

Family Law in Australia

BARGAINING IN THE SHADOW OF THE CONSTITUTION

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The Australian Constitution divides responsibility for several areas of Australian family law between the States and the Commonwealth. The dual system created as a consequence, particularly in relation to child protection issues, provides opportunities for confusion and duplication. And what are the effects of Federalism on those exercising jurisdiction under the Family Law Act?

The legal regulation of family related disputes in Australia is as complex, fluid and confusing as is family life itself. It is also as heavily influenced by constitutional law and political decisions as by the substantive law and the case law which interprets it. What constitutes 'family law' for particular purposes is dependent on that strange creature Federalism, and the century-old constitution which established it, rather than on any popular understanding or acceptance of the term.

It is not surprising that the roles of the many and varied Federal and State courts, tribunals and agencies which struggle to deal with difficult issues such as child abduction and abuse, family violence, and child and spousal maintenance remain a mystery to the many families most affected by the legislation these forums deal with. Attempting to explain the Australian 'system' to those operating outside it inevitably produces a considerable amount of bewilderment and incredulity.

This article seeks to spell out some of the existing problems, which will unfortunately only be exacerbated by the imminent establishment of the Federal Magistrates Court.

Australia has a specialist Family Court but, as this article explains, its powers do not extend to a number of areas which many would agree fall within the ambit of family law. The resulting fragmentation between the States and the Commonwealth creates an environment in which clients may on occasions 'shop around' for the court they consider most conducive to a favourable outcome. Allegations of systems abuse are another consequence of the divided jurisdiction. The number of constitutional constraints and the volume, size and diversity of family-related disputes also require their determination by judges and by officers exercising delegated judicial power.

Constitutional issues

Section 51, placita xx and xxi of the Australian constitution restrict the Commonwealth's involvement in family law by expressly vesting it with power to make laws 'with respect to (1) marriage, and (2) divorce and matrimonial causes and in relation thereto parental rights and the custody and guardianship of children'.

As a consequence, public law disputes (those matters in which the State is a party), and most particularly child protection, juvenile justice and adoption, are excluded from Commonwealth powers. Also outside the boundaries of Commonwealth power are the determination of financial disputes involving unmarried couples and (until a decade ago) their children.

The prevailing mores of a century ago would undoubtedly have prevented any official recognition by the all-male founders of the Constitution of 'aberrant' family forms, such as those based on de facto unions, or of ways of dealing with violent behaviour involving children. Moreover, notions of family autonomy and non-interference would have restrained anyone unwise enough to suggest that the homes of 'respectable' citizens should in any way be subject to outside supervision and control. Rather, the emphasis in 1901 was on the recognition of marriage as a status (both domestically and internationally), and its effectiveness in transferring rights over property and children – always a major motivation for de jure marriage amongst those sufficiently fortunate to have assets to devolve.

It is hard to find a rationale for the division of responsibility for public and private law between the states and the Commonwealth at the turn of the century, possibly because it was only briefly considered at that time. The commentators of the day, Quick and Garran (1901, para 200), merely note: 'It was thought that, except incidentally to matrimonial suits, the control of children was not a federal matter'.

In any event, those matters not specifically referred to by the Constitution as being within the power of the Commonwealth are the responsibility of the states. To further complicate matters, the situation is different in relation to the Territories, as section 122 of the Constitution gives the Commonwealth Parliament full legislative powers where the Territories are concerned. All states and Territories have separate (and far from uniform) child welfare, adoption, and juvenile justice laws, and many now also have laws which govern the rights of de facto couples who have financial disputes following relationship breakdown. Where there are inconsistencies between valid State and Commonwealth legislation the latter prevails.

The proponents of Federalism were influenced quite heavily by the United States constitution, and were particularly critical of its failure to grant divorce powers to the Federal government, thus paving the way for the multitude of different State laws we see in that country today. Fortunately in Australia their efforts in seeking Commonwealth involvement in the areas of marriage and divorce were successful. However, having been granted the powers, the Commonwealth appeared loath to exercise them and, (except for some post World War I and World War II measures to protect deserted wives), it did not enter the field until 1959, when the Matrimonial Causes Act was passed in relation to divorce, to be followed in 1961 by the Marriage Act.

In the intervening period the states enacted their own divorce legislation, based to varying degrees on the English Matrimonial Causes Act of 1857 which had replaced the expensive, and consequently rarely used, practice of Parliamentary divorce.

By today's standards those State Acts were restrictive, censorious and deeply imbued with ecclesiastical practices. However, as each State sequentially passed its own legislation in the years between 1860 and 1873 they

showed themselves to be somewhat more liberal than their predecessors, and therefore different from them, with Western Australia alone providing a no fault ground of separation. Another fairly widespread characteristic was the discriminatory nature of the statutes, with a woman frequently being required to prove two grounds for divorce against an errant husband, whilst he merely had to prove one ground to gain his 'freedom'.

Matrimonial Causes Act

The Commonwealth Matrimonial Causes Act came into operation in early 1961. Known as the Barwick Act after the Attorney General of the day, it unified the law of divorce (which was described as principal relief), and associated issues (called ancillary relief), across the country. The Act provided a list of 14 predominantly fault based grounds on which divorce might be granted, the major exception being the five years separation ground which had originated in Western Australia.

The Matrimonial Causes Act also perpetuated several ecclesiastical remedies such as jactitation of marriage¹ and judicial separation². Moreover, it gave the presiding judge considerable discretion as to whether a divorce would be granted or not, the mere proof of a ground for divorce (such as adultery) being in itself insufficient. Petitioners – and the name in itself is instructive – should themselves be 'blameless', and any act of adultery which they had committed since the marriage had to be acknowledged in a written discretion statement. This was provided in a sealed envelope to the judge who might then refuse the divorce because of the petitioner's conduct. A divorce would also be refused if it were shown that the husband and wife had conspired together to manufacture a ground for divorce, where one had encouraged the other to commit a matrimonial offence, or where the 'guilty' party had been forgiven by the other for his/her behaviour. These so-called bars to relief were called respectively collusion, connivance and condonation.

Because of concerns about their validity under the Constitution, orders ancillary to the divorce, such as maintenance and custody, could only be made under the Matrimonial Causes Act where divorce proceedings were being sought concurrently or had been completed. Otherwise, applications for ancillary relief were heard and determined in State courts according to State law. Matrimonial Causes Act proceedings were otherwise heard by State Judges in State Supreme Courts exercising Federal jurisdiction for that purpose.

The Matrimonial Causes Act was repealed with the passage of the Family Law Act which came into operation in January 1976. As is well known, that Act introduced no fault divorce and established the Family Court of Australia as a specialist forum. Henceforth judges were appointed according to their training, experience and personality, and counsellors and registrars were employed by the Court to resolve disputes in relation to children and financial matters, by way of conciliation where possible.

Constitutional challenges

Almost immediately and for more than a decade after its passage a number of High Court challenges were made to the validity of various provisions of the Family Law Act, alleging that they were unconstitutional because they were insufficiently connected to either the marriage or matrimonial causes provisions of the Constitution. Major initial concerns related to the rights of third parties in property and children's matters, and the validity of property proceedings in the absence of dissolution proceedings.

The phrase 'matrimonial causes', not defined in the Constitution and given a narrow meaning in the Matrimonial Causes Act, was defined more broadly in the Family Law Act prior to any amendments, and more broadly again by the 1983 and 1984 amendments to that Act following those challenges.

Family Court structure

Over the years, the Family Court has sought to manage its ever increasing workload in a variety of ways, and on all occasions the Constitution has cast a shadow over its efforts.

One less controversial move adopted the recommendation of the 1974 Senate Standing Committee on Constitutional Affairs that there be a two tier structure of senior judges and judges. It was intended that the senior judges would hear the more difficult matters, together with appeals, and the judges would deal with the determination of more routine disputes. When the Court was originally set up both senior judges and judges were appointed, but it soon became apparent that matters could not easily be categorised into simple and complex, and no senior judges were appointed after 1982.

Today the Family Court's jurisdiction is exercised through a judicial structure comprising judges, judicial registrars, senior registrars and deputy registrars, with all but the judges exercising jurisdiction delegated to them by the judges via the rules of the court. This is confusing but necessary, given the diversity of the matters which come before it and the constitutional constraints. The judges and other decision makers must deal with matters ranging from allegations of child sexual abuse, international abductions, and disputes involving complex trusts and overseas assets, to arguments about a child's surname, whether a child was over-held on a contact visit, or who should receive a share of a small bank account or 'house and garden' items. Registrars also play an important role by using their delegated powers to ensure that the Court's case management guidelines are adhered to.

In addition to the more 'traditional' family law areas, the Court also has jurisdiction to hear (amongst other things) applications to depart from the child support formula under the Child Support Assessment Act, or to authorise the marriage of a minor under the Marriage

Act. By virtue of section 67ZC of the Family Law Act, it also may make orders relating to the welfare of children. This undefined and amorphous *parens patriae* power has its origins in the Crown's obligation to protect children, and was traditionally the province of the English Courts of Chancery. It has most frequently been exercised by the Family Court in relation to medical procedures involving minors, and most particularly where authorisation is sought to sterilise intellectually disabled young women. However, it probably does not extend to ex nuptial children as the jurisdiction is not derived from the marriage power, and this remains to be tested. State courts also have a *parens patriae* power, which is probably superseded by orders of the Family Court.

The potential for State welfare (that is, child protection) laws to become inoperative because they are inconsistent with the Family Law Act is recognised in section 69ZK of the Act. The section provides that, with limited exceptions, courts exercising jurisdiction under the Family Law Act cannot make orders relating to a child who is under the care of a person pursuant to a child welfare law. This provision highlights the similarities of orders involving children made by Federal and State and Territory courts, the need to prevent perpetual conflicts between the State and Federal systems, and the fact that, in the face of an inconsistency between valid Commonwealth and State laws, the former will be preserved at the expense of the latter.

Over the years, the Family Court has sought to manage its ever increasing workload in a variety of ways, and on all occasions the Constitution has cast a shadow over its efforts.

In 1988 the Family Court (Additional Jurisdiction and Exercise of Powers) Act invested the Family Court with additional Federal jurisdiction in specified areas such as bankruptcy and trade practices, upon these being transferred from the Federal Court. The objective was to implement the recommendation of the Jackson Committee of the Constitutional Commission that the Court be 'renovated' by its judges being empowered to deal with a wider range of work. Several Family Court judges also have commissions as members of the Administrative Appeals Tribunal and I have a commission as a judge of the Federal Court. In reality, the volume of Family Court work precludes judges from dealing with any additional jurisdiction and very few matters have been referred to it by the Federal Court, and none for many years.

The 1988 legislation also created the offices of Deputy Chief Justice, Judge Administrator and judicial registrar, and established a permanent appellate division of the Court.

It is unnecessary in this article to describe in detail the different powers of the judges and other officers of the Court. Nor is there room to explain the important and different roles played by the Family Court of Western Australia and State Magistrates courts. For obvious reasons, judges hear those matters which go to a final defended hearing, while interim, procedural, and undefended matters which involve consent orders are usually delegated by the judges via the Rules of Court to judicial registrars and registrars.

However, there are constraints on the extent to which judicial power can legitimately be so delegated. In *Harris v Caladine* (1991) FLC 92-217, the High Court held that the delegations made initially several years earlier were constitutionally valid, but warned that judges must be able effectively to control and supervise the delegated functions for them to be so.

Again because of constitutional concerns, only judges can make final orders concerning children, whilst judicial registrars can make final property orders provided the gross value does not exceed \$700,000. Where the parties consent there are no constraints on the jurisdiction. The demarcation of powers between various Court officers creates particular difficulties in small registries where there are no judicial registrars, and when the Court is on circuit, with matters listed before registrars frequently having to be adjourned when they become contested or the applications are found to be more complex than was originally realised.

The other area of difficulty occurs because only judges are appointed under Chapter III of the constitution, and therefore appeals from decisions of anyone other than a judge can only be by way of a de novo review, rather than an appeal. This technical sounding term has practical consequences for litigants, as a hearing de novo means that proceedings must be heard again from the beginning, this time before a judge, with all the attendant costs and stress associated with such proceedings. In contrast, an appeal from a judge's decision (whilst still expensive and stressful) allows examination of material from the first hearing, with the Court having a discretion to admit additional material and reach different conclusions.

For several years the Court has struggled to keep waiting lists at acceptable levels. The delays have been particularly acute in children's matters and were exacerbated in 1996 with the coming into force of the amendments to Part VII of the Act, which has produced an increase in applications for parenting orders. The problem was exacerbated by the shortage of judges (who alone can hear matters which proceed to a final hearing), and by the limitations on the delegation of powers to Judicial Registrars and Registrars which resulted from the decision in *Harris v Caladine*. Essentially these restrictions also prevented anyone but Judges from hearing interim matters, and judges were spending increasing amounts of time on these, thus causing the delays for final hearings to increase. Ironically, as the times to final hearing blew out so did the demand for interim determinations, particularly in children's cases.

In early 1999, following the receipt of advice from the Solicitor-General, Family Court judges agreed to delegate their powers to determine interim parenting and some other matters to a new category of senior registrars. Although these registrars have only been employed since May 1999, they have proved themselves most capable and have carried an enormous workload. As a consequence, judges have been able to concentrate almost exclusively on final defended matters and the delays in children's matters have substantially reduced.

On a number of occasions the Court has pointed out the unacceptable complexities of its structure to various governments and Parliamentary inquiries. Specifically it sought the appointment of specialist 'Chapter III' Federal magistrates within the Court itself, and the establishment of something akin to a small claims tribunal to allow the summary disposition of minor disputes.

Instead, the Government has decided to establish a Federal Magistracy as a separate entity (see Margaret Harrison's article in *Family Matters* no. 53, p. 53). This may cause a number of problems, not the least of which will be the removal of the recently appointed senior registrars, who will be replaced by Federal Magistrates working externally to the Family Court and therefore operating independently of its case management guidelines. An already fragmented and misunderstood system is, as a result, in danger of becoming even less cohesive and more confusing.

Referral of powers

The most comprehensive constitutional change since Federation in relation to what can be described generically as 'family law' occurred between 1986 and 1990 when all states except Western Australia referred their powers over ex nuptial children to the Commonwealth. The need for such a referral became patently apparent during the previous decade, as anti-discrimination legislation heightened an awareness of the different ways in which disputes involving the children of unmarried parents were managed. It also became apparent that the advantages provided by the specialist Family Court (particularly access to its counselling service) were translating into child focused settlements and an avoidance of litigation. Since the referral was effected disputes involving *all* children are the subject of Family Law Act proceedings for parenting orders, regardless of the marital status of their parents. Currently 38 per cent of applications to the Court for parenting orders relate to ex nuptial children.

The uniformity of treatment of course extends to the substantive law also, and all parents have joint parental responsibility for their children, subject to proof of paternity being established (in the case of ex nuptial children) and to any court order to the contrary.

The referral of powers took nearly a decade of lobbying and the result was long overdue and most welcome. However, its very success has accentuated the differential treatment of married and unmarried couples. The

latter must still have their financial disputes determined differently in State courts and according to the differing laws of the State or Territory in which they live. A referral of State powers over de facto relationships to the Commonwealth may be forthcoming from some states in the not too distant future and the Commonwealth Attorney-General has indicated that he may accept such a referral, even if not all states agree to it. To date only Queensland and Tasmania have given any support for it and, although a partial reference may be better than none at all, and may ultimately encourage other states to participate. In the interim the lack of legislative uniformity will continue.

It is worth noting that the possibility of demarcation disputes arising between State and Commonwealth courts because of similarity of subject matter was acknowledged in the referral of powers legislation. Although the wording varies somewhat from statute to

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statute (and State to State), in general the Commonwealth cannot assume responsibility for actions which may prevent or interfere with a Minister of the Crown or officer of the State or any other person or body having or acquiring the custody, guardianship, care or control of children under a provision of a specified Act.

Cross vesting

As Margaret Harrison has explained in an earlier *Family Matters* (no. 53, p. 54), the statutory scheme by which some associated matters could be transferred to and consolidated in one court was found to be unconstitutional by the High Court in the matter of *Wakim; ex parte McNally* (1999) 24 Fam.L.R 669.

This procedure was known as cross vesting and it was an attempt by the states and the Commonwealth to overcome limitations on the hearing of matters whose subject matter was inter-related but still straddled both State and Federal jurisdictions. The major example of this in the area of family law was the ability to hear concurrently disputes between de facto couples concerning both children and property, which would otherwise be dealt with separately by the Family Court and State courts respectively.

Child protection issues

Technical discussions about jurisdiction and constitutional issues tend to mask the real effects of Australia's fragmented family law system on those it is meant to

protect. These effects are particularly evident in relation to children who are the subject of abuse concerns.

As Dessau (1998) has highlighted, the present system enables a child victim of abuse to be the focus of contemporaneous proceedings in a number of State courts and tribunals, as well as the Family Court. The child may also as a consequence be brought into contact with a variety of police, social workers, medical and legal practitioners and other professionals. State courts have different powers and manners of dealing with matters, both at first instance and on appeal, so the physical location of the family will determine the law and procedures applicable. State and Commonwealth legislation use different language to describe and define terms such as custody/residence and access/contact.

The overlap between jurisdictions can produce most unfortunate results. For example, an application may be awaiting hearing in a children's court at the same time as a parenting order is sought in the Family Court, or vice versa. Frequently also a welfare issue arises in the course of Family Court proceedings, possibly by way of an allegation that a child has been abused during a contact visit. Research conducted by Brown et al. (1998) has shown that these matters occur so frequently in the Family Court that their management has become a substantial component of the Court's core business. The empirical study undertaken in Victoria by Fehlberg (1998), will provide more examples of jurisdictional overlap and its impacts.

The Family Law Act provides for court personnel and parties to notify the relevant State child welfare authority of any reasonable suspicion that a child has been abused or is at risk of abuse. A judge may also make a notification or request the intervention of the child welfare authority. However, judges cannot compel such intervention, although some form of investigation is required once a notification is made.

The suggestion is frequently made that child welfare departments treat allegations of abuse that arise during Family Court proceedings as being brought falsely for tactical reasons, or consider them to be less serious than those brought in public law cases (Brown et al. 1998). In Victoria only 50 per cent of cases referred were investigated by the child protection services. Reports took on average 42 days to arrive at the Family Court, and many were cryptic and inconclusive. Nevertheless, the false allegation rate was approximately 9 per cent, the same as that for all abuse allegations.

In an attempt to improve outcomes and reduce the delay in children's matters, particularly those in which children may be at risk, the Court began piloting what is known as its Magellan project in the Melbourne registry in mid-1998. It has since been extended to the Dandenong registry. The project involves special case management of 150 cases which are dealt with by a designated small team of judges, registrars and counselors. Major characteristics include continual liaison with the Victorian Department of Human Services, and

with Victoria Legal Aid. As a result of good co-operation with these organisations, thorough investigations have been carried out early in the process and all the children are legally represented at court.

The project is being evaluated by a team from Monash University. The initial findings suggest that cases are resolving more frequently and earlier in the process, with fewer hearings. Importantly, the provision of detailed reports from the State Department allows all those involved to be better informed about the children's circumstances and therefore more able to encourage settlement, or to adjudicate defined issues where necessary. Cases which are proving to be incapable of resolution despite the special case management have often already been litigated in the Victorian Children's Court and are essentially re-run in the Family Court, sometimes taking several weeks to complete.

In the absence of particular case management processes and careful inter departmental liaison, the Family Court may often not be properly informed about the allegations, the detail or progress of the State welfare authority investigations, and the children's court proceedings. Sometimes, neither the Federal nor the State court knows the extent of proceedings in the other court.

Another side effect is the opportunity for what is known as 'forum shopping', with parties seeking to litigate in particular courts for optimum results, or re-litigating residence or contact issues in the Family Court once Children's Court orders expire. A State welfare authority, dissatisfied with a Family Court outcome, may also apply in the Children's Court rather than appealing from the Family Court decision. However, it is often impossible to determine which law (and therefore which forum) takes precedence.

By way of example, recent Family Court proceedings between parents involved competing applications for residence of their four young children. At the end of a five-day defended hearing a Family Court judge ordered that the children live with their mother, an outcome which was supported by the child's legal representative. On the day that judgment was handed down the State welfare authority served the parties with a care and protection application in the Children's Court, seeking an order that the children live with their father. This application was successful.

The mother then appealed from the Children's Court to the County Court, the father again succeeded and the protection orders subsequently expired. The parents then recommenced litigation in the Family Court, by which time the case had been in three different courts for more than four years.

Finally, whilst Family Court orders apply across Australia, State Children's Court orders only operate within the boundaries of the State in which they are made. The States and the Commonwealth have recently agreed to consider mechanisms to increase the portability of care and protection orders, which has already occurred in relation to family violence orders.

The role of protocols

In most states and the Territories the Family Court and the relevant welfare authorities and courts have entered into protocols which assist in coordinating the work of all those involved in the area of child protection. These protocols seek to overcome the structural and jurisdictional difficulties described above. They are vital in ensuring cooperation between the different personnel. However, as shown, they cannot always prevent instances of overlap and duplication which are so deeply embedded in the system.

The need for consistency and clarity

It is distressing to document the fragmentation and lack of cohesion in an area such as family law where consistency and clarity are so greatly needed. It is equally distressing to note that solutions to these difficulties, apart from band-aid measures, are not readily forthcoming.

Possible solutions include an amendment to the Constitution to give the Commonwealth wider powers, or referrals of power by the states to the Commonwealth in areas such as child protection, as occurred in the case of ex nuptial children.

Neither of these is likely in the near future, if at all, for a host of reasons. The demise of cross vesting has closed off any avenues that may have presented themselves in that arena. The passage of uniform State and Territory legislation would be of assistance in achieving some uniformity of approach, but is also an unlikely outcome. And, of course, uniformity is difficult to achieve in anything other than the short term.

Notes

1. This was an action brought against someone who was falsely asserting that he or she was married to the plaintiff.
2. An order for judicial separation did not dissolve a marriage and therefore did not permit the parties to remarry. However, it allowed them to live separately from each other.

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