AUSTRALIAN FAMILY LAW: THE TWILIGHT ZONE

BY H. A. FINLAY*

The title of this comment is not intended to evoke visions of science fictional heroes roaming the nebulae or probing the depths of outer space, but merely to focus upon some areas of family law which have been left outside the ambit of the Family Law Act 1975 (Cth) (hereinafter referred to as the Family Law Act). Although the machinery provisions of the Act offer some admirable beginnings in the creation of a modern and enlightened example of social engineering, the scope of its coverage for constitutional reasons unfortunately remains incomplete. It is even more incomplete now than when the Act was first enacted, as a result of the decision of the High Court in *Russell* v. *Russell*; *Farrelly* v. *Farrelly*.[1] This article seeks out those areas, and discusses the possible options that may be available to make good the deficiency.

When the Family Law Act came into operation on 5 January 1976, it continued a development that had begun fifteen years earlier with the commencement of the Matrimonial Causes Act 1959 (Cth) on 1 February 1961. This was the assumption by the Commonwealth of jurisdiction over "marriage"[2] and "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants"[3] with which it had been invested at its inception in 1901, but which for some sixty years it had refrained from exercising. On this occasion, the Commonwealth contented itself with only a part of the power, leaving sizeable and important areas of family law in the hands of the States. The areas into which it entered were those concerning the formation and the dissolution of marriage, whether for nullity (both void and voidable), or by way of divorce, and ancillary matters concerning the custody of children, maintenance and property. However, the administration of all these matters was vested in state courts[4] where of course they had been all along, while under state jurisdiction. At the time, this made good sense, for three reasons. It avoided the proliferation of judicial offices, it left the judicial work in experienced hands, and it promoted the continuing development of expertise in family matters, both federal and state, by not fragmenting jurisdiction into separate channels of jurisdictional competence.

Yet this meant that the previously existing fragmentation was to continue. The most important form which that fragmentation took was

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[1] (1976) 50 A.L.J.R. 594.

[2] Constitution, s. 51(xxi).

[3] *Id.* s. 51(xxii).

[4] Under s. 77(iii) of the Constitution.

that family matters remained distributed between the highest[5] and the lowest[6] rungs of the judicial ladder, with some matters[7] entrusted to intermediate courts.[8] Fragmentation extended not only to the tribunal, however, but also to jurisdictional criteria. This led to some unexpected and highly undesirable results, for example in relation to property disputes, which were resolved according to different criteria and principles, according to whether a matrimonial cause had or had not arisen. The applicable criteria varied from the strict and narrow guidelines under married women's property legislation,—modified, in the case of Victoria, by statutory "palm tree justice",[9]—to the different criteria again that were developed under section 86 and section 84 of the Matrimonial Causes Act 1959 (Cth).[10] The existence of different remedies, predictably, led to instances of manoeuvring and a kind of jurisdictional forum shopping, according as a party considered one piece of legislation or another more favourable to his case. Resort was had, on occasion, to fictitious applications, for example, restitution of conjugal rights, solely in order to invoke jurisdiction under the Matrimonial Causes Act 1959 (Cth).[11]

The assumption by the Commonwealth of jurisdiction in the Matrimonial Causes Act 1959 (Cth) was limited, *ex abundanti cautela*, no doubt, to areas as to which its constitutional competence was beyond challenge. But outside these areas, there were other matters, some of them almost undoubtedly, others at least arguably, within federal power.[12]

With the advent of a federal Labor government in 1972, conditions were favourable to an expansionist legislative programme, energetically promoted by the Attorney-General, Senator Lionel Murphy Q.C. (now Mr Justice Murphy of the High Court of Australia). The Family Law Act assumed a wide and comprehensive jurisdiction[13] over federal family law. The desire to extend federal jurisdiction, whatever may have been the motives of some of its protagonists, should be seen, however, not as just another example of federal expansionism, but as

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[5] Supreme Courts.

[6] Magistrates Courts.

[7] *E.g.* adoption.

[8] *E.g.* the County Court of Victoria.

[9] Under s. 161 of the Marriage Act 1958 (Vic.), as amended by the Marriage (Property) Act 1962 (Vic.).

[10] *Sanders* v. *Sanders* (1967) 116 C.L.R. 366. See also Sackville, "The Emerging Australian Law of Matrimonial Property" (1970) 7 Melbourne University Law Review 353.

[11] Sackville, *op. cit.*; Finlay, "The Broken Marriage and the Courts" (1970) 7 University of Queensland Law Journal 23; Finlay, "Jactitation and Restitution of Conjugal Rights: An Epitaph" (1974) 11 University of Western Australia Law Review 264.

[12] Sackville and Howard, "The Constitutional Power of the Commonwealth to Regulate Family Relationships" (1970) 4 F.L.Rev. 30.

[13] Argued for by Sackville and Howard, *op. cit.*

a logical move to bring together under one roof all matters of family law in the interests of expert, efficient and consistent administration.

Unfortunately, this still left two important areas of family law with the States: illegitimacy and adoption. The first of these, by definition, has nothing to do with marriage, divorce or matrimonial causes. Even though the position of ex-nuptial children has since been largely assimilated, so far as possible, to that of children born in wedlock,[14] nothing short of the marriage of their parents can bring those children within the constitutional ambit of placita (xxi) and (xxii) of the Constitution. The second area has no necessary connection with these topics of jurisdiction. Yet, so far as the expertise demanded by the subject matter is concerned, both involve considerations familiar to family lawyers: the paramount interest of the child, the amount of maintenance required in respect of a child, the guidelines determining custody of children and the suitability of competing custodians.

To these must now be added some matters originally included in the Family Law Act, but subsequently excluded from it as a result of *Russell* v. *Russell*; *Farrelly* v. *Farrelly*.[15] Proceedings with respect to (i) the maintenance of one of the parties to a marriage, (ii) the property of one or both parties to a marriage, and (iii) the custody, guardianship or maintenance of, or access to a child of a marriage—in other words, matters involving ancillary relief—are confined to proceedings between the parties to a marriage.[16] The same limitation applies to proceedings for an order or injunction in circumstances arising out of a matrimonial relationship[17] and to consequential matters.[18] Proceedings relating to the property of a party to a marriage have been further restricted to proceedings which relate to principal proceedings.[19] Furthermore, the concept of the "child of a marriage"[20] is now limited, for most purposes, to a child born to, or adopted by the parties[21] and excludes a child who has been merely *accepted* by them into the family, for example, a stepchild.

The restriction affecting proceedings involving inter-spousal property disputes is particularly unfortunate. One might have thought that the resolution of such disputes was an ideally suitable matter for the Family Court to deal with. If it arose independently of an application for divorce or other principal relief, then surely the procedures of the Court and its supportive staff of counsellors and social workers

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14 *Cf.* the various Status of Children Acts of the States.

15 (1976) 50 A.L.J.R. 594.

16 *Cf.* definition of "matrimonial cause" (c), Family Law Act 1975, s. 4(1) (Cth) as amended by the Family Law Amendment Act 1976, s. 3 (Cth).

17 *Id.* definition of "matrimonial cause" (e).

18 *Id.* definition of "matrimonial cause" (f).

19 *Id.* definition of "matrimonial cause" (c)(ii).

20 Family Law Act 1975, s. 5(1) (Cth).

21 Family Law Amendment Act 1976, s. 4 (Cth).

might at least offer a chance of defusing or minimising the conflict before it erupts into open war. Some of the views expressed in the *Marriage Act* case[22] would suggest that the marriage power[23] was capable of supporting the regulation by the Commonwealth of the property rights of the parties to a marriage among themselves. Indeed there are dicta in *Russell* v. *Russell*; *Farrelly* v. *Farrelly*[24] that might lend further support to such a proposition. It was ultimately the failure of the Act to connect property in dispute, between the parties to a marriage, in an identifiable way with the marriage relationship, that led Mason and Stephen JJ. to uphold the provisions relating to property only by reference to the divorce and matrimonial causes power in placitum xxii.[25]

The result of these limitations is the revival of areas of state jurisdiction, such as married women's property legislation, in relation to property disputes, and maintenance, custody and guardianship legislation in relation to a "child of the family" falling outside the more narrowly drawn definition of "child of the marriage". This process of fragmentation will have some undesirable consequences. In relation to the child of the marriage, it will infuse some additional anaemic lifeblood into an area of state jurisdiction which was kept alive only by the somewhat limited purpose of dealing with paternity and affiliation proceedings. The stepchild thus rejoins the ranks of the ex-nuptial second class citizens who are deprived of the counselling and welfare services that have been devised to assist the Family Court of Australia in dealing with matters arising under the Family Law Act, and that should have been available to all children regardless of status or origin.

As regards the other limitations in the range of ancillary proceedings, the danger arises of a proliferation of proceedings, and of the launching of fictitious applications for purposes of forum shopping. For example, a married women's property application initiated under state legislation may prove abortive and may need to be replaced by fresh proceedings under the Family Law Act once proceedings for principal relief under that Act are instituted. Moreover, the temptation will arise to initiate such proceedings solely for the purpose of supporting the former, even in a case where no real desire to claim principal relief otherwise existed. The ancillary jurisdiction would also, it seems, be attracted by an application for a declaration of validity of marriage, or for a nullity decree. Although the device of resorting to such applications for the sole purpose of attracting jurisdiction would in most cases be recognised as the manoeuvre it is and as being devoid of

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[22] *Attorney-General (Vic.)* v. *Commonwealth* (1961) 107 C.L.R. 529.

[23] Constitution, s. 51(xxi).

[24] *Cf. e.g.* (1976) 50 A.L.J.R. 594, 600 *per* Barwick C.J., 611-612 *per* Mason J., 616-617 *per* Jacobs J.

[25] *Id.* 613 *per* Mason J.; see also (1976) 50 A.L.J. 360.

merit, there could well be some cases, particularly involving marriages contracted overseas, where such proceedings could arguably be maintained.

Three cornered contests could also arise, for example, custody disputes between the parties to a marriage and a third party, such as a grandparent or an uncle or aunt to the child. Another case of "mixed" jurisdiction may exist where the custody of several children of a family is involved, some of whom satisfy the definition of "child of the marriage" and some of whom do not.

The result of all this will make for greater expense, delays and inconvenience, may produce uncertainty, and could provoke attempts to abuse the processes of the courts.

Were it only a dry and technical matter of lawyer's law, this continued fragmentation of jurisdiction would perhaps not matter so much after all. But with the Family Law Act the administration of family law took a very significant step forward. The Act set up the Family Court of Australia[26] which, unlike any previously existing court of law, is conceived of as a sophisticated social agency, governed by operational guidelines, of which the applicable law is only one, and arguably not always the most important.[27] The real innovation lies in the setting up of a staff of marriage counsellors and welfare workers, whose role will be, "not only to assist reconciliation but also to help separated or divorced spouses to establish improved on-going relationships",[28] and to assist in facilitating and supervising the welfare of children.[29] It is a pity then that this specialised agency should be prevented, by constitutional considerations, from being of benefit also to children and parties involved in paternity or adoption proceedings. The criteria governing their welfare do not differ, and they are left outside the competence of this agency, not on the merits or demerits of their own situation, but solely by the accident—or design—of constitutional draftsmanship. That exercise, going back almost a century, is the product of a time when the criteria governing the disposition of children were seen far more in terms of legal rights and obligations than they are today, and which was guided by a far less sophisticated body of knowledge of child psychology.[30]

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[26] Family Law Act 1975, s. 21 (Cth).

[27] That is not to say that the Family Court of Australia is not to function as a judicial tribunal in the traditional sense, acting upon recognised principles of adjudication. A suggestion, for instance, that proceedings under the Family Law Act were not adversary proceedings but of an inquisitorial nature was firmly rejected by the High Court in *Ex rel. Watson, ex parte Armstrong* (1976) 50 A.L.J.R. 778.

[28] *Family Law Handbook* (1975) 3; *cf.* Family Law Act 1975, s. 14(2A), 14(5) (Cth).

[29] *E.g.* Family Law Act 1975, ss. 14(5), 62, 63 (Cth).

[30] *E.g.* Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (1973).

Accepting, at least for the sake of argument, that it is desirable for all matters of family law to be administered in the same courts, there would appear to be four possible methods by which such a result could be brought about.

1. *Constitutional amendment.* This would be the most radical, and probably the most satisfactory method. Unfortunately, the history of constitutional amendment in Australia offers countless examples of casualties, and very few successes. Even though an amendment in this field might be thought to be a non-controversial measure, demanded by the subject matter, yet the electorate tends to be suspicious of any change in the distribution of powers between the States and the Commonwealth, and legislators, not surprisingly, fight shy of espousing potential lost causes. There is also a sufficiently strong undercurrent of States' rights which views any move to expand federal power as an attempt to undermine the position of the States in the federal Commonwealth. Hence this method is very difficult, if not impossible to implement. While it should remain the ultimate aim, some other method may yield more immediately effective results.

2. *By referral of State power to the Commonwealth.* Under section 51(xxxvii) of the Constitution, provision exists for matters to be referred by the States to the Commonwealth. Once they are so referred, they become a part of federal power, and a subject for Commonwealth legislation. Under this provision, some matters, usually of a technical and non-political nature,[31] have been transferred to the Commonwealth. The matters administered by family courts might have been thought to be of just such a nature, and the subject consequently eminently suitable for treatment in this fashion.

Nevertheless, there are, in addition to the political reservations mentioned above in relation to constitutional amendment, some of which are applicable also to this matter, other considerations which must make this appear as an inferior method of vesting power in matters of family law in the Commonwealth. For one thing, a transfer of power under section 51(xxxvii) of the Constitution extends only to those States which see fit to confer it.[32] For another, the power subsists only during such referral, and is presumably revocable at will.[33] Thus the possibility always exists, that some State or States might refrain from making a referral or, having made it, withdraw it again, possibly for political reasons. There is therefore no absolute certainty, either of uniformity or of continuity to be found in this method.

Still, just because States retain the power of revocation of referred power, and because reference of a State power does not deprive a State

[31] *E.g.* Commonwealth Powers (Air Transport) Act 1952 (Tas.).
[32] *Cf. Graham* v. *Paterson* (1950) 81 C.L.R. 1.
[33] *Id.*, especially at 25, *per* Webb J.

of the power, but enables it to retain a concurrent power—subject, of course, to the provisions of section 109 of the Constitution as to inconsistency[34]—this method would have certain political advantages. It is free from the cumbrousness and uncertainties of the referendum procedure, and it may be politically more palatable to the States. "State righters" might find it more acceptable because of the possibility of reversal. Provided all States acted in concert, the practical effect of a referral of power would be the same as an amendment of the Constitution, while once federal legislation had been enacted pursuant to such a referral and was operating successfully, it seems unlikely that any State would want to withdraw it.

3. *By the setting up of State Family Courts.* Provision exists in the Family Law Act for the setting up of State Family Courts.[35] The section was introduced as the result of an amendment by Senator Missen of Victoria. Reference to Hansard[36] makes it clear that it was intended as an alternative to a federal court. Where a State does set up a Family Court, that court is invested with federal jurisdiction under the Act[37] and it is intended to exercise that jurisdiction as an alternative to the operation in that State of the Family Court of Australia. The intention of the promoters of section 41 was to bring into being a practical example of that "co-operative federalism" which is being regarded by some as a desirable principle of development under the Australian Constitution, with the aim of accommodating both federal and state circumstances of concurrent administration.

From a family point of view, such a court would have the advantage of being able to administer both federal and State laws. Most of the shortcomings applying to the Family Court of Australia, of being unable to deal with *all* matters of family law which were mentioned above, would not therefore arise. At the same time, it is one of the pre-conditions of the investing of a State Family Court with federal jurisdiction under the Family Law Act that the Governor-General must be satisfied that "counselling facilities will be available to that court".[38] Only at the appellate level then would the lines of hierarchical competence of courts as to State and federal jurisdictional matters, respectively, part company, with only matters of federal law going to the Family Court of Australia sitting as a Full Court in its appellate jurisdiction,[39] while appeals on matters of State jurisdiction will be dealt with by State appellate tribunals.[40]

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[34] *Ibid.*
[35] Family Law Act 1975, s. 41 (Cth).
[36] S. Deb. 1974, Vol. 62, 2769-2771.
[37] Family Law Act 1975, s. 41(3) (Cth).
[38] *Id.* s. 41(4)(c).
[39] *Id.* s. 94(1).
[40] *Cf.* Family Court Act 1975, s. 33 (W.A.).

At the time of writing only one State has taken the opportunity of setting up a family court pursuant to section 41 of the Family Law Act. That State is Western Australia. Its Family Court Act 1975 (W.A.) establishes the Family Court of Western Australia.[41] The Court is declared to have the federal jurisdiction vested in it by the Family Law Act 1975 of the Commonwealth.[42] In addition, provision is made for it to have such non-federal jurisdictions as are conferred upon it by other state legislation.[43] This extends to adoptions,[44] and to ex-nuptial children.[45] Provision is made also for courts of summary jurisdiction to exercise jurisdiction under the Family Law Act, as is envisaged in that Act,[46] and these courts, like the West Australian Family Court, are declared to have the federal jurisdiction with which they are invested under the federal Act.[47] They are also invested with certain non-federal jurisdiction in family matters, except under the State's Guardianship of Children Act 1972-1975 (W.A.) and the Adoption of Children Act 1896-1975 (W.A.).[48]

In its provisions concerning the qualifications of State Family Court judges, the State Act follows the provisions of the federal Act. That Act provides as one of the conditions for recognition that State Family Court judges be approved by the federal Attorney-General, that they be suitable, and that they retire at sixty five years. This latter provision, while clearly desirable, appears somewhat incongruous since it is a condition which the federal Act, by virtue of section 72 of the Constitution, as interpreted in *Alexander's* case,[49] cannot impose in respect of federal judges, even though it was recognised in the debates on the federal Act that in this of all jurisdictions it was most desirable for the court not to be burdened with "geriatric judges".[50] The fact that State legislation can so provide, and thereby, by implication, create a better family court, was taken by supporters of section 41 as a strong factor in favour of the creation of State Family Courts. The main argument in its favour is, of course, the unity of the family jurisdiction which State courts can achieve, unhindered by the limitations imposed upon Commonwealth created bodies by the Commonwealth Constitution.

One very interesting provision in the West Australian Act is the possibility of dual or concurrent judicial appointments to both the

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[41] *Id.* s. 6(1).
[42] *Id.* s. 24.
[43] *Id.* s. 26.
[44] Family Court of Western Australia Regulations 1976, reg. 24.
[45] *Id.* reg. 26.
[46] Family Law Act 1975, s. 39(2), (6) (Cth).
[47] Family Court Act 1975, s. 29 (W.A.).
[48] *Id.* s. 30.
[49] *Waterside Workers' Federation of Australia* v. *J.W. Alexander Ltd* (1918) 25 C.L.R. 434.
[50] *Cf.* S. Deb. 1974, Vol. 62, 2774, *per* Senator Button.

Family Court of Australia and the Family Court of Western Australia.[51] It is not proposed here to examine the constitutional ramifications of this proposal, although it is intriguing to speculate whether this kind of appointment will be favoured in other jurisdictions or in other areas. But it is going to appear rather unusual that in the fullness of time State Family Court judges will be suitably youthful and therefore presumably in touch with their subject matter, while the Family Court of Australia may be lumbered with elderly incumbents who may, or may not have outlived their own aptitude in this highly sensitive area. The retirement of the federal judiciary, incidentally, would appear to be one matter on which electoral near unanimity may be confidently expected, and it only needs a federal administration to have the courage to "bell the cat" by initiating an appropriate referendum and thus put an end to the judicial "Old Men from the Sea".

4. *By "interstitial" legislation.* The phrase "interstitial legislation" is sometimes employed to refer to the use made of the device of judicial discretions, to fill in gaps of minutiae that cannot conveniently be covered by detailed legislation. It is not so used in the present context. Rather is it intended here to mean the gathering up of every possible available subject matter of Commonwealth power that may be relevant to the subject matter in hand. This device is not an unfamiliar one in Commonwealth legislation. It arises of course from the jurisdictional patterns established under the Australian Constitution, and accommodates itself to them, following often disparate and heterogeneous filaments of jurisdictional competence, rather than any logical pattern demanded by the subject matter.

An example occurs in the Family Law Act itself. Section 31(1) confers jurisdiction on the Family Court in:

> (a) matrimonial causes instituted or continued under this Act;
> (b) proceedings instituted or continued under the Marriage Act 1961-1973, other than proceedings under Part VII of that Act;
> (c) matters arising under a law of a Territory concerning—
> (i) the adoption of children;
> (ii) the guardianship, custody or maintenance of children; or
> (iii) payments of a kind referred to in s. 109; and
> (d) matters in which jurisdiction is conferred on it by a law made by the Parliament.

The matters in (a) clearly derive from the Constitution, section 51(xxii), in (b) from section 51(xxi), and in (c) from section 122,

[51] Family Court Act 1975, s. 20 (W.A.). *Cf.* Family Law Act 1975, s. 22(2A) and (2B) (Cth).

the Territories power, which is plenary and not limited to subject matters enumerated in the Constitution. Matters in (d) depend upon any other jurisdiction that may be conferred by a (valid) federal law —whatever that may be. It is thus an enabling provision, anticipating any federal power or powers that may be or become available. And of course one must not forget the incidental power.[52]

Another extension of power occurs in section 109 of the Family Law Act which is also referred to in section 31(1)(c) above. Section 109 concerns "interstate enforcement of affiliation and like orders". Affiliation orders as such are of course outside the marriage and matrimonial causes power, and affiliation itself cannot come within the scope of the Act. But the enforcement of judgments is ancillary to the exercise of the federal judicial power, and interstate service and execution of process of State court judgments is expressly provided for in the Constitution,[53] so that section 109 of the Family Law Act has these additional heads of power to draw upon.[54] Similarly, it may be presumed that the external affairs power is at least one of the bases for sections 110 and 111 concerning overseas enforcement of maintenance orders, and accession to the Convention on the Recovery Abroad of Maintenance which was concluded in New York in 1956.

Using this method of jurisdictional extension, an arguable case can be made for including within the scope of the Family Law Act the greater part of the area at present covered by the Adoption Acts of the several States.[55] This argument would rely upon placitum (xxi) of the Constitution—relating to marriage, and placitum (xxxix)—the incidental power in relation to marriage. It would be expressed in some such way as this:

> The Family Court has jurisdiction with respect to the adoption of a child
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> (a) by the parties to a marriage, or
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> (b) of the parties to a marriage.

The number of children included in (b) would be small, since most children offered for adoption are ex-nuptial. But it is suggested that category (a), on the other hand, would encompass by far the greater number of Australian adoptions. Indeed the Adoption Acts of the States provide that, subject to exceptional circumstances, an adoption order shall be made only in favour of a husband and wife.[56] Thus, if

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[52] Constitution, s. 51(xxxix).

[53] S. 51(xxiv).

[54] Some other recent random examples of attempted interstitial legislation may be seen in the Superior Court of Australia Bill 1973, cl. 19(1); the National Compensation Bill 1974, cl. 16(2) and the Legal Aid Bill 1975, cl. 6(3).

[55] Adoption in the federal territories is already included, s. 31.

[56] *E.g.* Adoption of Children Act 1964, s. 10 (Vic.).

the argument is valid, only a very small proportion of adoptions would remain outside the ambit of the Family Law Act.[57]

The argument that adoption could be regarded as ancillary or incidental to marriage rests on the fact that one of the principal purposes of marriage is the formation of families consisting of parents and children. Support for this proposition may be found in the judgment of Scarman J. (as he then was) in *Bowlas* v. *Bowlas*.[58]

> For the purposes of this jurisdiction, in our view a family comes into being upon marriage. At the moment of marriage there is a change in status of the contracting parties from that of single persons to that of husband and wife. From that moment they stand in relationship to each other as husband and wife—undertaking mutual obligations and enjoying reciprocal rights which the Act is intended to enforce and protect—and to the outside world as married persons. Their change of status and personal relationships marks the advent of a new social unit—the family —which now embraces them both: it is the collective noun to describe them in their new relationship and also such children as by natural procreation, *adoption*, or acceptance may accrue to them.[59]

Consonant with this view is the treatment of the ex-nuptial child when it is legitimated *per subsequens matrimonium*, as provided by section 89 of the Marriage Act 1961 (Cth). That section was held by a majority of four of the Justices of the High Court[60] to be within Commonwealth power with respect to marriage, against the dissent of Dixon C.J., McTiernan and Windeyer JJ.[61] As Scarman J. said in *Bowlas* v. *Bowlas* of such a child: "If a child is born to his parents before their marriage, he clearly becomes a member of the family for the purposes of this jurisdiction as soon as the family is brought into being, i.e. on the marriage of his parents." This principle is further extended to the case of an ex-nuptial child of one of the parties to a marriage who is brought into that marriage and accepted by the

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[57] Some additional interstices could be suggested in order to round off the federal power under this head. Thus adoption of, or by, aborigines could be included under s. 51(xxvi) of the Constitution so long, at least, as it seems appropriate to make special legislation concerning particular racial groups. The adoption of overseas orphans would presumably be covered by the external affairs power. Other, more far-fetched extensions could be suggested involving, for instance, members of the defence forces or of the federal public service, but there seems to be little merit in pursuing them. (See the passage quoted from the judgment of Windeyer J. in the *Marriage Act* case, *infra*, n. 70.)

[58] [1965] P. 440. The judgment was reversed in the Court of Appeal, reported at [1965] P. 450, but his Lordship's observations on this particular matter were not dissented from.

[59] *Id.*, 447 (italics added).

[60] Kitto, Taylor, Menzies and Owen JJ.

[61] *Attorney-General (Vic.)* v. *Commonwealth* (1962) 107 C.L.R. 529.

other party as a "child of the family" or "child of the marriage".[62] Scarman J. went on to say "What difference in principle is there—or ought there to be—between such a child [one legitimated by the subsequent marriage of his parents] and one whom a man has agreed to accept as a member of his family as soon as he marries the mother? We think none".[63]

Indeed it is a pity that *Bowlas* v. *Bowlas* was not cited to the High Court in *Russell* v. *Russell*; *Farrelly* v. *Farrelly*. The observations of Scarman J. may be thought to supply a strong argument against the restrictive view of the concept "child of the marriage" adopted in that case.

The concept of the "child of the marriage" was adopted in the Matrimonial Causes Act 1959 (Cth)[64] and was carried into the Family Law Act,[65] in almost identical terms. Indeed it may be thought that if the Act assumed jurisdiction over such children in the circumstances mentioned in the section referred to once they have been adopted, there can be little objection to a further extension of that jurisdiction so as to regulate the manner of such adoption, if only for the purpose of ensuring uniformity.

It is of course true that adoption brings with it other consequences than membership of a family, notably in relation to the laws of inheritance of property, and that most such matters are matters of State law. These issues were discussed in great detail in the High Court in the *Marriage Act* case,[66] though with remarkable lack of unanimity. In relation to section 89 of the Marriage Act 1961 (Cth), which deals with legitimation by subsequent marriage, the disagreement was really whether the section was a law with respect to marriage, or a law with respect to legitimation. The former was clearly within federal competence, the latter, with all that it entails in matters of personal status, was not.

One ingenious argument to counter the objection to conceding to the Commonwealth power to determine legitimacy—a status whose legal consequences are almost entirely to be found in the field of State law[67]—was the suggestion that there was nothing to prevent the States

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[62] "Child of the marriage" rather than "child of the family" is the expression used in the Matrimonial Causes Act 1959 (Cth) and the Family Law Act 1975 (Cth)—no doubt so as to annex this concept firmly to the marriage power in the Constitution.

[63] [1965] P. 440, 447-448.

[64] Matrimonial Causes Act 1959, s. 6 (Cth).

[65] Family Law Act 1975, s. 5 (Cth).

[66] *Attorney-General (Vic.)* v. *Commonwealth* (1962) 107 C.L.R. 529.

[67] It was the view of Quick and Garran that under the Constitution, civil rights generally had been reserved to the States (*Annotated Constitution of the Australian Commonwealth* (1901) 608). Rights and obligations arising out of marriage, however, impinge on the principal grant of power (*ibid.*) and parental and other rights derived from the marriage relationship, and the adjustment of

from legislating so as to discriminate between persons born legitimate and those "federally legitimated".[68] Somewhat fanciful though this might seem, it draws attention effectively to the difference between the status itself, and the legal consequences annexed to it. Pragmatists might object, of course, that without those legal attributes the status is a hollow shell of little or no significance.

Perhaps somewhat surprisingly, in relation to section 91 of the Marriage Act 1961 (Cth) which deals with the legitimacy of children of a(n invalid) putative marriage, the consensus in the High Court in favour of validity was much greater, and of the Full High Court only Dixon C.J. dissented on this point. The nexus between the section and constitutional power, according to Menzies J., was that in the case of a putative marriage there had been a(n albeit invalid) ceremony of marriage. It is not desired here to discuss the judgments in that case,[69] but merely to indicate the lines which a possible argument might take. The argument may be tenuous, but not as tenuous as the argument put up—and knocked down—by Windeyer J. in the *Marriage Act* case.[70] The passage is as follows:

> Every law for legitimation cannot, in my opinion, be a law with respect to marriage. Legitimation can be effected in various ways. These do not all have a place in English law, although English law recognizes their efficacy in other systems. For example, in some of the United States of America formal recognition by a child's father, without the parents ever being married at all, suffices. In some of the Australian States legal adoption may result in legitimation. Furthermore a bastard could always be legitimated by Act of Parliament, although there do not seem to be any modern instances of this except some mentioned in *Kent's Commentaries* as having occurred in the United States. I do not think, however, that the Commonwealth Parliament could provide for legitimation by recognition or adoption or simply enact that A, a bastard, should be the legitimate son of B. Or, to take a fanciful illustration —suppose that the Commonwealth Parliament decided that it would follow the example of Roman law by which a child might be legitimated by being made a *decurio*, that is a member of a

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those rights consequent upon divorce, are necessarily incidental to the powers respecting marriage and divorce respectively (*id.*, 611). The power of the Commonwealth to deal with these rights and obligations must therefore be regarded as an exception to the general principle that private rights are matters for the States.

[68] The expression was used, with some hesitation, by Dixon C.J. (1962) 107 C.L.R. 529, 547, but the argument, put forward by counsel for the Commonwealth, Sir Kenneth Bailey, at 538, was more kindly received by the majority, see *e.g.* Taylor J. at 564.

[69] Some discussion of relevance to the present argument may be found in Sackville and Howard, *op. cit.*, and also Finlay, "Commonwealth Family Courts: Some Legal and Constitutional Implications" (1971) 4 F.L.Rev. 287.

[70] *Attorney-General (Vic.)* v. *Commonwealth* (1962) 107 C.L.R. 529, 587-588.

> *curia* or local administrative council, and that it thereupon enacted that any one who was illegitimate would be legitimated by becoming a lighthouse keeper or a postman. Such an enactment would not, in my opinion, be a law with respect to marriage. And I think it unlikely that it would be a law with respect to lighthouses or postal services. It would be a law with respect to bastardy and legitimation, and beyond Commonwealth power.

The device alluded to by Windeyer J. of selecting subjects manifestly connected with Commonwealth power, such as lighthousekeepers or postmen, to annex to them legal consequences which in themselves are clearly beyond power, and thereby to attempt to sneak those forbidden topics into the *intra vires* area of Commonwealth competence would, if valid, constitute an example of that process of interstitial legislation which we have been discussing. It would not, of course, result in a complete coverage of subject matter and that is one of its chief vices. It could, in fact "produce such a hotch-potch of irregularly and partially operating law with respect to"[71] a particular subject matter, only some aspects of which fall into the sphere of Commonwealth legislative competence.

Any such scheme of distributive or interstitial legislation would vary as to the completeness of its coverage of a particular subject matter according to its terms, and according to the nature of that subject matter, and the connection or lack of connection of any parts of that subject matter with a given head of power. As regards the adoption of children, it is suggested that that coverage would be sufficiently complete to result in a fairly comprehensive and integrated legislative code, because the number of adoptions that could not be covered by Commonwealth legislation would be numerically small and statistically insignificant.

The question on which the suggested assumption of power really hinges then is whether adoption of children (of a marriage, or by the parties to a marriage) can be fairly regarded as being incidental to marriage. It is submitted that if marriage be regarded in its widest connotation in the light of the observations of Scarman J. in *Bowlas* v.

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[71] *Pidoto* v. *Victoria* (1943) 68 C.L.R. 87, 109, *per* Latham C.J. In that case, Latham C.J. was discussing a suggested interpretation of the Acts Interpretation Act 1901 (Cth) with respect to a hypothetical attempt by the Commonwealth to legislate generally as to larceny. Larceny itself is not within Commonwealth power, but different situations involving larceny could be covered under a Commonwealth law, by relying on a process of interstitial legislation, *e.g.* in relation to territories, postal and customs officers, inter-state and overseas trade, and so on. Such a law would be perfectly valid, and the provisions of the Crimes Act 1914 (Cth) are themselves an example of such an approach. The point in *Pidoto's* case was that in the absence of express legislation creating this kind of jurisdictional patchwork, the court ought not to imply such a distributive, and necessarily incomplete, legislative intent. Dealing with adoption laws in the way here contended, should be sufficient to show the required legislative intent.

Bowlas, then the procreation or adoption of children is one of the central purposes of marriage and as such clearly incidental to it. Certainly the cogency of this argument is on a different plane from that of the lighthousekeeper or postman. The difference would appear to lie in the fact that legitimacy in relation to lighthousekeepers' children has probably nothing whatever to do with the object of the power conferred on the Commonwealth in relation to lighthouses, while adoption of children into a family constituted by a marriage does have a strong and logical, indeed necessary connection with marriage.

The purpose of putting forward the foregoing argument is not, of course, to indulge in an exercise in sterile and hypothetical forensic disputation for its own sake. It is rather to draw attention to the unfortunate fragmentation which has occurred in Australian family law for historical and constitutional reasons, not because of anything inherent in the logical organisation which the subject matter, according to modern principles demands. This makes it desirable to explore every possibility of unifying all possible areas of that subject matter. What is important is that the effect to be achieved would be to the benefit of children and of married persons, by making the jurisdiction of the Family Court of Australia more complete in the interest of enlightened social and legal administration. The hope of achieving these benefits makes it worthwhile that the possibility should be looked into seriously, pending the optimum solution referred to above, viz an overhaul of the Constitution, to ensure that all like subject matter is dealt with in like manner.