordinary principles of property and trust law apply although there are special rules in Victoria.[28] State court proceedings may operate to the detriment of one spouse. For example, a married woman who has made no direct cash contributions to the purchase of the matrimonial home but who has remained at home caring for the children and performing other domestic tasks may find an apportionment along such lines quite inimical. But apportionment under the wider powers of s.79 of the Family Law Act, 1975 (Cth.), would usually be more favourable to her.

Secondly, it is clear that s.78 has been deprived of much of its practical importance. Originally, s.78 was intended to supersede State court jurisdiction to hear independent property proceedings. S.78 is now confined to an ancillary role. It would appear that applications under s.78 will be rare given the availability of s.79 in similar circumstances and the presence of a comparable provision in State legislation which may be invoked without the necessity of a twelve-month delay.[29]

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28. Marriage Act, 1958-1977 (Vic.), s.161.
29. But should the *dicta* of Jacobs J. in *Tansell* v. *Tansell* be followed (*infra*, n.61) applications for a declaration of property interests by estranged couples will not proceed in a State court.

Thirdly, the precise ambit of s.79 is unclear. Under s.3(e) of the Family Law Amendment Act, 1976 (Cth.), property proceedings can be taken under s.79 only if they are "proceedings in relation to concurrent, pending or completed proceedings for principal relief". Since "principal relief" is defined as including proceedings for a declaration as to the validity of a marriage, the question arose whether s.79 could be invoked by a fictitious application for a declaration concerning the validity of a marriage about which there had never been any real dispute. Again, there existed some uncertainty as to the meaning to be attached to the term "completed proceedings". Could the dismissal of a fictitious application for a declaration amount to "completed proceedings"? If so, could the Family Court proceed to make an order under s.79?

Fourthly, the new definition of a "matrimonial cause" introduced by s.3(f) of the Family Law Amendment Act, 1976 (Cth.), has assumed importance. The new section—s.4(1)(e)—of the principal Act reads as follows:

> "(e) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship . . ."

S.114(1) of the principal Act which deals with injunction proceedings makes it plain that the injunction power may relate very directly to property:

> ". . . the court may make such order or grant such injunction as it thinks proper . . . including an injunction . . . in relation to the property of a party to the marriage or relating to the use or occupancy of the matrimonial home."

The injunction under s.114(1) is an independent remedy which can be sought in the pre-dissolution period. This raises a number of questions. One might begin by asking why s.114(1) of the principal Act was not amended after the *Family Law Act Case?* If s.78, which provided for independent property proceedings, was invalid on constitutional grounds, why was the same not true of s.114(1)? If s.114(1) is constitutionally valid, under which of the two placita is it validated? And if s.114(1) is valid, can the injunction power be used in relation to property as a device to circumvent the limitations placed upon the jurisdiction of the Family Court?

3. *The Judicial Response*

Decisions of the Family Court in the period between July, 1976 and December, 1977 (when the judgment of the Full Court of the Family Court in *Tansell and Tansell* was handed down) exhibit an exceptional degree of judicial activism. Undismayed by the restrictions imposed upon independent property proceedings in the pre-dissolution period, judges of the Family Court proceeded to entertain arguments which were patently designed to circumvent those restrictions. The two devices employed to this end involved the use of the injunction power and proceedings for a declaration as to the validity of a marriage.

(A) THE INJUNCTION POWER

An injunction under s.114(1), which may relate to property, may be granted as an independent remedy in the pre-divorce period. In *Davis and Davis,*[30] husband and wife were separated but no proceedings for dissolution

30. (1976) 11 A.L.R. 445.

had been filed. In the lower court, Watson J. gave the wife the exclusive use and occupancy of the matrimonial home of which the husband was the sole owner. On appeal to the Full Court, the husband argued that the court lacked jurisdiction to make such an order and, alternatively, even if it did possess jurisdiction, that on the facts of the present case the discretionary power in s.114(1) should not have been invoked. The Full Court rejected the former argument. While the Family Court could no longer declare property interests under s.78 or alter them under s.79 unless proceedings for dissolution had been filed, there was nothing in the Act to indicate that s.114(1) should be given a restrictive interpretation.[31] Their Honours considered that an injunction dealing with the use and occupancy of the matrimonial home was validated under the marriage power but were careful to go no further:

> "Different considerations may apply to that part of s.114(1) which gives the Court power to make orders in relation to the property of a party to the marriage."[32]

Here the Full Court is employing the same considerations as the High Court in the *Family Law Act Case*; the matrimonial home is clearly matrimonial property, but the reference in s.114(1) to the "property of a party to the marriage" is suspect on the basis of its potential inclusion of "any property howsoever and whensoever acquired . . .".[33]

Counsel for the husband argued that an order granting the wife exclusive occupancy of the matrimonial home of which he was the sole owner was tantamount to the alteration of property rights. The Full Court took the view that such an order merely affected the husband's proprietary interests without altering them and, therefore, did not contravene anything said in the *Family Law Act Case*. This distinction between altering and affecting property rights was to re-emerge more dramatically in later cases.

In the event, the husband's appeal succeeded on the ground that the trial judge had incorrectly exercised his discretion. But the Full Court unequivocally indicated that the injunction power can support independent property proceedings in relation to the matrimonial home:

> "In our view, provided that there are proceedings between the parties in circumstances arising from the marital relationship, s.114(1) gives the Court wide power to deal with the use and occupancy of the matrimonial home and to make such order as it thinks proper. This power may be exercised even if the home is solely owned by one spouse and where the other spouse has no legal or equitable interest in the home."[34]

In *Farr and Farr*[35] the husband sought the discharge of an injunction obtained by the wife under s.114(1) preventing the sale of a house belonging to him until the Family Court had considered an application by the wife under s.79. No proceedings for principal relief had been filed. The husband argued that the Court lacked jurisdiction to issue an injunction in order to make possible a future application by the wife for settlement of property.

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31. *Id.*, 447.
32. *Ibid.*
33. *Supra*, n.21.
34. (1976) 11 A.L.R. 445, 447.
35. (1976) 13 A.L.R. 514.

Murray J. gave judgment for the wife and refused to dissolve the injunction. Her Honour noted that the injunction power under the Act amounted to an independent remedy which might be exercised in circumstances arising out of the marital relationship. Adopting dicta of Pawley J. in *Mazein and Mazein*,[36] Murray J. focused upon the word "altering" in s.79 and the word "affects" and drew a distinction between the two:

> "In my view it is a question of degree in every case as to when a proprietary interest becomes so affected as to be altered, but I am of the opinion that a temporary suspension of a party's right to deal with his property . . . does not so affect his interest in the property as to alter it within the meaning of s.79."[37]

Murray J. then examined the nature of s.4(1)(e) in order to ascertain whether the application for an injunction satisfied the criteria contained in that definition of "matrimonial cause". Since the Act was manifestly intended to provide remedies in disputes arising from marital difficulties, it followed that once marital difficulty or breakdown occurred,

> "events thereafter involving disputes between husband and wife arising because of that difficulty or breakdown must be circumstances which arise out of the marital relationship . . ."[38]

In *Farr*, the wife lacked the financial means to support herself and her three dependent children. The obligation to support a spouse and children stems from the act of marriage. It includes an obligation to provide accommodation for these persons which can be enforced by exercise of the injunction power.

The facts in *McCarney and McCarney*[39] and *Stone and Stone*[40] typify the jurisdictional conflict which was to culminate in *Tansell*. In *Stone* the husband and wife had been separated for seven months and no proceedings for dissolution had been filed. The wife applied to the Family Court for custody, maintenance, and access orders. The husband then instituted proceedings in the Supreme Court of Victoria seeking a declaration that he and his wife had a joint beneficial interest in the matrimonial home of which she was sole legal owner. He also sought an order for sale and equal division of proceeds. The wife made interlocutory applications to the Family Court for orders restraining the husband from interfering with her use of and interest in the matrimonial home and from pursuing State Court proceedings pending further orders from the Family Court. When the interlocutory applications were heard, the wife was living in the matrimonial home with three of the six children of the marriage. Two of the remaining children returned home from time to time. Because of her obligations to the younger children of the marriage, the wife had no effective earning capacity.

Strauss J. decided that it would be inappropriate for him to make an order restraining the husband from pursuing proceedings in the Supreme Court:

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36. (1976) 10 A.L.R. 540.
37. (1976) 13 A.L.R. 514, 517-518.
38. *Id.*, 518.
39. (1978) 16 A.L.R. 220.
40. (1976) F.L.C. (CCH) 90-134.

> "I do not think that I can interfere with the jurisdiction of that Court, nor do I believe it is necessary for me to do so to protect the interests of the wife and the children."[41]

His Honour noted that the parties had been separated for only seven months and, referring to the effect that this event had produced upon the children, decided that it would not be in their best interests to remove them from the matrimonial home. Applying ss.43 and 114, he held that the needs of the wife, the welfare of the children, and the protection of the marital relationship demanded that the wife be left with the sole use and occupancy of the home pending a further hearing.[42] On the jurisdictional issue, he said:

> "In my view, regardless of any order which the Supreme Court might make as to the rights of the parties or regarding their interests in the [matrimonial home], this court can make orders for the protection of the marital relationship and relating to the use and occupancy of the marital home, in circumstances such as exist here."[43]

The decision in *Stone* did not provide any final resolution of the jurisdictional question. The orders made by Strauss J. were stop-gap measures. The fact that he gave the parties liberty to apply again to the Family Court "in the light of anything which might be done in another court",[44] however, suggests that Strauss J. was not troubled by the prospect of direct jurisdictional conflict.

In *McCarney and McCarney* a husband applied for an injunction restraining his wife from dealing with her interest in the jointly owned matrimonial home and from pursuing an application in the Supreme Court of South Australia for an order that the property be sold and the proceeds divided equally. The parties had been separated for less than twelve months. The husband wished to apply to the Family Court for an order under s.79 when the twelve-month period of separation required by s.48(2) had elapsed. He sought an injunction preserving his rights in the property until such time as he could rely on s.79.

In the lower court, Gun J. granted the husband an injunction. In his view, while s.114(1) could not be used to alter property interests it could be employed to reserve rights created by the marital relationship (including "the rights created by s.79"[45]) until such time as they could properly be considered in the Family Court. His Honour was mindful of the injustice which might otherwise result from a successful application by the wife under s.69(1) of the Law of Property Act, 1936-1975 (S.A.):

> "I consider, however, that the husband would be entitled to claim that he had not been fairly and equitably treated if his claim under s.79 of the Family Law Act for a greater share than one half of the property could be extinguished by the applicant's proceedings under s.69 of the Law of Property Act. One can think of many examples of parties to a marriage deliberately dissipating their property or

41. *Id.*, 75,640.
42. *Id.*, 75,641.
43. *Ibid.*
44. *Id.*, 75,642.
45. (1978) 16 A.L.R. 220, 238.

> jointly owned personal property or divesting themselves thereof in order deliberately to defeat a claim by the other party."[46]

This decision, had it survived on appeal, would have virtually put an end to State Court proceedings in the twelve-month separation period. By use of the injunction power under s.114(1), the Family Court could have in practice prevented a spouse from proceeding in a State Court.

This deceptively simple solution to the complex constitutional problem did not survive. On appeal the Full Court held, *inter alia,* that the Family Court lacked jurisdiction to grant injunctions which purported to preserve the right of one party to make a future claim under s.79. Rights are not created under s.79 until an application for dissolution is filed. The Full Court allowed that there were instances in which s.114(1) could be used in relation to the property of the parties in the absence of proceedings for principal relief. In instances where a claim can be shown to arise out of the marital relationship, and yet not depend upon prospective rights under s.79, the injunction power may be invoked providing that it merely affects but does not alter property rights. Further, the Court's discretionary power in these situations is dependent upon the *bona fides* of the applicant:

> ". . . the exercise of the power remains a matter for the Court's discretion and one matter which would obviously concern the Court is to ensure an injunction be not granted where the application is not made bona fide, i.e., where the real or substantial purpose is to delay proceedings until the applicant can issue an application for dissolution and thereby make claims under s.79. However desirable this ultimate aim may seem, it is a drastic step in effect to deprive one party of rights to which he or she is legally entitled under State law."[47]

Their Honours were most conscious of the jurisdictional difficulties inherent in the present case. They stated:

> ". . . we consider it undesirable that an injunction should ever be framed to restrain a person from proceeding in another court of competent jurisdiction to seek relief to which he is entitled by law. While at all times prepared to assist applicants in proper circumstances and within the scope of the Act, this court should avoid making orders in terms which may give the impression of a jurisdictional conflict between judicial bodies."[48]

The Full Court was not unaware of the implications of their expression of jurisdictional comity, confessing to sympathy with Gun J. and sharing his fears regarding the difficulties and potential injustice of the law as it presently stood. Unfortunately, their sympathy was not matched by any practical resolution of the problem. They commented:

> ". . . it is well to remember that a party to a marriage who seeks to take advantage of that situation, for example a husband separated from his wife who divests himself of his assets before the expiration of the period of 12 months in the expectation that his wife will apply in due course for a property settlement, should realize that

46. *Id.*, 239.
47. *Id.*, 229.
48. *Id.*, 230.

> he or she does so at his or her own risk and in the knowledge that the proceeds may be called into account."[49]

This is cold comfort to the spouse whose partner has successfully divested his or her assets before s.79 can be invoked. Under what provision of the Act can he or she be called to account? And if assets have been divested, where is the "property" to which an order may attach? Nonetheless, the restrictive elements of the Full Court's decision in *McCarney* may be avoided by a careful framing of the application. The substance of the relief which the husband sought in *McCarney* can be achieved by a simple application for exclusive use and occupancy of the matrimonial home. Such an application avoids overt jurisdictional conflict and is consistent with the judgment of the High Court in the *Family Law Act Case.*

The practical advantages of appropriately wording an application for an injunction are aptly illustrated by *Kalenjuk and Kalenjuk.*[50] In this case the matrimonial home was owned by the husband and one of his sons. Originally, the applicant wife sought an injunction restraining her husband from selling the house. In view of the fate of this form of application in *McCarney*, a further claim was added in which the wife asked for the use and occupation of the matrimonial home and an order that the husband not interfere with her use of it.

Gun J. had no hesitation in granting the injunction in its amended form. His Honour referred to the decision of the Full Court in *Davis* and the discussion in that case of the court's power to grant injunctions. In *Davis* it was held that the injunction would be exercised "even if the home is solely owned by one spouse and where the other spouse has no legal or equitable interest in the home."[51] Counsel for the husband argued that the wife's application was a mere ruse to circumvent the effects of the *Family Law Act Case* and *McCarney.* This submission found no favour with his Honour:

> "It is clear from the decision in the case of *Davis* . . . that the court has power to grant the order sought by the applicant. If that is so, and if I consider that I should exercise my discretion and make the order, then the fact that the order may have the result of circumventing the decisions in *Russell* v. *Russell* and *McCarney* is not, in my opinion, a relevant consideration."[52]

The decision in *Tansell and Tansell* supports the conclusion of Gun J. although one might question his Honour's *dicta* on the circumvention of the decision of the High Court in the *Family Law Act Case.*

(B) DECLARATION PROCEEDINGS

The second device which has been used to avoid the restrictions imposed upon the Family Court's jurisdiction in property matters is the use of proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage. The use of such proceedings stems from the formal answers given in the *Family Law Act Case.* Before the decision of the Full Court of the Family Court in *Tansell and Tansell*, some judges of the Family Court interpreted those answers literally and allowed

49. *Id.*, 231.
50. (1977) F.L.C. (CCH) 90-218.
51. (1976) 11 A.L.R. 445, 447.
52. (1977) F.L.C. (CCH) 90-218, 76,139.

declaration proceedings to be used as a means of attracting the property jurisdiction of the Family Court under s.79. Had this procedure proved successful it would have provided an easier method than the use of the injunction power for limiting the jurisdiction of State Courts in property matters.

The operation of this device is exemplified by *Read and Read.*[53] Here, a wife who had been separated for less than twelve months sought a readjustment of property. In order to give the Family Court jurisdiction to deal with the property application she also filed an application for a declaration as to the validity of her marriage under s.113. But, as the wife herself admitted in one of her affidavits, there was no doubt as to the validity of her marriage. Watson S.J. held that this was a legitimate device and ordered that both applications proceed. His Honour did not consider that the declaration proceedings were frivolous or vexatious within the meaning of s.118, nor did he think that they amounted to an abuse of process. He referred to the use of fictions in the law and stated:

> "The use of fictions is not unknown to the common law. The forensic shades of John Doe and Richard Doe haunt the history of the law . . . Nor is the modern law bereft of fiction—who is the real defendant in the typical motor vehicle personal injury claim?"[54]

Watson S.J. drew a comparison between the present proceedings and similar proceedings under the repealed Act and cited the decision of Toose J. in *Casias* v. *Wallace.*[55] He concluded:

> "The mere fact that a legitimate device is used to attract jurisdiction not otherwise available is not in my view an abuse of process per se."[56]

However this apparently simple solution to the jurisdictional problem was decisively rejected in *Tansell* v. *Tansell; Tansell and Tansell.*

(C) TANSELL v. TANSELL; TANSELL AND TANSELL

The decision of the Full Court of the Supreme Court of South Australia in *Tansell* v. *Tansell* provides a limited answer to the problem of jurisdictional conflict in matrimonial property matters. *Tansell and Tansell,* a decision of the Full Court of the Family Court of Australia, clarifies the extent of the injunction power while rejecting the use of fictitious declaration proceedings as a means of attracting property jurisdiction.

The procedural history of these decisions is convoluted. The parties were married in 1954 and there were two children of the marriage. In 1958, the Tansells purchased a home in Elizabeth, South Australia which was registered in their joint names. In 1976, husband and wife became estranged, but both continued to reside in the matrimonial home. Before the twelve-month separation period had elapsed, the husband (on 9th March, 1977) instituted proceedings in the Supreme Court of South Australia. He sought an order under s.69 of the Law of Property Act, 1936-1975 (S.A.), for sale of the matrimonial home and equal division of the proceeds. On 14th March, 1977 the wife sought, *inter alia,* an order in the Family Court giving her exclusive use and occupancy of the matrimonial home. On 21st

53. (1977) F.L.C. (CCH) 90-201.
54. *Id.,* 76,062.
55. (1971) 17 F.L.R. 490.
56. (1977) F.L.C. (CCH), 90-201, 76,063.

March, 1977 she filed two further applications. She sought, in the first, a declaration as to the validity of her marriage, and in the second, a transfer of her husband's interest in the home to herself, or, alternatively, an order granting her occupancy of the home for life. By April certain interim orders had been made by the Family Court on the wife's first application.[57] In the light of these orders the Registrar of the Land and Valuation Division of the Supreme Court referred the husband's application to the Full Court of the Supreme Court; judgment on this matter was delivered in September 1977. Meanwhile the wife's second two applications had come before Murray J. who stated a case for the Full Court of the Family Court. The Full Court handed down its decision in December 1977.

The Full Supreme Court answered only one of the two questions referred by the Registrar. That question directly confronted the problem of jurisdictional conflict between State and Family Court. It read:

> "Does this . . . Court . . . have jurisdiction to continue to entertain the said [partition] proceedings presently before it . . . notwithstanding that the respondent has instituted . . . proceedings in the Family Court of Australia . . . pursuant to ss.113 and 79 of the Family Law Act 1975-6."[58]

The Full Court, by a majority (Bray C.J., Jacobs J.; Sangster J. dissenting), answered this question in the negative. Bray C.J. reasoned that because the husband's application in the State court did not amount to a matrimonial cause its initial validity was beyond doubt. The Family Law Amendment Act, 1976 (Cth.), ensured the validity of such an application and failed to impose "a subsequent barrier to operate at a later stage of the proceedings".[59] The Chief Justice saw no overt statutory answer to the resultant jurisdictional division. His solution was to infer from the Act an intention (pursuant to s.109 of the Constitution) to deprive the State Court of jurisdiction once the jurisdiction of the Family Court had been validly invoked by the institution of proceedings under the Act. To hold otherwise, he considered, would lead to "an unseemly conflict of jurisdiction or a gaping hiatus".[60] But the jurisdiction of the State court was not to be displaced by a "fictitious procedure"; a "feigned dispute" concerning a marriage admitted on all sides to be valid did not constitute a valid invocation of the jurisdiction of the Family Court. However, the wife's first application seeking an injunction giving her exclusive use and occupancy of the matrimonial home was clearly a matrimonial cause within the meaning of s.4(1)(e). Bray C.J. held that this application (and, in any event, the interim orders made in the Family Court in April) effectively displaced the jurisdiction of the State Court. In the opinion of the present writer, the reasoning and conclusion of the Chief Justice are entirely convincing.

Although Jacobs J. adopted the same conclusion as Bray C.J. he thought that the jurisdiction of the State Court might cease at the point when that jurisdiction was first invoked. Such a result would depend upon the facts in each case:

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57. Gun J. made an interim order giving the wife occupancy of the home. Murray J. later ordered that each party should have the right to use and occupy the home. See *Tansell and Tansell* (1977) F.L.C. (CCH), 90-307, 76,621.
58. (1977) F.L.C. (CCH), 90-280, 76,487.
59. *Id.*, 76,493.
60. *Ibid.*

> "I would accordingly hold that if it is made to appear to the State court that a marriage has *de facto* broken down, and that the fate of the matrimonial home is in issue . . . the Law of Property Act does not authorise the institution of proceedings for the sale or partition of the matrimonial home at the suit of one of the spouses unless it is also made to appear to the court that the breakdown of their marriage is treated by neither party as a reason for dissolution. Otherwise, the field, i.e. breakdown and dissolution of marriage and the resolution of property questions consequent thereon, is covered by the Family Law Act."[61]

With respect, the solution offered by the Chief Justice is preferable. According to Jacobs J., State jurisdiction is to be ousted upon proof of breakdown of the marriage. The jurisdiction of a court cannot be presumed to be ousted by so imprecise and variable a criterion as the *de facto* breakdown of a marriage. The institution of proceedings provides a clear and identifiable act by which jurisdiction in the State court may be excluded; *de facto* breakdown does not.[62] Again, a literal reading of the *dicta* of Jacobs J. could produce injustice. For example, a couple whose marriage has broken down but who seek no more than a quantification of their beneficial interests in the matrimonial home would be deprived of a speedy remedy if the State court were to decline jurisdiction.[63]

Sangster J., dissenting, held that the Supreme Court possessed jurisdiction to hear the partition proceedings. His Honour's reasons for so holding are puzzling. On the one hand, it was flatly asserted that the proceedings before the State court were not proceedings in a matrimonial cause. On the other, it was acknowledged that:

> ". . . a substantial argument could be presented for saying that the earlier application was effective and that the Family Court could have made valid orders . . . relating to the use and occupancy of the house as sought in that application."[64]

Again it was recognised by his Honour that both parties themselves regarded the State court proceedings as "matrimonial". His Honour appeared to be aware of the existence of a matrimonial cause and yet to ignore the jurisdictional problems it raised. How could the wife's first application have been anything but a matrimonial cause? On what other basis can the interim orders in the Family Court be explained? The facts clearly disclosed "circumstances arising out of the marital relationship" and, according to *McCarney,* the application itself was within the scope of the injunction power.

In *Tansell and Tansell*, the Full Court of the Family Court had to consider the extent of its power to deal with declaration proceedings under s.113 and property applications under ss.114(1) and 79. The Full Court (Evatt C.J., Demack and Fogarty JJ.) in a joint judgment unanimously

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61. *Id.*, 76,506.
62. But note that the Full Family Court in *Tansell and Tansell* did not affirm the views of Bray C.J. in *Tansell* v. *Tansell* on the operation of s.109 of the Constitution.
63. The estimated intervals between filing and final hearing of applications in the Family Court has increased. Current delays on undefended applications for dissolution of marriage range from 9 weeks (Sydney) to 5 months (Melbourne and Launceston). Delays on defended applications range from 8 months (Hobart) to over 2½ years (Melbourne): *Parl. Debs. (Senate),* 8th November, 1977, 2337.
64. (1977) F.L.C. (CCH), 90-280, 76,503.

rejected the use of declaration proceedings as a means of attracting property jurisdiction in circumstances where the validity of the marriage was unquestioned.[65] The decision in *Read* was overruled and the use of fictions disapproved. It was made quite clear that such means of acquiring jurisdiction in the pre-dissolution period were unacceptable:

> "It seems wholly inappropriate that the Court should attempt to gather to itself a jurisdiction which Parliament has not otherwise given it by resurrecting the ancient use of legal fictions."[66]

Having dismissed the application for a declaration, the Full Court considered the definition of matrimonial cause in s.4(1)(ca) of the Act. Could the property application be saved by treating the dismissal of the declaration proceedings as "completed proceedings"? The Full Court had some difficulty with this point. Drawing in part upon decisions under s.89 of the repealed Act, the Court reasoned that "with regard to jurisdiction . . . it cannot be maintained that the term 'completed proceedings' does not include 'dismissed proceedings'."[67] However, this was to place too technical a meaning upon the term "completed proceedings":

> ". . . it would clearly be inappropriate for the Court to consider property issues where its jurisdiction depended on proceedings which had been dismissed not on the merits but on the ground that the Court should not entertain these proceedings because they were frivolous or vexatious or beyond the scope of the Court's power."[68]

Further, the Court held that jurisdiction in all proceedings falling within s.4(1)(ca) is exercisable only "where there is a relationship between the principal relief sought and the property relief". It seems that the existence of that relationship will turn on the presence of appropriate circumstances. These will be present in every case involving divorce or nullity but not in a fictitious application for a declaration of the type before the Full Court in *Tansell and Tansell.* That application

> ". . . has no substance, effects no change in the parties' status, and creates no situation such as would give rise to the need to inquire into the parties' property or to alter their interests in any property."[69]

In other cases, if the Court decides that there is a doubt as to the validity of the marriage, property orders under s.79 may be made.[70]

The Full Court reaffirmed that s.79 cannot be invoked in proceedings independent of any application for principal relief and concluded that the wife's application for a transfer of her husband's interest in the matrimonial home must fail. The second part of the wife's second application (an order granting her occupancy of the matrimonial home for life) was also disallowed on the basis that such an order amounted to an alteration of property interests. However, their Honours upheld the wife's first application, on the basis that the occupancy application was a valid

65. (1977) F.L.C. (CCH) 90-307.
66. *Id.*, 76,628.
67. *Id.*, 76,629.
68. *Ibid.*
69. *Id.*, 76,631.
70. There must, however, be a relationship between principal and property relief. As to the fate of a property application which bears no relation to the doubt which allows the declaration to be made, see *id.*, 76,630-76,631.

invocation of the Court's powers under s.114(1). It is clear, therefore, that under s.114(1)

> ". . . the Court has a power independent of any other matrimonial cause to grant an injunction restraining a spouse from remaining in occupation or from interfering with the occupation of the other spouse, provided that such orders are made on a personal and temporary basis."[71]

The Full Court provided an answer to the fears of Gun J. and the Full Court in *McCarney* concerning the disposal of the matrimonial home in the pre-dissolution period. Adopting *dicta* of Jacobs J. in *Tansell* v. *Tansell*,[72] their Honours held that during the twelve-month separation period the Court might grant an injunction restraining a spouse from selling or encumbering the matrimonial home. The effect of such an order is identical to one preserving prospective rights under s.79. The Full Court dealt with the apparent inconsistency with *McCarney's* case by holding that, although the sections overlap, this in itself is no reason for restricting the ambit of s.114(1) and s.4(1)(e). In every case, however, the temporary and personal nature of the injunction power is a paramount consideration.

Prima facie the combined effect of *Tansell* v. *Tansell* and *Tansell and Tansell* is to resolve much of the jurisdictional uncertainty produced by the *Family Law Act Case* and the consequent amendments to the Act. In the pre-dissolution period the jurisdiction of a State court will cease upon the valid invocation of a matrimonial cause within the meaning of the Act.[73] The Family Court's jurisdiction will almost invariably be invoked by an application for an injunction under s.114(1) for occupancy of the matrimonial home. In that case, the injunction power may extend to the granting of an order restraining a spouse from selling or encumbering his or her interest in the home. It might be concluded, therefore, that the doubts surrounding jurisdiction in matrimonial property proceedings in the twelve-month separation period have been dispersed. The remaining section of this article will be addressed to an analysis of the accuracy of this conclusion.

4. Conclusion

Tansell and Tansell defined with precision discrete areas of jurisdiction in matrimonial property matters; it did not erase the fundamental division of jurisdiction. The utility of the resultant solution turns upon the statutory definition of the injunction power in s.114(1). Its effectiveness is therefore determined by the temporary and personal nature of the remedy and the statutory requirements that the proceedings lie between parties to a marriage and relate to circumstances arising out of the marital relationship. Certain limitations flow from these characteristics.

First, the temporary nature of the remedy leaves the potential duration of an order uncertain. At first glance this seems unexceptionable. It is

71. *Id.*, 76,633.
72. (1977) F.L.C. (CCH), 90-280, 76,505-76,507.
73. But see *supra*, n.63. It should be clearly understood, however, that State jurisdiction is excluded by operation of s.109 of the Constitution and not by declaration or order of the Family Court. While the Family Court cannot simply exclude State jurisdiction, it may make an order which has that effect under s.109.

established that the order must be temporary and personal, that it must not "affect in a permanent way" interests in property and that, in appropriate circumstances, the court will terminate the order. But it cannot be denied that the injunction power is capable in effect of affecting or preserving rights. If a party delays seeking principal relief, or if the divorce list has become clogged, will the injunction continue to apply? If so, is this not to affect property rights indefinitely? Again, delay will occur where a spouse decides to contest a property settlement consequent upon divorce. It is submitted that in the situations outlined above the distinction between altering and affecting property rights become practically meaningless.

Secondly, the proceedings must lie between parties to a marriage. As Nygh notes, this "means that injunctive relief cannot be sought, by way of independent proceedings, against third parties, be they foreclosing mortgagees or adulterers."[74] In *Kalenjuk*, Gun J. held that an injunction may adversely affect a third party. This decision cannot be of universal application and should be confined to those situations in which the fate of the matrimonial home is in issue. It is unlikely that an injunction would issue against property which could not be so readily characterised as matrimonial property.[75]

A third difficulty emerges from the requirement of "circumstances arising out of the marital relationship" and the reference, in s.114(1), to "the property of a party to the marriage". The Family Court has expressed misgivings over the scope of the latter phrase.[76] Property in dispute must be capable of being characterised as matrimonial property before an injunction will issue.[77] An order for the protection of the marital relationship may involve an order relating to property, as in *Stone*, but the property involved will usually be the matrimonial home. Thus the scope of the injunction power when applied to property other than the matrimonial home and car remains uncertain.

By now it will be apparent that there exists a compelling need for the Family Court to have power to effect a readjustment of the spouses' financial affairs during the pre-dissolution period. The injunction power provides a limited solution but leaves the underlying problem of jurisdictional division unanswered. The only satisfactory solution is an extension of Commonwealth power in the area of matrimonial property. How can this be achieved? Neither referendum nor referral of power are likely to provide an immediate answer. What is required is an amendment to the Act giving the Family Court power to effect an equitable distribution of matrimonial property in the pre-dissolution period. This was recommended by both the Family Law Council and the Royal Commission on

74. Nygh, *Guide to the Family Law Act 1975* (2nd ed., 1978), 160.
75. *Mills and Mills* (1976) 11 A.L.R. 569; *Mazein and Mazein* (1976) 10 A.L.R. 540. In the *Family Law Act Case*, Barwick C.J. stated:
> "Though a system of communal property between spouses might possibly be erected as a consequence of the act of marriage . . . it could not be properly said . . . that the creation of jurisdiction to settle disputes as to such property . . . was within the subject matter 'marriage'." (1976) 9 A.L.R. 103, 114.

In the light of the decisions discussed in this article it might be argued that the emergence of such a system is being effected by the courts. The matrimonial home is now regarded as matrimonial property and subsequent decisions may incorporate other property within this definition.
76. *Davis and Davis* (1976) 11 A.L.R. 445, 447.
77. *Supra*, n.75.

Human Relationships.[78] Such an amendment may well be challenged and the High Court will be directly confronted with the question of the scope of the marriage power in relation to matrimonial property.[79] One can only hope that the problems left by the *Family Law Act Case* will then be conclusively determined. Until this event one can foresee the continuation both of injustice to spouses and of the type of judicial activism described in this article.

78. Family Law Council, *First Annual Report* (1977), 17; Royal Commission on Human Relationships, *Final Report* (1977) IV, 60-61.
79. Mason, Jacobs and Murphy JJ. would almost certainly support such an amendment if it was restricted to "matrimonial property".