CASE NOTE

RUSSELL v. RUSSELL; FARRELLY v. FARRELLY[1]

Constitutional law (Cth) — Marriage power — Divorce and matrimonial causes power — Interpretation — State courts invested with federal jurisdiction — Validity of Family Law Act 1975 (Cth).

Russell v. *Russell* involved a petition for divorce and ancillary relief under the Matrimonial Causes Act 1959 which was pending when the Family Law Act 1975 came into operation in January 1976. At the respondent's request and pursuant to s. 9(2) of the Family Law Act 1975 the case was to be heard as if the proceedings had been instituted under the Family Law Act 1975, whereupon the Act was challenged on constitutional grounds. The case was then removed to the High Court.

In *Farrelly* v. *Farrelly* a custody application under the South Australian Guardianship of Infants Act 1940 was pending in January 1976, and s. 9(4) of the Family Law Act 1975, read with s. 8(1)(b) and paragraph (c)(iii) of the definition of "matrimonial cause" in s. 4(1) of the same Act, required such an action to be dealt with under that Act. Again it was suggested that there might be obstacles to the validity of the Act, and the case was removed into the High Court. The two cases were heard together.

In the latter case the issue arose directly of the validity of the Act in so far as it purported, by the extended definition of "matrimonial cause" in s. 4(1), to deal with custody, maintenance or property disputes in the absence of a petition for principal relief, namely a decree of dissolution or nullity of marriage. This issue was also argued in *Russell*, (although there was in that case an application for principal relief), on the grounds that if these provisions were invalid the whole Act might fall.

In *Russell* there was also a challenge to s. 97 of the Family Law Act 1975. This section lays down certain rules to be followed by all courts exercising jurisdiction under the Family Law Act 1975. Section 97(1) requires that proceedings under the Act be heard in closed court, while s. 97(4) provides that in such proceedings neither Judges nor counsel should robe. While the validity of these provisions in their application to the Family Court was not in question, their purported application to State courts which had been invested with federal jurisdiction under s. 39 of the Family Law Act 1975 raised difficulties.

The power of the Commonwealth Parliament to invest State courts with federal jurisdiction is found in s. 77(iii) of the Constitution. The scope of this power was a subject of disagreement.

---

[1] (1976) 50 A.L.J.R. 594; (1976) 9 A.L.R. 103. High Court of Australia; Barwick C.J., Gibbs, Stephen, Mason and Jacobs JJ.

Barwick C.J. and Gibbs J. held s. 97(1) and s. 97(4) invalid. Mason and Jacobs JJ. held both sub-sections valid. Stephen J.'s view, which was that s. 97(1) was invalid and s. 97(4) valid, was the decisive one.

Barwick C.J. and Gibbs J. took a fairly simple view of the problem. They distinguished between the organization of the State courts, which cannot be altered by Commonwealth legislation, and the functions of those courts, which may be affected by the Commonwealth Parliament.[2] Both judges regarded the challenged sub-sections of s. 97 as attempts to alter the structure of State courts, although Barwick C.J. emphasised the break with tradition effected by the section as a reason for its invalidity.[3]

Stephen, Mason and Jacobs JJ. took a more complex view of the problem. They considered that Commonwealth laws purporting to affect State courts must satisfy two criteria of validity; first, such laws must not affect the "constitution and organization of State Courts", and secondly, they must be "so germane to the jurisdiction which is being invested as to be incidental to that investiture".[4] Gibbs J. and Barwick C.J., it seems, would regard these two tests as opposite sides of the same coin. Gibbs J., for instance, distinguishes those laws which are incidental to the exercise of Commonwealth power from those which are laws with respect to the State courts,[5] whereas Stephen, Mason and Jacobs JJ. do not regard these categories as mutually exclusive. In their view a law might be regarded as incidental to the exercise of Commonwealth power (that is, it might satisfy the first test of validity) but might ultimately be held invalid because it affected the State courts in an unacceptable way (that is, it would not satisfy the second test of validity).

Mason J., having referred to the two tests of validity, asserted first that the Commonwealth Parliament has power to regulate the procedure to be followed by State courts when they are exercising federal jurisdiction, and secondly that it cannot be doubted that the laws in issue deal with procedural matters. The laws are therefore valid in their application to State courts, unless they affect the constitution, structure or organization of those courts.[6] Mason J. took a very narrow view of the meaning of these words; the "organization" of the court was taken to mean the various aspects of the relationship between the State Court and its staff, and neither the prohibition on the wearing of robes nor the requirement of closed courts affected the "organization" of the State courts in such a way as to be rendered invalid. Although like Gibbs and Stephen JJ. he admitted that sitting in open court is part of the tradition of the State courts, his narrow view of what the Commonwealth Parliament is precluded from altering enabled

---

[2] (1976) 50 A.L.J.R. 594, 599 (*per* Barwick C.J.); 603 (*per* Gibbs J.).
[3] *Id.* 598-599.
[4] *Id.* 608 (*per* Stephen J.).
[5] *Id.* 601-602.
[6] *Id.* 610.

Mason J. to deny that the break with tradition necessarily invalidated the Commonwealth law.[7]

Jacobs J. also distinguished the two tests of validity set out above; he found that s. 97 was clearly within Commonwealth power and that it did not alter the constitution or organization of the State Supreme Courts. Without considering the meaning of "constitution or organization" as closely as Mason J., he concluded that neither of the matters dealt with in s. 97 altered the nature of the courts; "The same Court sits whether the place of hearing be open or closed to the public and whether or not any particular form of dress is prescribed".[8]

Stephen J. took the opposite view; he suggested that to require a State court to sit in closed court would be to turn that court into "a different kind of tribunal".[9] However he agreed that s. 97(4) did not affect the constitution or organization of the State courts, and that it was sufficiently connected with the Commonwealth investiture of State courts with federal jurisdiction to be valid.[10] The necessary connexion was found here in the nature of the jurisdiction conferred; the formality or otherwise of courts exercising family law jurisdiction is generally recognized as a significant matter.

The question of whether a failure to comply with the requirements of s. 97 would render proceedings void caused less trouble. Because of their view of s. 97, neither Barwick C.J. nor Gibbs J. was called upon to answer this question, but both suggested that no invalidity would be caused by such default if s. 97 were valid,[11] the Chief Justice did suggest, however, that if a court were closed without authority proceedings therein might be voidable.[12] Mason and Jacobs JJ. agreed that no invalidity could be caused by a breach of s. 97, and Stephen J. decided similarly with respect to s. 97(4); having found s. 97(1) invalid he did not comment on its effect.[13]

In both *Russell* and *Farrelly* it was argued that certain other sections of the Family Law Act 1975 were invalid as outside the constitutional power of the Commonwealth. Specifically, these were sections 9(4), 39, 64, 74 and 78. The effect of these sections, read with the definition of "matrimonial cause" in s. 4(1), was to create a jurisdiction to hear proceedings for maintenance, custody or property settlements where there has been no application for a decree of divorce or nullity of marriage. Although these were the sections challenged, the result of the case depended on the view taken by the members of the Court of the definition of "matrimonial cause". The relevant definition is as follows:

---

[7] *Id.* 611.
[8] *Id.* 618.
[9] *Id.* 609.
[10] *Id.* 608-609.
[11] *Id.* 598 (*per* Barwick C.J.); 604 (*per* Gibbs J.).
[12] *Id.* 598.
[13] *Id.* 613 (*per* Mason J.); 618 (*per* Jacobs J.); 610 (*per* Stephen J.).

"matrimonial cause" means—

(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;

(c) proceedings with respect to—

(i) the maintenance of one of the parties to a marriage;

(ii) the property of the parties to a marriage or of either of them; or

(iii) the custody, guardianship or maintenance of, or access to, a child of a marriage;

(d) proceedings between the parties to a marriage for the approval by a court of a maintenace agreement or for the revocation of such an approval or for the registration of a maintenance agreement;

(e) proceedings for an order or injunction in circumstances arising out of a marital relationship; or

(f) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (e), including proceedings of such a kind pending at, or completed before, the commencement of this Act.

It was generally accepted that the challenged sections could not be a valid exercise of the divorce and matrimonial causes power, s. 51 (xxii) of the Constitution, although Jacobs J. did not discuss the matter specifically.[14] The Solicitor-General for the Commonwealth however sought to support the sections as a valid exercise of the marriage power, s. 51(xxi) of the Constitution.

The decision on this matter turned upon the interpretation of the marriage power, and this in turn depended to a significant extent on the approach to constitutional interpretation taken by each member of the Court.

All members of the Court accepted that the marriage power extended beyond the power to make laws with respect to the celebration of marriage.

Stephen J. did not discuss the marriage power at all but adopted the view of Mason J.[15] There were thus four judgments dealing with the validity of these sections, and each of them was different. The only matter considered by all the judges was the question of how far any

[14] *Id.* 599 (*per* Barwick C.J.); 606 (*per* Gibbs J.); 611 (*per* Mason J.); Stephen J. adopted Mason J.'s judgment on this issue.

[15] *Id.* 608.

paragraph of s. 51 of the Constitution can be regarded as limited by any of the other paragraphs; here the issue was specifically, can or must s. 51(xxi) be read down in the light of s. 51(xxii)?

Barwick C.J. and Gibbs J. believed that the former placitum could and should be read down in the light of the latter placitum, while Mason and Jacobs JJ. took a different view. However it will be seen that the importance of this issue varied from judgment to judgment.

Barwick C.J. asserted that s. 51(xxi) had to be read down by reference to s. 51(xxii). If, he argued, s. 51(xxi) included power to provide for the enforcement of parental rights, custody and so on whenever disputes arose out of a marriage relationship, then s. 51(xxii) would be "otiose and unnecessary". To disregard s. 51(xxii) in interpreting s. 51(xxi) would be "completely opposed to the principles of constitutional construction".[16]

However this approach was not vital to the Chief Justice's decision, since he took the view that even in the absence of s. 51(xxii), s. 51(xxi) would not comprehend power to create a jurisdiction to enforce the consequences of marriage. Following *Attorney-General for the State of Victoria* v. *The Commonwealth*,[17] he accepted that the marriage power extends to "attaching consequences to the act of marriage, both for the spouses and through their parent or parents, for the children of one or both of them", and possibly to the creation of mutual rights and obligations which will flow from the act of marriage,[18] but he denied that the power to create such rights and duties carries with it a power to create a jurisdiction for their enforcement. The creation of such a jurisdiction he saw as neither incidental to marriage so as to be within s. 51(xxi), nor within s. 51(xxxix).[19]

Gibbs J. took a wider view of the effect which s. 51(xxi) might have had if it had stood alone; he asserted that in general—

> When the Parliament is empowered by one of the paragraphs of s 51 to create substantive rights and liabilities it may also under the same power provide for the enforcement of those rights in legal proceedings . . .[20]

But for the presence of s. 51(xxii), s. 51(xxi) would clearly give the Commonwealth power to legislate for the enforcement of the rights and duties of a married couple arising out of the marriage relationship.

Gibbs J. referred to the general rule that the paragraphs of s. 51 are not to be regarded as limiting each other, but then he mentioned the fact that there are exceptions to this rule; specifically he cited paragraph (xxxi), which has been taken to limit all other Commonwealth powers.[21] Like Barwick C.J., Gibbs J. concluded that paragraph (xxii)

---

[16] *Id.* 601.
[17] (1962) 107 C.L.R. 529.
[18] (1976) 50 A.L.J.R. 594, 599-600.
[19] *Id.* 600.
[20] *Id.* 606.
[21] *Ibid.*

should not be ignored in the construction of paragraph (xxi), and therefore that the express limitation on Commonwealth power which, in his view, is to be found in s. 51(xxii) must also have the effect of limiting the scope of the power granted by s. 51(xxi); this is, s. 51(xxi) does not empower the Commonwealth to provide for custody proceedings to be dealt with under the Family Law Act 1975 in the absence of an application for principal relief.[22]

Both the Chief Justice and Gibbs J. would have been prepared to read down the offending sections of the Family Law Act 1975 to bring them within the scope of the power granted by s. 51(xxii).[23]

Mason J., in what was to be the deciding judgment on this issue, first considered s. 51(xxii) and adverted to the limited interpretation which has been placed on this section, pointing out that the extended definition of "matrimonial cause" found in s. 4(1) of the Family Law Act 1975 cannot be validated entirely by s. 51(xxii).[24]

He then turned his attention to s. 51(xxi), and agreed that this paragraph gives the Commonwealth power to regulate the respective rights, duties and obligations of the parties to a marriage which arise out of or as a consequence of that marriage, and, subject to the effect of s. 51(xxii), power to enforce those rights, duties and obligations. He rejected as arbitrary Barwick C.J.'s distinction between the power to create rights and duties and the power to provide for their enforcement.[25]

Two arguments advanced in an attempt to narrow the scope of s. 51(xxi) were then considered.

The first, that a law which defines the rights and obligations of the parties to a marriage is a law with respect to married persons and therefore not a law with respect to marriage, was dismissed with the short comment that a law which can be characterized as a law with respect to married persons is not automatically precluded from being also a law with respect to some other subject, for instance marriage.[26]

The second argument was that based on the existence of s. 51(xxii). Unlike Barwick C.J. and Gibbs J., Mason J. was not convinced by this argument; he pointed out that "it is a Constitution that we are construing and that the legislative powers that it confers should be construed liberally".[27] He was especially unwilling to apply this restrictive approach to construction to the extreme of

> substracting from the content of the marriage power, not only what is contained within s. 51(xxii), but the entire topic of enforcement of the rights, duties and obligations created in the exercise of the marriage power.[28]

---

[22] *Id.* 607.
[23] *Id.* 601-602 (*per* Barwick C.J.); 607 (*per* Gibbs J.).
[24] *Id.* 611.
[25] *Ibid.*
[26] *Ibid.*
[27] *Id.* 611-612.
[28] *Id.* 612.

Mason J. concluded, citing various authorities in support, that s. 51(xxi) gives the Commonwealth power to provide for the enforcement of any rights or duties which are created in the exercise of the power granted by that paragraph. He was then required to consider what rights and duties may be created under the marriage power, and to examine the challenged sections of the Act in the light of this decision.

The marriage power, so interpreted, allows the Commonwealth to provide for "the enforcement of rights of maintenance, custody and property by proceedings separate and independent of proceedings for annulment or dissolution of marriage . . .".[29] It must be remembered that these are the rights and duties of the parties to a marriage to each other and to the children of the marriage, and it is implicit in Mason J.'s judgment that these rights and duties are only enforceable *between* such people, or at least that enforcement at the instance of an outsider is not within the scope of the marriage power.

Therefore, of paragraphs (c), (d), (e) and (f) of the definition of "matrimonial cause", only (d) was valid as it stood, because unlike the other three paragraphs, it is limited to "proceedings between the parties to a marriage".

Mason J. considered whether s. 15A of the Acts Interpretation Act 1901 (Cth) enabled him to validate the other paragraphs, and if so, to what extent. A problem arose because the invalid paragraphs could be read down with reference either to the marriage power or to the divorce and matrimonial causes power, but results of the alternative methods of proceeding would not be the same.

Mason J. referred to the comments of Latham C.J. in *Pidoto* v. *State of Victoria*[30] to the effect that the court should not feel inhibited in reading down an invalid law to achieve validity if the law itself indicates how it should be read down.[31] Here, Mason J. found such an indication in the clear intention of Parliament to establish a jurisdiction to deal with family law matters independently of an application for annulment or dissolution of marriage. This showed an intention to exercise the marriage power, and so the various paragraphs could be read down so as to constitute a valid exercise of that power.

Mason J. limited paragraphs (c)(i), (c)(iii) and (e) to proceedings between the parties to a marriage, and paragraph (c)(iii) was further limited to refer only to the natural or adopted children of both parties to the marriage.[32] This latter limitation had the effect of invalidating, for most purposes, that part of the definition of "child of the marriage" in s. 5(1) of the Act which referred to children of one or other party to a marriage who were, at a specified time, part of the household of the parties. Since Mason J. had already limited paragraph (c)(iii) to proceedings between the parties to a marriage, and since the whole

---

[29] *Ibid.*
[30] (1943) 68 C.L.R. 87.
[31] *Id.* 109-110.
[32] (1976) 50 A.L.J.R. 594, 613.

nature of the matrimonial household is obviously closely related to the marriage relationship, it is hard to see why he felt the need to impose this additional limitation on this paragraph. Clearly in some cases the existence of a marriage should not of itself bring the parties to a dispute within the scope of the Commonwealth marriage power; for instance, not every property dispute between a married couple concerns rights and obligations arising out of the marital relationship.

It seems unfortunate that Mason J. decided that a dispute over a child who is the child of one of the parties to a marriage and a member of the matrimonial household is not a dispute arising out of the marital relationship. It is hard to see how any good can come of creating a distinction, within households, between these children on the one hand and the natural or adopted children of the marriage on the other. Mason J.'s decision is particularly unfortunate in view of the fact that an effectively identical definition of "child of the marriage" was included in s. 6(1) of the Matrimonial Causes Act 1959 (Cth) and was acted upon by the courts for some fifteen years without being successfully challenged. The limitation imposed by Mason J. is all the more surprising in view of the fact that Barwick C.J., although generally more conservative in his view of the marriage power than Mason J., was prepared to include in the scope of the power laws regulating the effect of a marriage on the children of one of the parties to that marriage.[33]

Paragraph (c)(ii), according to Mason J., did not show a close enough relationship with the marriage power to be read down according to that power; this was because it purported to extend to all disputes with respect to any property, however and whenever acquired, of any married person. He therefore limited this paragraph by reference to the divorce and matrimonial causes power, with the result that property matters can once again only be affected by Commonwealth legislation when they are ancillary to applications for principal relief.

Jacobs J. took a very wide view of the extent of the marriage power and was able to uphold paragraphs (c), (d) and (e) of the definition of matrimonial cause as exercises of this power. His validation of paragraph (c)(ii) was achieved by a complex and somewhat unsatisfactory argument to the effect that the paragraph was valid as far as the matters it included were otherwise dealt with by the substantive sections of the Family Law Act 1975. Jacobs J. was the only judge who found this paragraph valid as expressed, and it is felt, with respect, that his reasoning in this case is unlikely to create a significant precedent, so no attempt to explain his argument will be made. However, his general approach to constitutional interpretation, and to the marriage power in particular, is worthy of discussion.

Jacobs J. regarded the argument that s. 51(xxi) of the Constitution must be read down in the light of s. 51(xxii) as "fragile".[34] However

[33] *Id.* 599-600.
[34] *Id.* 616.

he went further than this and suggested an explanation for the co-existence of the two paragraphs which, if accepted, overcomes the force of the argument which convinced Barwick C.J. and Gibbs J., namely that s. 51(xxii), if not taken to limit s. 51(xxi), has no meaning. The explanation proferred was that when the Constitution was drafted, it was necessary to make it clear that custody and guardianship disputes, within Commonwealth power during the subsistence of a marriage, remained within Commonwealth power after the dissolution of the marriage.[35]

In his consideration of the effect of paragraphs (xxi) and (xxii), Jacobs J. pointed out that these two Commonwealth heads of power are the only ones relating to private or personal rights rather than "public economic or financial subjects".[36] He made it clear that this fact should not be allowed to induce the court to take a narrow view of the scope of the two powers in an attempt to minimize what he called the "unique intrusion" into areas of State power. As well, he referred to the free movement of people within the Commonwealth as creating a need for the Commonwealth to have power over these particular personal relationships.[37]

Having accepted, like all the other members of the Court, that s. 51(xxi) extends beyond the power to regulate the ceremony of marriage, Jacobs J. considered the nature and basis of the institution of marriage in an attempt to determine the scope of the power to make laws with respect to that institution.

Marriage, he decided, is primarily an institution of the family;[38]

> The nurture of children by, and in a recognized and ordered relationship with, their parents is . . . integral to the concept of marriage as it has developed as an institution in our society.[39]

Custody, guardianship and maintenance of the children of a marriage are "aspects of the nurture of children within the marriage relationship" and therefore laws dealing with them are laws with respect to "marriage as a social institution".[40]

Jacobs J. would have included in the marriage power the power to make laws giving the custody and guardianship of a child of a marriage to a third party, whether or not the parents of that child are alive. Such power is "ancillary to the power to make laws for the nurture of a child of a marriage by its parents . . .".[41]

Having taken this wide view of the extent of the marriage power, Jacobs J. was able to uphold without alteration paragraphs (c)(i), (c)(iii), (d) and (e) of the definition of "matrimonial cause". His view may have even wider implications than this; for instance, it leaves

---

[35] *Ibid.*
[36] *Id.* 614.
[37] *Ibid.*
[38] *Id.* 615.
[39] *Ibid.*
[40] *Id.* 616.
[41] *Ibid.*

open the possibility of a Commonwealth adoption law dealing with adoptions of children of marriages and perhaps even with the adoption of any children by married couples. Although this aspect of Jacobs J.'s judgment was not supported by any other member of the court, and although it is unlikely that the Commonwealth would wish to pass an adoption law which would apply to only a proportion, whether large or small, of all adoptions taking place in Australia, this possible new direction of Commonwealth power should not be forgotten.

Mason J.'s judgment on this issue was decisive. His view was supported and adopted by Stephen J., and Jacobs J. took a very wide view of the validity of the Act which included upholding all the parts of the Act which were upheld by Mason J. Mason J.'s view therefore triumphed over the views of Gibbs J. and Barwick C.J.

Some of the specific ramifications of the decision in this case have been mentioned in the course of the earlier discussion. The general results of the case also deserve comment.

The decision in *Russell* and *Farrelly* provides welcome judicial backing for the Family Law Act 1975 and the purposes of the legislation, which were stated by Senator (now Mr Justice) Murphy, when he was Commonwealth Attorney-General, to be

> to eliminate as far as possible the high costs, the delays and indignities experienced by so many parties to divorce proceedings under the existing Matrimonial Causes Act.[42]

Although in these cases there was no direct challenge to the basic concept of "no-fault" divorce, it seems impossible in view of the judgments of all members of the Court that this aspect of the Act could be successfully challenged. However, it is unfortunate that another important fundamental aspect of the Act, the provision for determination of property interests apart from divorce proceedings, was invalidated.

In 1970 Sackville and Howard considered the power of the Commonwealth Parliament to regulate family relationships.[43] In support of an argument that the Commonwealth in fact had power to provide for the resolution of property disputes independently of divorce proceedings, they made a suggestion which could now be adopted to overcome the effect of the High Court's decision on property disputes.

The writers pointed out that

> there is apparently no obstacle to the Commonwealth allowing a decree of judicial separation to be granted at short notice on a very liberal non-fault ground, such as separation for two weeks. Nor is there any apparent obstacle to the Commonwealth's authorizing a settlement of property incidentally to a petition for judicial separation. . . .[44]

---

[42] S. Deb. 1974, Vol. 60, 758.
[43] (1970) 4 F.L. Rev. 30.
[44] *Id.* 58.

They go on to point out that such a decree has very little practical effect; that is, unlike a divorce, it does not significantly alter the matrimonial status of the parties to the order. A scheme such as this could be used to allow for a determination of property interests nearly twelve months before divorce proceedings could be initiated and very soon after matrimonial problems had come to a head. This would avoid many of the problems which will be caused by a return to the situation that, during the subsistence of the marriage, property disputes must be determined according to State laws, which in general do not provide for recognition of non-financial contributions to the acquisition of matrimonial property.[45]

The decision in *Russell* and *Farrelly* vindicated the view of Sackville and Howard in the article referred to above, that the scope of the Commonwealth marriage and divorce powers, and in particular the former power, could well be found by the High Court to extend significantly beyond those areas covered by the Matrimonial Causes Act 1959 and the Marriage Act 1961 (Cth). Although the power to deal with property disputes independently of divorce proceedings has been denied to the Commonwealth, the equally significant power to deal with custody and maintenance disputes in the absence of divorce proceedings has been allowed to the Commonwealth after having been exercised solely by the States since federation.

The Commonwealth government moved quickly after *Russell* and *Farrelly* were decided, and the Family Law Amendment Act 1976 was passed to amend the Family Law Act 1975 in accordance with the decision in those cases.

The most significant amendments effected by this Act were to the definition of "matrimonial cause" in s. 4(1). Paragraph (c),[46] which created a very wide jurisdiction, was replaced by paragraph (c), (ca) and (cb), which are as follows:

> (c) proceedings between the parties to a marriage with respect to—
>
> (i) the maintenance of one of the parties to the marriage; or
>
> (ii) the custody, guardianship or maintenance of, or access to, a child of the marriage;
>
> (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;
>
> (cb) proceedings by or on behalf of a child of a marriage against one or both of the parties to the marriage with respect to the maintenance of the child.

Proceedings with respect to the property or maintenance of the parties to a marriage, or the custody or guardianship of or access to a

---

[45] But see Marriage Act 1958, s. 161 (Vic.).

[46] Set out on page 95 *supra*.

child of a marriage, are now limited to proceedings between the parties to a marriage. Proceedings with respect to the property of the parties to a marriage are further limited to proceedings ancillary to proceedings for principal relief between those parties. Proceedings with respect to the maintenance of a child of a marriage may be brought between the parties to a marriage *or* by or on behalf of the child against one or both of the parties to the marriage.

Although these amendments considerably narrow the scope of the Family Law Act 1975, it is submitted that with the exception of property disputes, the disputes now excluded from the consideration of the Family Court will be few in number and minor by comparison with the increased scope of Commonwealth activity in the field of family law achieved by the basic validation of the Family Law Act 1975. For instance, it is much more significant that the Family Court can now deal with maintenance disputes between the parties to a marriage without proceedings for principal relief having been instituted, than that it can no longer deal with proceedings for the maintenance of a party to a marriage at the instance of a third party.

The amendment to the paragraph dealing with property disputes is not so easily dismissed. Although the amendment to this paragraph effects Mason J.'s decision as to the extent of the validity of the paragraph, it is suggested that this is not the only form which the amendment could have taken. The amendment might have been more in line with the spirit of the Act in its original form had it instead rectified the fault seen by Mason J. in the paragraph, namely that it did not show a close enough relationship with the marriage power to be even partially supported by it.[47] This paragraph too could have been amended simply by the insertion of the words "between the parties to a marriage" after the word "proceedings" in paragraph (c). A more cautious amendment, adding to the end of paragraph (c)(ii) the words "where the acquisition of the property was related directly (or indirectly) to the marital relationship" (or words of similar effect) would have brought the sub-paragraph squarely within the marriage power as explained by Mason J., while at the same time overcoming the problem created by the actual amendment, namely that jurisdiction over matrimonial property is distributed between two sets of courts which apply several different rules at different stages of the marital relationship.

Paragraph (f) of the definition of matrimonial cause was also amended to restrict the availability of injunctions to proceedings between the parties to a marriage. Finlay points out that this precludes the granting of injunctions under the Family Law Act 1975 against an interfering mother-in-law or an adulterer, at the same time conceding that it is by no means clear whether this is a good thing or a bad thing.[48]

---

[47] (1976) 50 A.L.J.R. 594, 612.
[48] (1976) 50 A.L.J. 360, 365.

Further in line with Mason J.'s judgment the definition of a child of a marriage in 5(1) has been amended to include only children adopted since the marriage by the married couple, and children born to the parties to the marriage before the marriage; children born to the parties during the marriage are of course included automatically. The potentially unfortunate effects of the resulting distinction between children who fall within this definition and other children who may be members of the same household, has already been mentioned.[49] The extended definition of child of a marriage was retained for the purposes of s. 63 which relates to divorce decrees and is thus supported by the divorce and matrimonial causes power rather than the marriage power.

The decision in *Russell* and *Farrelly* and the subsequent Family Law Amendment Act 1976 have established a much extended scope for the Commonwealth marriage power, and this is constitutionally a significant result. From the point of view of Australian family law, although many more family matters are now affected by the Family Law Act 1975 than were affected by the Matrimonial Causes Act 1959, the major problem, namely the division of such a sensitive jurisdiction as family law between several independent courts and several different sets of laws, has not been overcome. The dividing line between matters reserved for the State courts and those which come within federal jurisdiction has shifted but it has not disappeared.

H. R. PENFOLD*

[49] Pages 98-99 *supra*.

* B.A./LL.B.