WARDSHIP: A CRISIS IN JURISDICTION

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The scope of the ancient power to make a child a ward of court has recently been questioned. One Supreme Court[1] has even held that in respect of a child of a marriage no court in Australia has jurisdiction to make a wardship order. Subsequent decisions have softened this blow somewhat,[2] but even these result in a wardship jurisdiction which is severely truncated. This writer views these developments with alarm. Accordingly, the aims of this work are fourfold:

1. To consider the scope of the concept of wardship of court and to assess its benefits.
2. To discuss recent decisions which take a restrictive view of the current state of wardship jurisdiction.
3. To suggest mechanisms by which wardship jurisdiction may be given its widest operation within the context of the present law.
4. To propose legislative reform to enable this jurisdiction to be given its optimum operation by conferring wardship powers on the Family Court of Australia.

WHAT IS WARDSHIP?

Historically, the jurisdiction to make a child a ward of court derives from the Crown's powers as *parens patriae*, which were delegated to the Lord Chancellor. Originally it was of interest only in respect of wealthy infants, as the early role of the Equity Court in making a minor a ward of court was to protect his property in the event that his parents were dead or unable to protect the child's rights.[3] However, the scope of the jurisdiction as it finally developed was such that it has been said that latterly, "The outstanding characteristic of the wardship jurisdiction is that no limit has ever been set to it."[4] The effect of making a child a ward of court is that custody, in the sense of the sum of parental rights and powers, will vest in the court, and that residuum of these powers remaining with the court will

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1 *Meyer* v. *Meyer* (1978) F.L.C. 90-465.

2 *Thompson* v. *Thompson* (1980) F.L.C. 90-815; *Lloyd* v. *Lloyd* (1980) F.L.C. 90-816.

3 S. Cretney, *Principles of Family Law* (2nd ed., London, Sweet & Maxwell, 1976) p. 353.

4 Ibid. 354.

override the rights of any custodian or guardian of the child or of any individual involved in the day to day care of the child.[5] A wardship order may be regarded as having these effects: First, the person caring for the child must inform the court of the progress of the ward and must always seek the guidance of the court in such matters as the education, religious upbringing, place of residence and marriage of the child. Second, any interference with the ward or other contravention of the wardship order will amount to contempt of court. Even the ward himself may be committed for contempt if he wilfully refuses to obey the court's directions. Accordingly, orders are frequently made which may be regarded as "protecting the ward from himself". For example, the court must consent to the marriage of its ward[6] and the consent will be withheld if the court regards the proposed match as unsuitable. Similarly, the court may order that the ward be restrained from associating with undesirable companions.[7] Other orders are directed at a person having care of the ward where it may be felt that this person lacks competence or judgment to make important decisions regarding the ward,[8] or that there is a risk that the child may be removed from the jurisdiction. The wardship order enables the court to supervise important decisions affecting the child (e.g. the choice of his career[9]) and prevents the removal of the child without the permission of the court.[10]

The procedure for making a child a ward of the court in Victoria is found in the *Supreme Court Act* 1958 (s. 177) and the rules thereunder. There must be an application specifically seeking that a child be made a ward of court and it must be returnable within 21 days. However, as soon as the application is filed the child becomes a ward of court. Thus it is a very easy matter to create an emergency wardship, at least for a 21 day period, particularly as it has been held that anyone may apply for wardship who is not a mere stranger.[11] The wardship jurisdiction of the Supreme Court has always been understood, it is submitted, to confer powers in excess of and different to the powers of a court exercising custody and guardianship jurisdiction, although it must be appreciated that a court which has jurisdiction in custody or guardianship may make orders which may have some features of a wardship order.[12] However, a court which can make custody or guardianship orders but is unable to make the child a ward of court

[5] P. M. Bromley, *Family Law* (4th ed., London, Butterworths, 1971) p. 332.
[6] *Re S. (M)* [1971] 1 All E.R. 459.
[7] See, for instance, *Re F. (An Infant)* [1971] Q.W.N. 37.
[8] See, for instance, *Lloyd* v. *Lloyd* (1980) F.L.C. 90-816.
[9] *Livesley* v. *Livesley* (1886) 12 V.L.R. 221.
[10] *Re Callaghan* (1884) 28 Ch. 186.
[11] *Zwillinger* v. *Schulof* [1963] V.R. 407.
[12] See *D.K.I.* v. *O.B.I.* (1979) F.L.C. 90-661, where the Family Court awarded custody to the mother of two small children. To allay the fears of the father, who was concerned that the mother might attempt to remove the children to her home country, Malaysia, she was required to give an undertaking to the court that she would not, without the consent in writing of the father or on order of the court, remove the children from the state of Victoria.

could not, it is submitted, make a wide variety of orders which are the daily fare of courts enjoying plenary wardship powers, e.g. there would be no power to order blood tests to determine the paternity of a child,[13] to give permission for the infant to pursue a trade or vocation, or to direct that the infant's money be directed to some particular purpose or be withheld from an unapproved purpose.[14] Similarly, a court exercising custody or guardianship powers but lacking wardship jurisdiction would be unable to prevent an infant from associating with undesirable persons, whereas in the past such orders have been made under wardship powers, e.g. to protect the infant from an immoral environment,[15] or even from religious influences, which were against the parent's wishes.[16] It has already been found that orders requiring a child to be submitted to certain medical or psychiatric procedures would be beyond jurisdiction in the absence of wardship powers,[17] whereas wardship jurisdiction has been held to enable a court to prevent the sterilization of an infant.[18] Certainly no court without wardship jurisdiction could go so far as to prevent the publication of a book concerning the father of a ward so as to prevent damage to the child.[19]

It may be appreciated that the jurisdiction in wardship is a very wide one indeed. It has been held that a wardship order may even override normal concepts of justice so that the usual rules of evidence may be suspended,[20] e.g. a solicitor has been compelled to disclose to the court any information in his possession concerning the whereabouts of a ward of court, despite the normal rules of professional secrecy.[21]

To deny the existence of this jurisdiction in respect of a wide class of proceedings is to bring about a situation where many orders, freely made by courts with wardship powers, can no longer be made in respect of a wide class of proceedings by any Australian court. This must be regarded as a retrogressive development. The conclusion that these powers have inadvertently been lost is one which ought to be avoided, if that can be done, as such powers were, it is submitted, essential to a comprehensive jurisdiction in relation to children.

13 *Lamb* and *Lamb* (No. 1) (1977) F.L.C. 90-225. This has also been done in wardship jurisdiction: see *Re L. (An Infant)* [1968] P. 119.
14 Cf. fn. 9 supra, where a ward was granted permission to become an apprentice; and *Ware* v. *Ware* (1878) 4 V.L.R. 119 on direction as to money.
15 See fn. 7 supra.
16 See *Iredell* v. *Iredell* (1885) 1 T.L.R. 260.
17 See *Gaunt* and *Gaunt* (1978) F.L.C. 90-468.
18 *Re D. (A Minor)* [1976] 2 W.L.R. 279.
19 *Re X. (A Minor) (Wardship: Jurisdiction)* [1975] Fam. 47. The existence of jurisdiction to do this was conceded although in the result the order was declined because the interest in freedom of publication was considered to be more important.
20 *Re P.A. (An Infant)* [1971] 1 W.L.R. 1530.
21 *Re K. (Infants)* [1965] A.C. 201.

First, however, we must attempt to state the current law and to identify those proceedings in which it has been held that wardship jurisdiction has been lost.

THE CURRENT CASES: LOST JURISDICTION

The notion that the creation of a federal law with respect to children eclipses the state law of wardship is not a new one. It had been held even under the *Matrimonial Causes Act* 1959 (Cth.) that state wardship jurisdiction lapsed after decree absolute in respect of a child who was the subject of a custody order made under that Act.[22]

Currently the content of federal jurisdiction, with respect to children, which is exercised by the Family Court under the *Family Law Act* 1975 (Cth.) would seem to be an exclusive jurisdiction to hear proceedings in relation to the custody or guardianship of, or access to, a child of a marriage[23] with respect to:

(a) initial proceedings between the parties to that marriage (whether or not principal relief proceedings are contemplated),[24] in respect of the custody or guardianship of, or access to, the child;

(b) proceedings in relation to previous proceedings which were between the parties to the marriage under the *Family Law Act* in respect of the child. A proceeding to vary any federal custody order may involve a third party.[25] Such variation proceedings, even if they involve third parties, are comprehended within the exclusive jurisdiction of the Family Court;[26]

(c) proceedings in respect of a custody order made by the Family Court where the custodian subsequently dies. In that event, the surviving parent does not automatically have custody but must apply to the court under s. 61(4) of the Act. Strangers may be party to such proceedings, consequent upon the death of the custodian.[27] Such proceedings also come within the exclusive jurisdiction of the Family Court.

It may be said, therefore, that s. 4(1)(c)(ii) and s. 4 (1)(f) of the *Family Law Act* create a wide, although not comprehensive, exclusive jurisdiction with respect to the custody and guardianship of, and access to, children. The Act does not, however, cover:

(i) children who are not the children of a marriage (ex-nuptial children)

22 *Troutbeck* v. *Fisher* (1974) 24 F.L.R. 212 per Harris J. in the Victorian Supreme Court.
23 *Family Law Act* 1975 (Cth.) s. 8(1)(a).
24 S. 4(1)(c)(ii).
25 *E* and *E* (No. 2) (1979) F.L.C. 90-465.
26 It is a matrimonial cause under s. 4(1)(f); see *E* and *E* (No. 2) (1979) F.L.C. 90-465.
27 *Dowal* and *Murray* and *Anor.* (1978) F.L.C. 90-516.

(ii) initial proceedings relating to children who are nuptial children but are not the children of both of the parties to the marriage,[28] e.g. a dispute involving a stepchild may not be heard in the Family Court in the first proceedings with respect to such a child.

Such proceedings remain matters of state law, as there is no federal jurisdiction to make custody, guardianship or access orders in these situations.

However, it must additionally be noted that there is no express wardship power conferred on the Family Court. Moreover, it has been held that the Family Court has not acquired an inherent jurisdiction as *parens patriae* i.e. there is no general equitable Family Court jurisdiction.[29] It must be conceded, therefore, that the *Family Law Act* as it presently stands confers no wardship power on the Family Court. It would seem, then, at first sight that the power to make a child (including a child of a marriage) a ward of court has remained with the states and it is submitted that in the absence of federal wardship powers this is a desirable view of the law.

However, *Troutbeck* v. *Fisher*[30] had established, even before the passing of the *Family Law Act*, that an order making a child a ward of the court is in substance identical in content with an order that can be made with respect to the children of a marriage under the *Matrimonial Causes Act* after decree absolute. It followed from this reasoning that state jurisdiction in wardship was suspended after decree absolute because the federal legislation manifested an intention to cover the field and prevailed, owing to s. 109 of the Constitution.

This reasoning was adopted and extended under the *Family Law Act* by Powell J. in the Supreme Court of New South Wales. He said in *Meyer* v. *Meyer*[31] that

> "It is clear that, in contrast to the former *Matrimonial Causes Act* 1959 (Cth.) which dealt with the questions of guardianship and custody of children only in the context of what might be called traditional matrimonial causes, the *Family Law Act* 1975 goes much further and intrudes into the area of guardianship and custody of children in cases in which no traditional matrimonial cause has been or is intended to be instituted. This being so . . . the Commonwealth Act has exhibited an intention to cover the field . . . although for constitutional reasons the class of children . . . is limited to children of a marriage."[32]

The notion that a federal assumption of power in relation to custody and guardianship will also cover the field in relation to wardship derives from the view that custody and guardianship orders are in substance

[28] S. 4(1)(c)(ii) and *Russell* and *Russell; Farrelly* and *Farrelly* (1976) F.L.C. 90-039.
[29] See *Lamb* and *Lamb* (No. 1) (1977) F.L.C. 90-225.
[30] See fn. 22 supra.
[31] (1978) F.L.C. 90-465.
[32] Ibid. 77, 379.

co-extensive in nature and effect with wardship orders. Powell J. asserted in *Meyer* v. *Meyer* that this was so, adopting the reasoning in *Troutbeck* v. *Fisher* in these terms: a wardship order is one "by virtue of which the court can supersede the natural guardianship of a parent and place the child in such custody as seems most calculated to promote its welfare. This . . . is a jurisdiction of essentially the same kind as that conferred upon the Family Court of Australia".[33] Accordingly, in *Meyer* v. *Meyer* a father, who had been required by an order of the High Court of England to make the child of his marriage a ward of court in Australia, was unable to comply with that order, which had been made so that the English child's stay in Australia would be supervised by a court of competent jurisdiction. Because this was a child of a marriage the Supreme Court felt that wardship jurisdiction had been extinguished by the passing of the *Family Law Act*, while the father was also told by the Family Court that wardship jurisdiction had equally never been conferred on the Family Court. Accordingly, the perplexed Mr Meyer was informed that because his child was a child of a marriage no court in Australia had the jurisdiction to make him a ward of court.

Happily, Powell J.'s brethren on the bench of the New South Wales Supreme Court have not been happy to leave the law with respect to wardship of children of a marriage in this annihilated state. There has been a substantial, though by no means total, retrieval of this jurisdiction by three subsequent New South Wales decisions involving children of a marriage.

In *Kirkland* v. *Kirkland*[34] the Full Court of the Supreme Court of New South Wales Court of Appeal upheld a decision of Kearney J. in a contest between the grandparents and the father of twins. The children were the children of the father's marriage. The mother had died and they had lived with the grandparents for some time. Kearney J. made the twins wards of court and gave the grandparents guardianship. In upholding this order the Full Court made no reference to *Meyer* v. *Meyer*.

Needham J., in *Thompson* v. *Thompson*,[35] also found that the New South Wales state court had jurisdiction in wardship in proceedings relating to two children of a marriage where those proceedings were between the children's older stepsister and their father. Again, the mother had died and the stepsister proposed that the children be made wards of the court and placed in her care and control. The Commonwealth and state Attorneys-General were invited to intervene owing to the Commonwealth-state issue. In finding that the court had jurisdiction, Needham J. considered *Meyer* v. *Meyer* and found that he could distinguish it on the ground that

[33] Ibid.
[34] (1979) F.L.C. 90-660.
[35] (1980) F.L.C. 90-815.

the contest before him, unlike that in *Meyer*, was not between the parties to the marriage, albeit the child was a child of the marriage. Moreover, s. 61(4) of the *Family Law Act* did not apply so as to require the father to proceed in the Family Court because there had never been a custody order in favour of the mother. Powell J.'s comments were regarded as going "too far unless they were to be construed as limited to cases where the contest was between the parties to the marriage."[36] In the event, the wardship order was declined in *Thompson* because Needham J. felt that the appropriate decision on the facts was to make a custody order in favour of the father. However, *Meyer* had been confined to the situation where the parties to the proceedings in wardship were the parties to the marriage—or at least to where there had been proceedings previously between parties to the marriage in respect of the child. In those events the matter was properly a *Family Law Act* matter and wardship jurisdiction abated.

Needham J. acted on this view again in *Lloyd* v. *Lloyd and Ors*,[37] where he actually made orders making children of a marriage wards of court in a contest between their mother and their paternal uncle and aunt. The father had been recently killed in an accident and the two small children had been cared for over a period subsequent to the death by their late father's brother and his wife. The mother had been shocked and depressed and was felt to be somewhat negligent and nomadic. For all her faults Mrs Lloyd was regarded as the more suitable parent owing to her loving relationship with the children. However, these circumstances made it desirable for the court to retain supervision of this family, and the wardship order was made while the mother was given care and control. The jurisdictional basis for the wardship order was clearly the same as that in *Thompson* i.e. there were not, nor had there ever been, proceedings between the parents being the parties to the marriage. Presumably, if there were proceedings between the parties *ab initio* then the *Family Law Act* would be regarded as covering the field (s. 4(1)(c)(ii)), while the same reasoning would extend to proceedings for the variation of such an order (s. 64(2)) and to proceedings consequent upon the death of a party to the marriage in whose favour a custody order had been given (s. 61(4)).

Accordingly, the current view of the extent of the wardship jurisdiction of the state Supreme Courts taken in the Supreme Court of New South Wales would seem to confine it, in relation to the children of a marriage, to the situation where there are not, nor ever have been, proceedings in relation to such a child between the parties to the marriage. Consequently, the state Supreme Courts are able to make orders in the exercise of wardship powers in relation to ex-nuptial children which cannot be made in relation to a variety of proceedings concerning nuptial children. Nor

[36] Ibid. 75, 140 per Needham J.
[37] (1980) F.L.C. 90-816.

can any other court make such orders for the protection of nuptial children. In short, this view entails that the paternalistic jurisdiction of the court is narrower in respect of nuptial than ex-nuptial children, an ironic phenomenon in an era characterized by a struggle for the rights of the illegitimate. For once, when it comes to wardship jurisdiction, the nuptial child is treated as second class.

THE NEW SOUTH WALES EXPERIENCE: ARE SELF-DENYING ORDINANCES NECESSARY?

Meyer v. *Meyer* and the subsequent New South Wales decisions which accept its basis are founded on the view, expressed in *Troutbeck* v. *Fisher*, that there is some considerable identity of jurisdiction assumed in custody, as in wardship, cases.[38] This is no doubt true to a point. For example the custodian of a child acquires many powers that the court of which he is a ward may exercise, such as the power to determine where the child will live,[39] where he is to be schooled,[40] and what his name is to be.[41] However, we have already noted impressive categories of orders which may be made by a court which has wardship jurisdiction, that are not available in a court which has custody jurisdiction but which lacks wardship powers (e.g. the present inability of the Family Court to order blood tests[42] or other surgical procedures[43] would be cured by granting that court wardship powers).

Accordingly, it cannot be said that an order making the child a ward of court is in substance identical in content with an order that can be made by the Family Court. *Troutbeck* v. *Fisher*, it is submitted, ought not to have been followed by the New South Wales Supreme Court, and, being a decision of a single judge in the Victorian Court, need not have been followed. Moreover, the decisions which accept *Troutbeck* v. *Fisher* in the New South Wales court have likewise been single judgments of Powell J.[44] and of Needham J. respectively.[45] On ordinary principles of *stare decisis* these decisions bind no other superior court and again, it is submitted, they should not be followed by other state Supreme Courts. These cases, restricting jurisdiction in wardship in respect of children of a marriage, constitute an unwarranted incursion into a necessary facet of Supreme Court jurisdiction. Together they should be regarded as an example of the aphorism that *communis eror facit ius*. This writer is of the view that the Supreme Court's jurisdiction in wardship remains substantially intact

[38] See 209 supra.
[39] Cf. *Craven* and *Craven* (1976) F.L.C. 90-049.
[40] *Newbery* and *Newbery* (1977) F.L.C. 90-205.
[41] *Chapman* and *Palmer* (1978) F.L.C. 90-510.
[42] See *Lamb* and *Lamb* (No. 1) (1977) F.L.C. 90-225.
[43] *Gaunt* and *Gaunt* (1978) F.L.C. 90-468.
[44] *Meyer* v. *Meyer* (1978) F.L.C. 90-465.
[45] *Thompson* v. *Thompson* (1980) F.L.C. 90-815; *Lloyd* v. *Lloyd* (1980) F.L.C. 90-816.

notwithstanding the existence of federal jurisdiction in custody and guardianship. For while the possibility of a federal court and a state court making orders, some aspects of which may clash, undoubtedly creates problems in constitutional co-existence, the draconian response of removing state jurisdiction in the whole field is felt to be an overreaction to these problems. It is proposed here that we should adopt a more sensitive response.

STATE WARDSHIP JURISDICTION AND FEDERAL POWERS: CO-EXISTENCE AND CO-OPERATION

Courts exercising wardship jurisdiction have long had to live with the fact that an infant who is a ward of the court may properly be made the subject of decisions of some other body with competing powers in respect of the child. Even in England, where the courts are spared the agonies of constitutional conflicts in jurisdiction, a court with wardship powers is frequently met by a decision taken by another court or administrative agency exercising statutory powers in respect of the child's welfare. It has long been accepted that in that event wardship jurisdiction is not, for all purposes, ousted or abrogated, but may be invoked as residual protection for the child.[46] The *modus vivendi* arrived at in England appears to be that the jurisdiction in wardship is regarded as existing, but that it will not be exercised contrary to a specific power which may have been obtained by a local authority or other body—including powers in the nature of parental rights (e.g. by a care order).[47] Indeed, the court is frequently in the habit of refraining from exercising its jurisdiction, e.g. in the event that the ward has been lawfully posted overseas in the service of the armed forces.[48] However, wardship jurisdiction is emphatically not extinguished and indeed it may be invoked by the court (e.g. by granting an injunction in the exercise of wardship jurisdiction) to assist the authority, by granting an order to the authority prohibiting contact with the child by a specified person.[49]

These English decisions, it is submitted, may be adapted to our position so that we may regard Supreme Court wardship jurisdiction as alive and well but to be invoked, in the event of clashing Family Court jurisdiction, only in the aid of Family Court jurisdiction and not so as to countermand any Family Court order in respect of a child who is the subject of both orders.

Moreover, it is submitted that the state wardship order should be given plenary operation unless and until some potentially conflicting Family Court order is made (contrast the present New South Wales view that

46 See S. Cretney, op. cit. 379.
47 See *Re T. (A.J.J.)* [1970] Ch. 688.
48 *Re Mohammed Arif* [1968] 1 Ch. 643.
49 *Re B. (A Minor) (Wardship: Child in Care)* [1975] Fam. 36.

even if no Family Court order has been sought, the fact that both parties to the wardship litigation are parties to the marriage *ipso facto* prevents wardship jurisdiction from arising).

In effect, then, state wardship orders could co-exist with Family Court custody orders in a number of situations:

(a) If no Family Court order is sought in respect of a child of a marriage, state wardship jurisdiction should be regarded as unabridged;

(b) If a Family Court order is obtained, the state wardship order may be regarded as operative to the extent that it does not conflict with the federal order i.e. as operating subject to it. Thus, for example, the state court which has made the wardship order may not interfere with the religious upbringing of the child, as this is accepted to be part of the bundle of powers wielded by the custodian under the federal order.[50] It may, however, be able to order medical procedures, grant an injunction to prevent the child from associating with undesirables, or direct that the infant's own money be applied for some purpose, on the grounds that these are orders which are not comprehended in the custody order made by the Family Court, nor could they be made by any other order available in the Family Court.[51]

An order which may be made by a court but which is to operate in a restricted manner is concededly a strange beast. However, there exists venerable precedent for a court making orders which are only to operate to the extent that they give no offence to the constitutional supremacy of some other court. The precedent referred to is, perhaps ironically, a decision of the Family Court itself, which has been approved by the High Court of Australia. In *Re Demack; ex parte Plummer*,[52] Demack J., in the Family Court, was faced with s. 10 of the *Family Law Act*, which seeks to preserve the authority of the states to deal with children who are wards of the state. However, s. 10(3) confers upon the Family Court jurisdiction to make an order in respect of the custody, guardianship or maintenance of such a child if the court "is satisfied that there are special circumstances which justify the making of the order". Despite the apparent overriding effect of s. 10(3), it was held in that case that the rights of the state Director of the Department of Children's Services could not be affected and that, although the Family Court might make an order in respect of the child in question, it could not affect any right or action the Director might take. At best it could determine who, as between the parties to the marriage, was entitled to custody once the Director relinquished his rights. The result of the decision is that the Family Court and the state authority can make contradictory orders, each being valid, by the former giving way to the latter in operation.

[50] *Sampson* and *Sampson* (1977) F.L.C. 90-253.
[51] See 206-7 supra.
[52] (1977) F.L.C. 90-244.

It is suggested here that, in establishing the extent of state jurisdiction in wardship, the reasoning in *Re Demack* provides us with a valuable model. Applied *mutatis mutandis,* that reasoning would give the state Supreme Court jurisdiction to freely make wardship orders in respect of a child of a marriage, subject to the eclipsing of those orders only if the Family Court makes an inconsistent order under the *Family Law Act.* Even after such an order is made the Supreme Court could make orders in the exercise of its wardship jurisdiction, but such orders would by their nature need to be complementary to, and not derogate from, the operation of the federal order.

This device would ensure that between them, the Family Court and the state Supreme Court could supply the needs of the comprehensive jurisdiction in respect of a child of a marriage. This device would also have the benefit that it could be applied forthwith without any need for legislative amendment, as it could operate within the existing legal framework. All that is required is that *Troutbeck* v. *Fisher* and the New South Wales cases based upon it, i.e. *Meyer* v. *Meyer, Lloyd* v. *Lloyd* and *Thompson* v. *Thompson*, should not be followed because they rest on a false basis, viz. that the federal custody or guardianship order and the state wardship order are essentially the same in substance.

This is not the optimum operation of wardship jurisdiction, but it represents a substantial improvement on the current view of the law taken by the New South Wales Supreme Court.

THE BETTER SOLUTION: AMENDMENT OF THE FAMILY LAW ACT

The last two years have witnessed an expansion in the content of the Family Court's jurisdiction with respect to children. In the days of *Russell* and *Russell: Farrelly* and *Farrelly,*[53] when the High Court clipped the constitutional wings of the *Family Law Act*, the lone voice of Jacobs J. urged that the marriage power in the Constitution could found a comprehensive jurisdiction in respect of the children of a marriage. His Honour was of the view that it "includes a power to make laws relating to the nurture of . . . a child of the marriage",[54] so that it extended in time beyond the marriage of the parties, and in jurisdiction beyond the parties to the marriage, to include strangers who might be involved in custody or access proceedings in relation to such a child. Since that time Jacobs J.'s views have found acceptance in the High Court in *Dowal* and *Murray* and *Anor.*[55] where an expansive view of Family Court jurisdiction with respect to children of a marriage was adopted. Moreover, the Family Court itself

[53] (1976) F.L.C. 90-039.
[54] Ibid. 75, 175.
[55] See fn. 27 supra.

has not been slow to take Jacobs J. at his word so as to extend the ambit of federal jurisdiction in recent decisions.[56]

It is submitted that there would seem to be no constitutional restriction preventing the Family Court from acquiring wardship powers. Indeed, it is now accepted that wardship powers are qualitatively similar to the powers which the Family Court already enjoys.[57] It would seem to follow that conferring wardship powers on the Family Court would not involve adding powers of a fundamentally different nature but would only augment the extent of that essentially similar jurisdiction. A wardship power would be a welcome addition to the armoury which the Court requires for a comprehensive jurisdiction with respect to children. It is inefficient to require that wardship proceedings can only be taken in the Supreme Court in respect of a child who is otherwise within the ambit of Family Court jurisdiction. The power would best be vested in the Family Court, and this writer suggests that this may be done without rushing in where angels have learned to fear to tread on sensitive domains of constitutional competence.

It is proposed, therefore:

(a) that the *Family Law Act* be amended so as to specifically confer on the Family Court power to make orders declaring a child to be a ward of court.

(b) that the procedure for so declaring a child be similar to that currently employed in the *Supreme Court Act* 1958 (Vic.). This procedure is regarded as efficient and successful.[58]

(c) that the wardship power be defined as being akin to that currently exercised by Australian Supreme Courts, which derives from the plenary powers of the Lord Chancellor as *parens patriae.*

[56] *E* and *E* (No. 2) (1979) F.L.C. 90-465; *Robertson* and *Robertson* (1977) F.L.C. 90-214; *McKay* and *McKay* and *Arena* (1980) F.L.C. 90-831.

[57] See 209 supra.

[58] J. F. Fogarty, *Bourke and Fogarty's Maintenance, Custody and Adoption Law* (3rd ed., Melbourne, Butterworths, 1972) pp. 217-18.