The Commonwealth Family Law Act

THE FIRST CHAL-LENGE

RUSSELL v. RUSSELL

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Following the decision of the High Court of Australia here discussed, the Commonwealth Attorney-General introduced legislation amending the Family Law Act 1975 (Family Law Act Amendment Act 1976). Most of this Act came into operation on 1st July, 1976. Some of its provisions are designed to rectify drafting ambiguities, but the most significant of them attempt to modify the Act according to the directives given by the High Court. Accordingly, this article provides the background to the Amendment Act.

The Background to the Case

It is not as well known as it ought to be that the Family Law Act 1975 is a very sweeping piece of legislation. The public tends to think that the only purpose of the Act was to simplify the grounds for divorce, and provide a single ground of irretrievable breakdown instead of the thirteen previous grounds, most of which were based on a matrimonial offence. This, in itself, was a radical change. But the Act contains 122 other sections, many of which introduce new law.

It was obvious to a lawyer, however, that the Act would be the subject of constitutional challenge. Its ambit was so wide that it seemed to cut across all previous constitutional dogma on the division of state and federal jurisdiction. Some thought that the draftsman of the Act had deliberately invited challenge. To his credit, he had not been deterred by the doubtful constitutional validity of some of the provisions from making a sweeping attempt to cover the whole field of matrimonial law. From a family lawyer's point of view, this was a worthy objective. For the fragmentation of family law into federal and state jurisdiction, and its distribution amongst various courts, with different personnel and different practices, different welfare services and different methods of enforcement, had been a clumsy and unwelcome consequence of the constitutional division. What the new Act was trying to do was to allocate all matters relating to divorce, nullity, maintenance, custody and matrimonial property to the federal jurisdiction.

In order to appreciate the difficulty of this move, it is necessary to give a brief outline of the constitutional provisions and principles affecting this branch of law. By section 51 of the Australian Constitution, the Parliament of the Commonwealth may make laws relating to . . .

(xxi) Marriage;
and
(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.

Now it was in 1959 that the Federal Parliament for the first time made use of these powers. In the Matrimonial Causes Act 1959, they were used sparingly. The federal Act related only to divorce, nullity and a few other actions for principal relief, together with maintenance, custody and matrimonial property applications that were **ancillary** (that is, incidental to) to a petition for principal relief. In other words, matters such as maintenance, custody and matrimonial property disputes which were not conducted by the parties as part of divorce proceedings were still heard by a variety of state courts. Indeed, the law of the states varied a great deal on some of these matters. Matrimonial property is a good example. Victoria favoured a form of community of property, whereas the other states favoured strict separation of property, that is the property belonged to whoever was shown to have purchased or acquired it. And in the federal jurisdiction, that is ancillary to a divorce petition, matrimonial property law was different still. The

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spouses' interests in property could be varied so as to give one spouse a share in property in which he or she did not have any ownership, in accordance with the justice of the case. In other words, at state level, pre-divorce, a strict property law applied, whereas in divorce proceedings the court was granted a substantial amount of discretion.

The 1959 Act was regarded as a tremendous advance in family law, and none of its provisions was held to be unconstitutional. Some of them were tested in the courts but there was no doubt that the Act had been drafted carefully so as to avoid any constitutional wrangles. A further use of the federal powers was in the Marriage Act 1961 which, for the first time, promulgated a uniform marriage law throughout Australia.

Now a foremost constitutional difficulty arose from the fact that the Family Law Act 1975 purported to set up a new system of courts to deal with family law. The Commonwealth Family Court of Australia is a brilliantly conceived court which is operating throughout Australia, except in Western Australia. In Western Australia, the state has established its own family court, and vested jurisdiction both in state law and in matters under the Family Law Act in that state family court. In the other states, however, including Victoria, the Family Court of Australia has jurisdiction only over the matters within the Family Law Act, and the state courts retain jurisdiction over the various matters which are still dealt with in state law, such as affiliation and adoption. The disadvantage of the Victorian approach will become clearer as this article proceeds.

The Family Law Act, while vesting jurisdiction in the Family Court of Australia, also provided for a transitional period during which proceedings that were commenced before the Act came into operation should continue in the court in which they were begun. So that the Supreme Court of Victoria, and other courts of Victoria, still have jurisdiction over pending matters. What is more, in country areas, where there is no Family Court of Australia, it is still possible to bring actions in the local state courts. Now the Family Law Act purported to establish new procedures for the conduct of cases in these state courts. And this inevitably gave rise to a constitutional challenge. Were the Family Law Act's new and sweeping procedures constitutional vis-a-vis the state courts having jurisdiction under the Act?

How the First Challenge Arose

The first challenge to the Family Law Act occurred in consolidated proceedings brought before the High Court of Australia in February and March 1976, which resulted in a judgment handed down in Melbourne on the 11th May, 1976. The case is named **Russell** v. **Russell; Farrelly** v. **Farrelly** (reported: C.C.H. Reporter, 75, 145), as it arose from two separate cases. The first involved Mr. and Mrs. Russell, and rose in the Victorian Supreme Court. The other concerned Mr. and Mrs. Farrelly and came from the Supreme Court of South Australia.

The High Court's decision first attracted some publicity. And first it is necessary to point out that the press reports of this case were entirely misleading. One newspaper, for instance, announced that the Family Law Act had been "found valid". Apart from being inaccurate, this is an optimistic statement. In fact, as Barwick C.J. and Gibbs J. pointed out in their respective judgments, the Family Law Act as a whole was not in contention. Indeed, both these Justices expressed the view that the way was open for further challenges to certain sections of the Act, and that this case dealt only with a limited number of sections which had arisen for decision in the two cases. It is a rule of law that only issues which are directly raised by a case can form the subject of a definitive judgment. There were, however, several **obiter dicta** (that is incidental comments) which throw some light on other sections of the Act. The decision of the High Court directly affected only the two issues that will be outlined below.

One's impression of the judgments is that certain key sections of the Act survived by the skin of their teeth. There were five Justices sitting on the High Court. (It is notable that Murphy J. disqualified himself, as he had been the architect of the Family Law Bill while he was Attorney-General.) At one end of the spectrum were Barwick C. J. and Gibbs J. who took a very strict and literal line. At the other end of the scale were Mason and Jacobs J.J. who approached the Act liberally. As it turned out, the most significant judgment was that of Stephen J., who took a middle course. For, in an otherwise even court, he held the balance of power.

Robing and Closed courts.

Let us now look at the principal issues raised in these two cases. One problem concerned the procedure of the court dealing with matrimonial causes. There were two doubtful provisions. First, section 97 (1) of the Act provided that "proceedings under the Act shall be heard in closed court". Secondly, section 97 (4) proclaimed that "neither the Judge nor counsel shall robe". There could be no objection to this mandate as far as it referred to proceedings in the Family Court of Australia. Surely, the Federal Parliament was entitled to provide in its own court a procedure having greater informality, and securing confidentiality for the parties as they reveal the humiliating details of their married life. The Act, however, purported to apply these directives not merely to the Family Court of Australia, but to any other court which exercised jurisdiction under the Family Law Act. And as was said earlier, several state courts have been entertaining jurisdiction, and will continue to do so.

(i) Robing

Now the requirement that Judges should not be robed runs completely counter to the normal requirements of state courts. The question was,

therefore, whether the Commonwealth had power to compel a state court, exercising federal jurisdiction, to amend its practices so as to require Judges and counsel to be unrobed. And an interesting side-issue to this question was whether non-compliance with this mandate would render the court's decrees null. Some members of the public may well think that this is a trivial issue. It has been said that lawyers are great actors at heart, and the charade of dressing is given exaggerated importance by them. And it certainly seemed, particularly from press reports, that this issue was a typical example of lawyers' preoccupation with their own dignity. My own view, however, is that this issue was one of great importance, particularly in the development of family courts. I have repeatedly said that the way in which family law is administered is even more important than the **corpus** of law.

What did the High Court decide on the robing issue? Barwick C.J. took the view that it was a matter of great importance. The robing of Judges, he said, was part of the traditional inheritance of the common law that was administered in state courts. It was fundamental to the common law concept of justice that it could not be interfered with by the Commonwealth Parliament. The same view was taken by Gibbs J. However, Mason and Jacobs J.J. were of a different opinion. They considered that this provision did not alter the organizational structure of the state Supreme Court. As Jacobs J. put it, the court is still the same whether or not any particular form of dress is prescribed.

We must therefore turn to the key judgment of Stephen J. for the verdict, which was that **the question of robing does not touch on the organization of the court and is properly incidental to the power to vest jurisdiction in a state court.** Therefore section 97 (4) is valid. However, non-compliance with it would not render a judgment void.

(ii) **Closed court**

The second issue was the question of the constitutionality of the requirement that the hearing should be closed to the public. Most people will perceive the importance of this question. For at stake is the principle enshrined in the hallowed maxim that "Justice must not only be done but also must manifestly be seen to be done". This maxim embodies one of the most gloried traditions of common law. Lawyers' hackles rise whenever it is impugned. Of course, there have been exceptions but, so it is said, the exceptions prove the rule. So when the Federal Parliament sought to require family law cases in state courts to be held in a closed court, one can imagine the ructions that this must have caused amongst traditionalists.

It is certainly a very sweeping mandate. The wonder of it is that it even found the support of two justices. They were, however, in the minority. The "middle" judge, Stephen J., on this occasion sided with the two hard-liners, so that this requirement was held to be invalid vis-a-vis the state courts. Stephen J. thought that this was a change so radical that it turned the court into a different kind of tribunal. Therefore, it amounted to an alteration of the constitution and organization of the state courts. This is not within the power of the Federal Parliament. Accordingly, the majority decision was that the **requirement of a closed court was invalid vis-a-vis state courts.**

The Limits of Federal jurisdiction

Now let us turn to the more substantial attack on the Act. Was it permissible for the Act to subsume the vast jurisdiction over matrimonial disputes that it purported to do? The Commonwealth attempted to assume jurisdiction over all matters relating to maintenance, matrimonial property and custody of children, whether or not these were ancillary to a divorce or other principal petition. Was this a valid exercise of power? Well, in order to determine this, the court had to look at s.51 of the Constitution. This assumption of jurisdiction could only be valid if it were in the exercise either of the power relating to **marriage** or of the power relating to **divorce and matrimonial causes.**

Barwick C.J. thought that it was entirely beyond the power of the Commonwealth Parliament to make laws relating to maintenance, matrimonial property or custody which were independent of divorce proceedings. He first tested the legislation by reference to the marriage power. Having looked carefully at the cases on this sub-section of the Constitution (s.51) (xxi)), he came to the view that the purported jurisdiction went beyond legislating on the **consequences** of the act of marriage, which is within the power of the Federal Parliament. It had in fact erected a jurisdiction to enforce the rights and duties of marriage, which was **ultra vires.** Further, in his opinion, the divorce and matrimonial causes power could not possibly authorize such a wide jurisdiction. For in Barwick C.J.'s view, unless proceedings for maintenance, custody or the settlement of property are ancillary to proceedings for divorce or nullity, then, in exercise of the divorce and matrimonial causes power, the Federal Parliament has no power to create such jurisdiction. The effect of Barwick C.J.'s judgment would have been to render invalid all the definitions of "matrimonial cause" contained in the Family Law Act 1975, s.4, except principal proceedings for divorce or nullity. To like effect was the judgment of Gibbs J.

The other three judges, however, were not so unyielding. Stephen J. agreed with Mason J. and did not write a separate judgment on this point. Mason J.'s view was that independent maintenance, custody and matrimonial property proceedings were valid in the exercise of the power granted by the Constitution to legislate in respect of marriage. Nevertheless, he thought that the definitions of matrimonial cause should be read down. His essential approach to the problem was expressed in the following words: "It is a constitution that we are construing and . . . the legislative powers that it confers should be construed liberally." This, of course, is a different approach from Barwick C.J. and Gibbs J. Mason J. refused to apply the maxim, **expressio unius est exclusio alterius,** to a constitution. In other words, he would not read down the marriage power of s.51

(xxi) by referring to the express inclusion in the Constitution of the divorce and matrimonial causes power (s.51 (xxii)). This would be too restrictive an interpretation, he thought. He did not think that the two powers were necessarily mutually exclusive, but rather overlapped. In other words, he thought that the marriage power should be construed liberally to allow the Federal Parliament to deal with my aspect of the solemnisation of or the mutual rights and duties created by marriage. The fact that the Constitution then expressly granted power to deal with divorce and matrimonial causes did not necessarily imply that these powers were unavailable under the marriage power.

The Definitions of "Matrimonial Cause" Examined.

Nevertheless, even Mason J. felt that the Act as drafted went too far. For if the legislation was valid by virtue of the marriage power, it must be limited to a marriage situation, and several types of matrimonial cause were not so limited.

In order to appreciate the signifcance of Mason J.'s critical judgment, it is necessary to examine each of the particular definitions that were challenged. The Act purported to assume **exclusive** jurisdiction over all "matrimonial causes" as so defined in s.4(1). The first two examples of "matrimonial cause" — "divorce" and "nullity" (s.4(1) (a), s.4(1) (b) — were not challenged. The third (s.4(1) (c) is the most important and controversial. "Matrimonial cause" means —

> proceedings with respect to (i) the maintenance of one of the parties to a marriage; (ii) the property of the party to a marriage or of either of them; (iii) the custody, guardianship, or maintenance of, or access to, a child of a marriage.

Mason J. tested each of these by reference to the marriage power. On its face, according to Mason J., s.4(1) (c) (i) permitted maintenance proceedings to be brought against a person to whom the applicant was not necessarily married. This was **ultra vires** the Commonwealth.

Thus the maintenance definition (c) (i) had to be read down so as to be limited to proceedings between the parties of marriage. If this were done, Mason J. thought that maintenance proceedings independent of divorce or nullity could properly be provided for by this Act. Mason J. then tested s.4(1) (c) (iii) against the marriage power, and found that it was too widely drawn. For, as drafted, it could apply to children for whose status and origin the marriage was irrelevant. Therefore, to be valid, the custody definition must be limited to the natural and adopted children of the parties of the marriage.

Unfortunately, Mason J. could not justify the matrimonial property definition (s.4(1) (c) (ii) by reference to the marriage power at all. For, as drafted, it envisaged a situation where the court had power to deal with property which was neither acquired during marriage, nor in any way in which that sub-section could be justified was by reference to the divorce and matrimonial causes power. Accordingly, the only matrimonial property cases which could be validly covered by the Family Law Act were those ancillary to divorce or nullity applications.

The three final definitions of "matrimonial cause" were all commented on by Mason J. The fourth (s.4(1) (d) relates to court approval and registration of maintenance agreements between parties to a marriage and was considered valid by Mason J. The fifth (s.4(1) (e) is interesting and is worth setting out in full:

> "Matrimonial cause" means:—
> Proceedings for an order or injunction in circumstances arising out of a marital relationship.

This, according to Mason J., would be a valid exercise of power if it were restricted to proceedings between the parties to a marriage.

And finally, s.4(1) (f), a section granting incidental powers, was considered by Mason J. to be valid only insofar as they arose inconnexion with proceedings which were themselves valid, according to the tests propounded above.

The Liberal Judgment of Jacobs J.

Stephen J. agreed **in toto** with Mason J. The final judgment of Jacobs J. is the most liberal of all. Insofar as it coincides with those of Mason J. and Stephen J., Jacobs J.'s views are binding. In fact, the only way in which Jacobs J. differed from Mason and Stephen JJ. is that he would have regarded section 4(1) (c) (ii) as valid as between the parties to a marriage, but invalid if it involved in any way the devolution of property on any **child.** For in his view this power purported to enable the court to vest property on a child of any age, and he found difficulty in reading this as a valid reference to the marriage power. As drafted, the matrimonial property definition would have permitted a "child" of 50 to benefit from a settlement of property acquired by his parents in their 70s. It would be absurd to say that such a settlement was in any way related to "marriage", as the parental duties of a husband and wife to their children lapse on the child's attainment of majority. How could such a settlement be predicated on the marriage power of the Constitution?

Subject to that limitation, however, Jacobs J. would have accorded full validity to the whole of the definitions of "matrimonial cause".

SUMMARY OF THE CASE

The effect of this difficult case is, I think, as follows:—

1. The sub-section that compelled a non-federal court to sit as a closed court was invalid.
2. The sub-section that compelled a judge and counsel in a state court not to robe was valid, but non-compliance with that precept would not invalidate a decree.
3. The definition of "matrimonial cause" was valid to this extent:

(a) Only those maintenance applications brought by one party to the marriage against the other were valid, and the Act had properly subsumed these, independently of divorce. The normal maintenance application, pre-divorce, will continue to be brought under the Family Law Act 1975.

(b) Applications, however, for matrimonial property, independently of divorce, could not validly be governed by the **Family Law Act,** and therefore the state jurisdiction arises. This means that section 161 of the Victorian **Marriage Act** 1958 has been re-vivified, and so has the state legislation in other states.

(c) Custody, guardianship and access to children, independently of divorce, could be validly governed by the **Family Law Act,** but only as respects the natural or adopted children of both parties to a marriage.

(d) The injunction power was also valid, but seemingly only to the extent that an injunction can be directed at another party to a marriage. In other words, it is doubtful whether the court can use this injunction power to throw out an interfering mother-in-law or make any other order against a third party.

4. According to the order of the court, Family Law Act 1975, s.64, which deals with the power of courts in custody proceedings, is valid only as respects the natural and adopted children of the parties to the marriage. But here the writer feels that the court, in its order, went further than the individual judgments seemed to warrant. For it seemed to be the intention of the majority judges that these limitations should apply only to proceedings **independently of divorce.** One would have thought that, as regards custody applications ancillary to divorce, section 64 would have been valid exercise of the divorce and matrimonial causes power (Constitution, s.51 (xxii). Certainly, however, the definition of child of a marriage (section 5 (1) (c) which included a child of either the husband or wife, if that child was an ordinary member of the household to the husband and wife, and which was directly taken from the **Matrimonial Causes Act** 1959 is no longer constitutional as regards independent custody proceedings. However, the Justices surely did not purport to read down this definition in respect of divorce proceedings, for this was unnecessary to the decision in **Russell** v. **Russell.** It is submitted that the official order of the court appears to be more widely drawn than was necessary.
5. Section 74 with respect to the maintenance of a party or child of the marriage must also be limited, but once again one would think that this limitation applied only to non-ancillary proceedings.
6. Section 78, which gave the court jurisdiction to make declarations of interests in property, was valid only in respect of proceedings ancillary to divorce. In other words, the matrimonial property jurisdiction of the state is revived.

It is interesting to speculate on the constitutionality of certain sections which were not before the court. I have already dealt with s.5 (1) (c) dealing with the extended definition of child of the marriage. When I read **Russell** v. **Russell** for the first time, I came to the conclusion that s. 79, which deals with the power of the courts to **settle** matrimonial property, would be of doubtful validity. This section was not before the court. But the case suggested that this readjustment power cannot constitutionally be exercised in relation to s.15. Section 15 permits any party to file a notice in the Family Court stating that he or she intends to seek the assistance of Counselling facilities of the court. In fact, the Commonwealth Attorney-General appeared to take this view, for this power has been removed by the Family Law Act Amendment Act 1976. Henceforth, the power to settle property may only be exercised as ancillary to a divorce or nullity.

It is also doubtful whether s.61 (4) is valid, at least as regards independent applications for custody. This section purports to grant to a third party the right to apply for custody of the children. It is doubtful whether this and any other of the sections or sub-sections of the Act which expressly or impliedly grant the court power to make a custody award on the application or intervention of a third party are constitutionally valid. Particularly disturbing is the possibility that s.65, allowing the court to order that a child be separately represented, could be constitutionally invalid. It is doubtful whether an application by an organisation concerned with the welfare of children could possibly come within the marriage power of the Constitution.

This section must be regarded now as of considerable constitutional doubt.

What is abundantly clear is of course that the Federal Parliament has no power to make any jurisdiction over any ex-nuptial child. So that the limited attempt in the Act to deal with ex-nuptial children both under s.5(1) (c) and under s.109 (dealing with the interstate enforcement of affiliation) must be regarded as highly doubtful.

I have doubts as to the validity of s.119, which provides that parties to a marriage can bring proceedings in contract or tort against the other. The difficulty with this section, and with s.120, is that the Federal Parliament has attempted radically to change State law, and again, it is doubtful whether the change can be construed as falling within the Commonwealth's marriage power. S.123 must also be regarded as doubtful in respect of any other court having

jurisdiction apart from the family court. This section deals with the penalties for printing or publishing reports of family law cases:—

The Future

The decision in **Russell** v. **Russell,** at first blush, seems a body-blow to the development of a uniform family law in Australia. It may be, however, that it is a blessing in disguise. I have always taken the view that it was desirable that all family law matters be subsumed within one court. Western Australia has attempted to do this, and the way is open for other states to do it by arrangement with State Attorneys-General under section 41 of the Family Law Act. It would be possible perhaps for State family courts to be set up in every state which would have jurisdiction over all state family law matters and the matters vested in it by the Family Law Act. The Family Court of Australia might then become an appellate court only, save perhaps for original jurisdiction in the Australian Capital Territory and the Northern Territory.

Whatever the event, it is a salutary lesson to Australians that the limitations of a written constitution have once again prevented or placed severe restrictions on sweeping and enlightened legislation, which otherwise would have placed this country at the forefront of jurisdictions in the world. The framers of the Australian Constitution have a great deal to answer for!

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BOOK REVIEWS

Owing to the large number of articles submitted for publication the Book Review Section has been held over until the next issue.

Book Review Editor.

Hospital Care can be damaging, says Health Care Policy Report

A special supplement of the Medical Journal of Australia prepared by the Association for the Welfare of CHILDREN in Hospital outlines the Association's "Health Care Policy relating to children and their families."

Dr. Sidney Sax, Chairman of the Hospitals and Health Services Commission in the preface to the report says ". . . we should all be distressed to learn that abnormal personality development has occurred in young children as the direct result of their care in hospital."

The preamble continues: "It is now generally realised that the provision of a clinically sterile, medically oriented environment has overshadowed the emotional needs of the child, sometimes, in the case of the young child, at the high cost of aberrated personality development.

"An impersonal, detached attitude which fails to recognise the emotional needs of the child has no place in a hospital or similar environment which to a child, is threatening, alien without familiar figures and distorted by fears of unknown possibilities of pain and loneliness."

The report is based upon eight policy statements which are listed below:

(1) A child should only be hospitalized if there are clear and unavoidable indications for this.

(2) The duration of a hospital stay, particularly for a young child, should be as brief as possible.

(3) When health care for the child is necessary within an institution of any health care programme, a close and continuous relationship between the child and the family (or surrogate care givers) should be encouraged and maintained wherever possible. Provision should be made for a range of facilities and programmes to allow for this continuing relationship.

(4) Every effort should be made to minimize the physical and emotional distress to children and their families whether inpatients, outpatients, or in other community health care.

(5) Those involved in child care should be chosen with consideration for their special personal attributes such as perception, sensitivity and compassion for young children which will render them more suited to this role.

(6) Professionals involved in child care should have special training in the unique psychological needs of young children in sickness and in health.
This should logically include a knowledge of family dynamics and child development.

(7) The provision of paediatric care, recognizing the physical, emotional and intellectual needs of the child during sickness, provides a special opportunity to help create an informed public opinion about the care of children generally and the relevance of the family.

(8) On-going evaluation of policies (including this one) and programmes of care is essential. This should involve staff at all levels, of all disciplines, the recipients of care, and the community generally.

The complete report is available from the National Organizer, Association for the Welfare of Children in Hospital, 5 Union Street, Parramatta. N.S.W. 2150.