# VOID AND *DE FACTO* MARRIAGES

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## Aim

This article aims to discuss the question of when will the partners to a *de facto* marriage come within the ancillary jurisdiction under the Family Law Act 1975 (Cth.) over property, maintenance and custody? This aim leads to the question of when will a *de facto* marriage be declared to be a "void" marriage?

## Background — The Movement to Recognize Some *De Facto* Relationships

In recent years *de facto* marriages have received a lot of publicity in legal text books;[1] journals;[2] litigation;[3] law reform bodies[4] and the

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[1] E.g. H. A. Finlay, *Family Law in Australia,* (2nd ed., 1979) Ch.9; M. A. Glendon, *State, Law and Family,* (1977) at 78-112; G. Douthwaite, *Unmarried Couples and the Law* (1979).

[2] R. J. Bailey, "Legal Recognition of De Facto Relationships" (1978) 52 *A.L.J.* 174; A. Bissett-Johnson, "A Mistress's Right to a Share in the Matrimonial Home" (1975) 125 *New L.J.* 614; C. S. Bruch, "Property Rights of De Facto Spouses" (1976) 10 *Fam.L.Q.* 101; S. Poulter, "The Death of a Lover No. 1" (1976) *New L.J.* 417; D. Pearl, "The Legal Implications of a Relationship Outside Marriage" (1978) 37 *Cam.L.J.* 252; H. A. Finlay, "The Battered Mistress and the Violent Paramour" (1978) 52 *A.L.J.* 613; D. Waters, "Matrimonial Property Disputes, Resulting and Constructive Trusts — Restitution" (1975) 53 *Can. Bar Rev.* 366; J. C. McCamus and L. Taman, *"Rathwell* v. *Rathwell*: Matrimonial Property, Resulting and Constructive Trusts" (1978) 16 *Osgoode Hall L.J.* 741; A. H. Oosterhoff, "Remedial Constructive Trusts" (1979) 57 *Can. Bar Rev.* 356; H. H. Kay and C. Amyx, *"Marvin* v. *Marvin*: Preserving the Options" (1977) 65 *Cal.L.Rev.* 937; S. A. Coolidge, "Rights of the Putative and Meretricious Spouse in California" (1962) 50 *Cal.L.Rev.* 866; H. J. Folberg and W. P. Burren, "Domestic Partnership; A Proposal for Dividing the Property of Unmarried Families" (1976) 12 *Will. L.J.* 453; J. M. Masson, "The Mistress's Limited Rights of Occupancy" [1980] *Conv.* 184; A. Zuckerman, "Formality and the Family — Reform and Status Quo" (1980) 96 *L.Q.R.* 248.

[3] E.g. *Richards* v. *Dove* [1974] 1 All E.R. 888; *Eves* v. *Eves* [1975] 3 All E.R. 768; *Cooke* v. *Head* [1972] 1 W.L.R. 518; *Tanner* v. *Tanner* [1975] 1 W.L.R. 230; *McRae* v. *Wholley,* S.C. of W.A., 15th August, 1975, Jones, J.; *Fraser* v. *Gough* (1975) 1 N.Z.L.R. 138; *Valent* v. *Salamon,* No. 1 and No. 2, Supreme Court of N.S.W. 8th Dec., 1976 (No. 1), 16th March, 1977 (No. 2), (Holland, J.); *Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170, 173 (Helsham, C.J.); *Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R. 504 (Holland, J.); *Horton* v. *Public Trustee* [1977] 1 N.S.W.L.R. 182; *Olsen* v. *Olsen* [1977] 1 N.S.W.L.R. 189; *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685; *Pascoe* v. *Turner* [1979] 2 All E.R. 945; *Dyson Holdings Ltd.* v. *Fox* [1976] Q.B. 503; *Davis* v. *Johnson* [1978] 2 W.L.R. 553; *Helby* v. *Rafferty* [1979] 1 W.L.R. 13; *Spindlow* v. *Spindlow* [1979] 1 All E.R. 169; *Hohol* v. *Hohol* (1980) F.L.C. 90-824; *Kardynal* v. *Dodek* (1980) F.L.C. 90-823; (1980) 5 Fam.L.R. 706.

[4] N.S.W. Anti-Discrimination Board, *Report* (August, 1977); Royal Commission on Human Relations, *Final Report* (A.G.P.S. 1977) Vol. 4, at 72-73; Tasmanian L.R.C., *Report on Obligations Arising from De Facto Relationships* (1977); N.S.W. L.R.C., *Working Paper on Testator's Family Maintenance and Guardianship of Infants' Act, 1916* (1974) at 50-53, 63-69; *Report* No. 28 (1977) at 22-3.

media.[5] The number of *de facto* marriages is often alleged to be increasing in western societies.[6] Of course, statistics to verify this alleged trend are almost impossible to collect as firstly, there are no statistics from former times (say the early 1950s) with which to compare the present rate and secondly, today by definition, no formal records are kept of informal marriages. Some helpful statistics may emerge where *de facto* couples acknowledge their relationship in order to claim financial benefits such as tax deductions, social security payments or student grants.[7] In the unlikely event that such statistics could be assembled, the alleged increase (presumably per head of population) in the number of *de facto* relationships could then be plotted on an historical graph. This would probably indicate that the modern rate of *de facto* marriage is far below that in other stages of western history.[8] For example, in the colony of New South Wales in 1809 a letter from T. W. Plummer to Colonel Lachlan Macquarie stated,

> It will perhaps scarcely be believed that, on the arrival of a female convict ship, the custom has been to suffer the inhabitants of the colony each to select one as his pleasure, not only as servants but as avowed objects of intercourse, which is without even the plea of the slightest previous attachment as an excuse for rendering the whole colony little better than an extensive brothel and exposing the offspring to these disgraceful connexions to the risk of an example at once infamous and contageous. So prevalent has this practice been that it is estimated there are actually at this time about one thousand illegitimate children in the colony of this description.[9]

It seems to be reasonably clear that *de facto* marriage and divorce have always been very common, and often the norm, amongst poor people.[10] Perhaps the alleged increase in the number of *de facto* marriages may

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[5] Especially the "palimony" claims of certain North American entertainers, e.g. Britt Ekland-Rod Stewart; Michelle Triola-Lee Marvin; *Marvin* v. *Marvin* Sup. 134 Cal. Rept. 815; 18 Cal. 3d 660; 557 P.2d 106 (1976); 5 Fam.L.Rep. (BNA) 24 (1979).

[6] E.g. Poulter, *supra* n. 2; Bruch, *supra* n. 2 at 101, fn. 1; Royal Commission, *Final Report supra* n. 4 at 72-73, para 122; Tasmanian L.R.C., *op. cit. supra* n. 4 at 3; *Campbell* v. *Campbell* [1976] 3 W.L.R. 572 at 577: "There is an increasing tendency, I have found in cases in chambers, to regard and indeed, to speak of the celebration of marriage as 'the paper work'. The phrase is: 'We were living together but we never got around the paper work.' "

[7] In U.S.A., census statistics allegedly suggest that between 1960 and 1970 the number of unmarried couples living together in U.S.A. increased eightfold, *per* C. M. Fernandez, "Beyond Marvin: A Proposal for Quasi-Spousal Support" (1978) 30 *Stan.L.R.* 359, fn.1; *quaere* reliability of statistics, e.g. Glendon, *op. cit. supra* n. 1 at 91-2.

[8] E.g. G. O. Mueller, "Inquiry into the State of a Divorceless Society: Domestic Relations Law and Morals in England from 1660-1857" (1957) 18 *Uni. of Pittsburg L.R.* 545; H. Foster, "Common Law Divorce" (1961) 46 *Minnesota L.R.* 43; M. Rheinstein, *Marriage, Stability, Divorce and the Law* (1972) esp. at 158-193; C. H. Currey, "The Law of Marriage and Divorce in New South Wales (1788-1858)" (1955) 41 *Royal Aust. Hist. Journ.* 97.

[9] Quoted in J. D. Shearer, *Bound for Botany Bay* (1976) at 32.

[10] *Supra* n. 8.

have occurred within the propertied middle and upper classes which themselves have increased notably in size in affluent western countries. It has been suggested that prevalent reasons for entering an informal union may include "social security and inheritance advantages in the case of the elderly; inability to enter a [full-status formal] marriage; a desire to avoid the legal effects of marriage; a wish to 'try' marriage before undertaking a legal commitment; or a simple lack of concern with the legalization of a marriage relationship for cultural, social or personal reasons".[11]

All this debate presumes of course that a common historical meaning can be given to the concept of *"de facto* marriage", which however is a very doubtful presumption. The phrase *"de facto"* is often used to describe an informal marriage on the assumption that it is the legal opposite to a *"de jure"* marriage. That is, if a marriage is only one in fact,[12] it would supposedly thereby attract only a minimum of legal rights and duties. Although this analysis may have been helpful at various times, such an antithesis is rather misleading today. For it is clear that an increasing number of legal rights and duties are being attached to various *de facto* marriages. That is, *de facto* marriages are becoming increasingly *de jure*. Accordingly, perhaps a more helpful description than that of *"de facto"* would be "informal", or "non-ceremonial" marriage.[13] Nevertheless despite these comments, the descriptive phrase *"de facto"* will be used in this article if only because it seems to be both popular and accurate (until used as an antithesis to *"de jure"*). What then is meant by the concept of a *"de facto* marriage"? A *de facto* marriage has a great variety of popular and legal terms of description such as an informal, illicit, reputed, putative, purported, free, meretricious, non-ceremonial, cohabitation, shadow or a no-paper work marriage or quasi-marital relationship. Keeping a mistress, living in sin, concubinage, handfasting,[14] marriage without benefit of clergy and shacking-up can be added to the list. Now it may be that each of these phrases can be used to describe different kinds of relationships.[15] However for the purposes of this discussion, a single description will initially be adopted.

A *de facto* marriage can be described as generally an unsecretive relationship between a man and a woman which actually lasts for more

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[11] Fernandez, *supra* n. 7 at 370, fn. 52.

[12] That is, in fact fulfilling most of the traditional functions of marriage.

[13] Even the description "informal" suffers further upon analysis, as many factual marriages have form, though fewer have ceremony. For comments on the use of the word "informal", see J. H. Wade, "The Family Court of Australia and Informality in Procedure" (1978) 27 *I.C.L.Q.* 820.

[14] See *Oxford English Dictionary*: "an uncanonical, private or even probationary form of marriage".

[15] See *infra* text at nn. 129-213 for an attempt to distinguish between some of the varieties of *de facto* marriages. Previously in English Law some distinction was attempted in the variety of terminology, e.g. R. Burn, *Ecclesiastical Law* Vol. II (1842 ed.) "Marriage".

than a short time and within which *most* of the traditional functions of marriage, namely mutual help, companionship, genital sexual expression and the procreation of children, are performed. As most *de jure* marriages fit this description, what special characteristic attracts the label "*de facto*"? It is the absence of some formality or ceremony prescribed by the dominant legal system,[16] which absence or prescribed formalities has legal consequences. Sometimes a *de facto* relationship is described by its consequences. That is, a *de facto* relationship often has a limited legal status in that it does not have the same rights and duties attached to it as are attached to a formalized marriage. For example, in a monogamous society a *de facto* marriage often has limited status at least to the extent that both parties are free to enter a formalized full status marriage without firstly obaining a divorce. Usually, the legal consequences are even more drastic and *de facto* spouses are not given rights such as those rights to spousal maintenance or income tax deduction. Of course, if and when a *de facto* marriage is given all of the same rights and obligations as a formalized marriage,[17] it no longer deserves the distinctive label *de facto* for it has become a full status, formal (albeit by different form) marriage.

During most of English history A.D., *de facto* relationships in the above described sense received both legal recognition and frequently moral approval[18], but only if certain further requirements were fulfilled. For example the parties must both have had capacity[19] and both must have expressly or impliedly consented to marry. There was a strong presumption of the existence of such consent from the fact of public cohabitation.[20] This widely recognized type of *de facto* marriage has sometimes been called a "canon law marriage", or, a "common law marriage". In England, a prescribed public ceremony did not become necessary for full legal recognition of a *de facto* relationship until

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[16] Here the question is quickly raised, whether the legal system of the dominant group will recognize the marriage norms of deviant and minority groups, e.g. R. M. Berndt, "Tribal Marriage in a Changing Social Order" (1960-62) 5 *U.W. Aust. L.R.* 326; P. E. Nygh, "Malaysia, Singapore, Australia and Papua New Guinea; The Common Law Approach to Interpersonal Law on Marriage Relations" (1972) 3 *Lawasia* 137; M. D. Kirby, "T. G. H. Strehlow and Aboriginal Customary Laws" (1980) 7 *Adelaide L.R.* 172; see *infra* text at nn. 180-188.

[17] It may be difficult to effectively prescribe that *de facto* spouses go through a form of divorce in a court before remarrying; though some prescribed divorce procedure by recitation ("I divorce thee") and/or registration may be desirable. Unilateral divorce without formality seems to have functioned in Rome after second century B.C.: see J. Bryce, "Marriage and Divorce under Roman and English Law" in *Select Essays in Anglo-American Legal History* (1907) Vol. 3, 782. *Cf.* Russian experience especially 1918-1944; E. L. Johnson, *An Introduction to the Soviet Legal System* (1969) at 171-173; J. N. Hazard, W. E. Butler, P. B. Maggs, *The Soviet Legal System* (3rd ed. 1977) at 480-491.

[18] See Foster, Mueller, Rheinstein, *supra* n. 8; D. E. Engdahl, "Medieval Metaphysics and English Marriage Law" (1968) 8 *Journ. of Fam. Law* 381; Bryce, *supra* n. 17.

[19] E.g. must be of age, single, widowed or divorced, not within prohibited degrees of consanguinity or affinity and of marriageable age.

[20] See also discussion *infra* text at nn. 117-128.

1753.[21] Of course, this requirement of ceremony did not suddenly occur due to new revelation concerning "moral" behaviour. Courts dealing with property disputes had for centuries before 1753 suggested that a ceremonial marriage was far easier to prove in court than merely a *de facto* one.[22] Thus then, as today, formalized marriages were especially desirable for evidentiary reasons. But ethics certainly played at least a subsidiary role in the emergence of the legal requirement of ceremony. For public ceremony hopefully gave time for reflection about the serious nature of marriage, perhaps delayed impulsive passion, scared off fortune hunters in search of heiresses, and allowed time for social approval and advice.[23] Thus for approximately two centuries after 1753 most *de facto* marriages had virtually no special legal rights and duties attached to them — that is, were not usually legally recognized to any extent in England, Canada, New Zealand and Australia. During that time a small number of *de facto* or informal relationships were fully or partly recognized under such legal principles as common law marriage,[24] customary marriage,[25] presumption of marriage arising from cohabitation,[26] and some legislation.[27] In other western jurisdictions, such as the United States of America[28] and Scotland[29] at least the canon law variety of *de facto* marriage continued to be legally recognized for most purposes during those two centuries.

Today it seems that the historical pendulum has again swung. A substantial number of people are again willing to acknowledge openly that *ethically* at least, certain moral obligations ought to arise out of certain *de facto* marriages.[30] For whatever reason, fewer people seem to say, "It's her own fault for not getting a wedding ring first" or, "she got herself into this mess by not getting married, so why should the courts help her out?" Thus there is a slowly awakening ethic, though

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[21] Lord Hardwick's Act, 26 Geo II c. 33. It is sometimes argued that pre-1200, marriage at the church door was necessary for validity in both secular and ecclesiatical courts; see *infra* text at nn. 123-126.

[22] E.g. Engdahl, *supra* n. 18.

[23] For a short summary of the alleged benefits of formality and the detriments of informality, see S. M. Cretney, *Principles of Family Law* (1976) at 5-9.

[24] E.g. S. J. Stein, "Common-law Marriage: Its History and Certain Contemporary Problems" (1969) 9 *Journ. of Fam. Law* 271; see *infra* text nn. 162-177 for discussion of common law marriage. Note esp. the difference between a *Millis* and a traditional common law marriage.

[25] See *infra* text nn. 117-128, esp. Nygh, *supra* n. 16 at 148 (New Zealand Maoris).

[26] See *infra* text at fns. 135-204 for the variety of *de facto* marriages.

[27] D. Tolstoy, "The Validation of Void Marriages" (1968) 31 *Mod. L.R.* 656; Marriage Act 1961 (Cth.) ss. 48(3), 89, 91. See *infra* text nn. 129-213 *re* variety of *de facto* marriages. For legislation partially recognizing *de facto* relationships see *infra* text at nn. 150-162.

[28] Stein, *supra* n. 24; W. O. Weyrauch, "Informal and Formal Marriage — An Appraisal of Trends in Family Organization" (1960-61) 28 *Uni. of Chicago L.R.* 88; H. H. Clark, *Law of Domestic Relations* (1968) at 45-57.

[29] E. M. Clive and J. A. Wilson, *Husband and Wife* (1974) at 33-41; 107-122.

[30] Where this reawakened ethic comes from is unclear — revelation, nature, intuition, reason, public opinion?

scarcely a strong majority conviction, that it is wrong for a man to live with a woman for several years and then leave her (by death, injury or marriage breakdown) in financial straits especially if he has some capital and/or earning capacity and/or if she has been a good wife.[31]

The question then arises concerning whether this ethical view should go further and receive some legal embodiment and sanction, either judicially or legislatively. Thus there has been a flurry of activity in law reform bodies, learned journals and the popular press debating the issue and generally leaning towards the view that *some* legal rights and obligations should arise out of *some de facto* relationships.[32]

However in Australia, any proposed legislative reform must overcome at least three major hurdles of a constitutional, political and substantive nature. The constitutional problem involves the question of who has legislative power over *de facto* marriages in a federation like Australia? This is discussed later.[33] The pragmatic or political problem is common to all jurisdictions and involves the question of what political advantage does a government receive if and when it effects reform concerning the rights and obligations arising out of *de facto* marriages? Legislation "recognizing" *de facto* marriages seems to be within the same category as legislation on abortion or homosexuality. Strong voter feelings are aroused, the media revels amidst the raised temperatures, and the risk looms of losing the next election over a merely "moral" issue when only a vocal minority are clearly supporting the reform. Thus there is a clear temptation for legislatures to sidestep the whole ethical debate by ignoring it or by referring it to a law reform commission or other learned body while more pressing political issues are attended to. If and when the learned body reports and thereby rekindles the *de facto* rights issue in the media, it may then be politically expedient to denounce or "temporarily postpone" implementation of the report.[34]

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[31] E.g. in Canada there was a prolonged public outcry after the cases of *Rooney* v. *Rooney* (1969) 36 W.W.R. 641; *Murdoch* v. *Murdoch* (1974) 41 D.L.R. (3d) 367; *Rathwell* v. *Rathwell* (1974) 14 R.F.L. 297 which cases all involved refusal to award a property interest at equity to long term hard working "ranch wives". Judicial interpretation of the same equitable principles has since changed markedly in favour of the deserving wife. E.g. *Rathwell* v. *Rathwell* (1977) 71 D.L.R. (3d) 509; *Fiedler* v. *Fiedler* (1975) 48 D.L.R. (3d) 714; (1975) 55 D.L.R. (3d) 397; *Becker* v. *Pettkus* (1978) 87 D.L.R. (3d) 101; *supra* n. 2.

[32] *Supra* nn. 1, 2, 4; A. Samuels, "The Mistress and the Law" (1976) 6 *Family Law* 152; I. Brewer, "A Mistress' Rights: an Appraisal" (1976) 120 *Sol. Jo.* 19; Wevrauch, *supra* n. 28; D. Lasok, "The Concubine's Licence" (1976) 73 *Law Soc. Gaz.* 112; J. Dwyer, "Immoral Contracts" (1977) 93 *L.Q.R.* 386; J. D. Davies, "Informal Arrangments Affecting Land" (1979) 8 *Syd. L.R.* 578; J. Wade, "Trusts, The Matrimonial Home and De Facto Spouses" (1979) 6 *Uni. of Tas. L.R.* 97; M. A. Neave, "The Constructive Trust as a Remedial Device" (1978) 11 *Melb. U.L.R.* 343.

[33] *Infra* text at nn. 117-128.

[34] E.g. The Australian Prime Minister's denunciations of the Royal Commission on Human Relationships, *Final Report* upon its release late in 1977; the announced postponement by the Premier of N.S.W. of the recommendations of the Anti-Discrimination Board, *Sydney Morning Herald*, 3rd October, 1978; Joint

While legislatures have been inactive or active in only certain limited areas, a small minority of judges have been willing to find some degree of flexibility in the established common law principles relating to property, to thereby give some effect to the perceived changes in public opinion.[35] Of course this practice, even by a minority, raises the ever present questions concerning the role of the judiciary in a democracy. When is it appropriate for the pendulum present in the common law to move away from predictability towards change and perceived justice? For the willing court, *personal* remedies which provide money or property against a deceased or absent *de facto* spouse are potentially available in quasi-contract,[36] tort,[37] contract,[38] proprietary estoppel,[39] perhaps implied partnership,[40] ancillary maintenance and property relief under the Family Law Act 1975 (Cth.) effected by a broad definition of a marriage void for lack of formalities,[41] or in very limited circumstances, agency.[42] These potential personal property rights are sometimes judicially pushed towards being more like "proprietary" rights.[43] A variety of past and present concepts have been devised to sometimes protect deserving *de facto* spouses against third parties, even though this has created some uncertainty for conveyancers.[44]

Thus there are numerous *existing* principles of law which have within their terminology and tradition a sufficient degree of flexibility

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Footnote 34 (Continued).

Select Committee on the Family Law Act, *Family Law in Australia* (1980) at 22.

[35] E.g. *Eves, Cooke, Tanner, Valent, Pearce, Ogilvie, Horton, supra* n. 3; comments Davies, Wade, *supra* n. 32; *infra* text at nn. 189-213.

[36] *Shaw* v. *Shaw* [1954] 2 Q.B. 429 (C.A.) (damages against estate of a male for breach of implied warranty that male was free to marry); *Stinchcombe* v. *Thomas* [1957] V.R. 509 (*quantum meruit*); *Deglman* v. *Guaranty Trust Co. of Canada and Constantineau* [1954] 3 D.L.R. 785.

[37] Perhaps the tort of deceit where owner intentionally misled claimant concerning who had title, e.g. facts of *Pearce, Eves, supra* n. 3.

[38] E.g. *Tanner, Pearce, supra* n. 3; *cf. Horrocks* v. *Forray* [1976] 1 W.L.R. 230.

[39] E.g. *Dillwyn* v. *Llewellyn* (1862) 4 De G.F. & J. 517; *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129; *Raffaele* v. *Raffaele* [1962] W.A.R. 29; comment (1963) 79 *L.Q.R.* 238; *Inwards* v. *Baker* [1965] 1 Q.B. 29; Davies, *supra* n. 32; *Pascoe* v. *Turner, supra* n. 3; B. Surfin, (1979) 42 *Mod. L.R.* 574; *Jackson* v. *Crosby (No. 2)* (1979) 21 S.A.S.R. 280.

[40] E.g. *Chaachou* v. *Chaachou* 135 S. 2nd 206 (1961); G. Steinem, "The Implied Partnership" 26 *Uni. of Florida L.R.* 221; Bruch, *supra* n. 2 at 118-121.

[41] The main point of discussion of this article; ss. 5(4), 60, 71 of the Family Law Act 1975-79 (Cth.); s. 23(1)(c) of the Marriage Act 1961-76 (Cth.); *Corbett* v. *Corbett (No. 2)* [1970] 3 W.L.R. 195 at 197.

[42] The presumption of agency arising from keeping house, *Phillipson* v. *Hayter* (1870) L.R. 6 C.P. 38; *Gage* v. *King* [1961] 1 Q.B. 188, and therefore applicable to a *de facto* couple, as compared to the "agency of necessity" arising from maintenance obligations. See *Finer Report of the Committee on One Parent Families* (Cmnd 5629, London: H.M.S.O. 1974) Vol. 2 at 98-99.

[43] Thus the constant difficulty in distinguishing "personal" and "proprietary" rights, e.g. J. Wallace and Y. Grbich, "A Judge's Guide to Legal Change in Property: Mere Equities Critically Examined" (1979) 3 *U.N.S.W.L.J.* 175.

[44] E.g. tort, contempt of court, fraud at common law, fraud under the Torrens system, convevances with intent to defraud creditors; see generally Wade, *supra* n. 32 at 110-114.

to enable some *limited* remedies of a personal or proprietary kind to be given to *de facto* spouses. Most of these have not yet been explored and exploited in any depth, with the notable exception of the doctrine of constructive and resulting trusts. Nevertheless, a legal realist would argue that a willing judge could be given "many pegs on which to hang his hat". As always however, even willing judicial creativity is limited by the boundaries of the existing doctrines, by the reminders of division of powers in a democracy and by the realization that wholesale legislative reform is far more efficient even if not politically expedient.[45]

Back in the legislatures, it has already been noted that reform faces the difficulties of constitutional division of powers and political expediency. There is also the third conceptual and practical hurdle of where to draw the line in the recognition of *de facto* marriages? And what side effects follow from giving full status recognition to certain *de facto* relationships? There are some definite advantages to having a system of public registration of marriage, even if this means some attempt to compulsorily register *de facto* marriages.[46] The aims of a system of registration of marriage are to ensure that:

> there is a public record of an event which has important legal consequences both for the parties themselves and for third parties and for the State. The parties need such a record as evidence of their marriage and so that they can present proof of it to others. Third parties need it so that they can determine the status of the parties and the status (e.g. legitimacy) of themselves and others in so far as that is dependent on the marriage of the parties. The State needs it because upon it may depend rights and obligations owed by or to the State in relation, for example, to tax, social security, and allegiance. An effective system of registration affords means of proof or disproof and avoids uncertainty where certainty is essential. In addition registration provides statistics regarding marriage which are vital for any serious research into legal, social or demographical problems.[47]

How then to legally recognize some *de facto* relationships without causing more ethical and administrative problems, than are thereby solved? Reform, either piecemeal judicial or wholesale legislative, must deal with the following three difficult and interrelated questions. Firstly, which *de facto* marriages ought to have legal consequences attached to them? Secondly, and closely associated with the first question, what

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[45] See *supra* text at nn. 33-34.

[46] Cretney, *op. cit. supra* n. 23 at 5-6, shortly discusses the list of alleged benefits — certainty, proof, public records, avoidance of deception, a check against young marriage, solemnity. In Scotland, marriage by cohabitation with habit and repute itself constitutes a legally full-status marriage, and marriage *per verba de praesenti* and *per verba de futuro subsequente copula* were full status marriages until 1940. This caused some degree of both conceptual and evidentiary difficulty especially in relation to the time of commencement of the marriage. See Clive and Wilson, *op. cit. supra* n. 29 at 107-122.

[47] U.K. Law Commission Report, No. 53, Annex, para. 4, (1973).

different legal consequences ought to be attached to the variety of *de facto* marriages? Thirdly, how should the legal rights attached to *de facto* marriages fare when they come into competition with other legal rights?[48]

In the absence of a wholesale legislative response to these three questions, this article will look at only *one* of the avenues potentially open under the existing law, whereby judges may be asked to respond to these questions. To restate the aim again — this article raises the questions of to what extent does the Federal Parliament have constitutional power[49] over *de facto* marriages, and to what extent has the Federal Parliament already exercised power over *de facto* marriages in the Family Law Act and the Marriage Act?

First, it is generally presumed that Federal Parliament does not have constitutional power over *de facto* marriages *per se*. However it is submitted that it is quite likely that Federal Parliament does have constitutional power over *certain kinds* of *de facto* marriages though this issue has never been raised in this manner before the High Court.[50] The Royal Commission on Human Relationships reported in 1977:

> We consider that there is scope for some limited recognition of the mutual obligations assumed by parties to a stable relationship. We note in this regard that Federal legislative power extends to marriage, but have not considered whether this would include such a concept as the Scottish marriage by repute, under which, in certain circumstances, a man and woman who have lived together openly as man and wife are considered as married.[51]

Assuming for the moment that it is correct to say that Federal Parliament has constitutional power over certain *de facto* marriages,[52] it is generally presumed that the Family Law Act does not actually purport to exercise jurisdiction over any, let alone all, *de facto* marriages. However a literal interpretation of the legislation leads to the opposite conclusion. That is, a *de facto* marriage is a marriage void for lack of

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[48] E.g. where both a *de jure* and *de facto* spouse make maintenance claims on the same male or his estate. Should the breadwinner support his first family? *Richards* v. *Richards* [1942] N.Z.L.R. 313; *Nelson* v. *Nelson* [1965] N.S.W.L.R. 793; *Brown* v. *Brown* (1961) 2 F.L.R. 118; *Moss* v. *Moss* (1962) 4 F.L.R. 252; *McOmish* v. *McOmish* (1968) 12 F.L.R. 370; *In the marriage of Ostrofski* (1979) F.L.C. 90-730; *In the marriage of Lutzke* (1979) F.L.C. 90-714; or his latest family? *Roberts* v. *Roberts* [1970] P.1; [1968] 3 All E.R. 479; *Re E., E.* v. *E.* [1966] 2 All E.R. 44 (deceased made testimentary provision for mistress); *Re Joslin* [1914] Ch. 200; or will the court just weigh up the facts? *In the marriage of Soblusky* (1976) F.L.C. 90-124; 2 Fam. L.R. 11,553; *In re Fagan deceased* (1980) F.L.C. 90-821.

[49] Under the "marriage" power — s. 51(xxi) of the Constitution.

[50] Constitution, s. 51(xxi); *A-G for Victoria* v. *The Commonwealth* (1962) 107 C.L.R. 529 (the *Marriage Act Case*) esp. Windeyer, J. at 576-7; Finlay, *op. cit. supra* n. 1 at 285-6.

[51] Royal Commission, *Final Report supra* n. 4 Vol. 4, para. 129.

[52] See *infra* text at nn. 117-128 for more detailed discussion of constitutional considerations.

formalities[53] and therefore either or both of the *de facto* couple can approach courts with jurisdiction under the Family Law Act for property,[54] maintenance[55] and custody orders.[56] Before this rather unexpected proposition is dismissed, it is worthwhile to consider in detail its basis and possible qualifications.

**Definitions**

The reader is asked to initially bear with some lengthy definitions. For the purposes of this discussion, four categories need to be described and distinguished from the outset — namely *de facto* marriage, full status legal marriage, non-marriage and invalid marriage.

A *de facto marriage* has already been described as basically a relationship between a man and a woman which actually lasts for more than a short time and within which most of the traditional functions of marriage are performed.[57]

A *full status legal marriage* is a legal status, with consequential legal rights and duties, imposed upon persons, usually a male-female couple, by a legal system.[58] It is a "full" status legal marriage when traditional rights and duties of western marriage, such as the duty to maintain wife and children, socialize children, cohabit and especially not to marry a second time without first obtaining a divorce, are recognized and perhaps enforced to *some* extent by the legal system. There are many legally recognized or status marriages which are not "full" status because they lack the essential element of a marriage bond. That is, the parties are legally free to enter another marriage of the full status kind without first obtaining a divorce.

A *non-marriage* is a category to describe the total absence of a hint of marriage status under any connected legal system and the total absence of the performance of any traditional marriage functions. Such a category describes the relationship and legal status between the vast majority of men and women in the world. It is as though to describe all the rocks in the world as non-trees. Rocks do not have the slightest possibility on virtually any test as being classified as trees. Thus I have a non-marriage in status and function with the vast majority of women in the world.

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[53] Family Law Act 1975-78 (Cth.), s. 51; Marriage Act 1961-76 (Cth.), s. 23(1)(c). Note also the *functional* description of "marriage" in Family Law Act, s. 43.

[54] Family Law Act, ss. 71, 79; s. 4(1) definition of "matrimonial cause", para. (ca).

[55] *Id.* ss. 71, 72, 73; s. 4 definition of "matrimonial cause", para. (c).

[56] *Id.* ss. 5(4), 60, 4(1) definition of "matrimonial cause", para. (c). Property, maintenance and custody orders will hereafter be referred to as "ancillary" orders. They are "ancillary" in the sense that the constitutional and legislative jurisdiction to make such orders for *de facto* couples, only arises by connecting such ancillary orders to a finding of a void marriage. See constitutional discussion *infra* text at nn. 117-128.

[57] See *supra* n. 16 for a more detailed description.

[58] Some difficulty arises here with regard to the meaning of "legal", especially in smaller communities and cultures. When should social and customary status and obligations be called "legal" status and obligations?

An *invalid marriage* is a situation where the tradtional legal status of "marriage" is denied to a male-female couple[59] *at least* to the extent in a monogamous society that both are free to enter a subsequent full-status legal marriage without first obtaining a court decree in the nature of a divorce. It is important again to remember that many invalid marriages are valid for purposes other than marriage bonding. That is, invalid marriages may be limited legal status marriages. For example, a couple who marry in Germany without a civil ceremony will normally have an invalid marriage in Australia[60] in that they are free to enter a full-status legal remarriage but will still have a limited status of marriage, with consequential rights and obligations in the areas of maintenance, property division and custody.[61] An invalid marriage differs from both a non-marriage and a *de facto* marriage. It differs from a non-marriage in that to be an invalid marriage there must be a reasonable possibility that someone would describe it as a "marriage". That is, an invalid marriage is a much narrower category than a non-marriage in that to be an invalid marriage *either* the parties must have some connection with a legal system which arguably, either objectively or subjectively, may give them some degree of marriage status *or* the parties must have fulfilled some of the traditional functions of marriage, such as companionship, for a time.

An invalid and *de facto* marriage can be distinguished in that an invalid marriage does not necessarily need to have experienced traditional marriage functions such as companionship. Thus a proxy marriage between parties both present in Australia could be called invalid before cohabitation ever occurs. After a period of cohabitation it could be called a *de facto* marriage. Thus, on these concepts, a *de facto* marriage is an invalid marriage which has functioned to some extent for a time.

A *"void marriage"* is a phrase used traditionally to describe the non-existence of any special legal status between a specified male and female. That is, no special legal rights or duties arise between the parties to the void marriage. By legislation this is no longer the case and thereby void marriages now do have a limited legal status.[62] This is of course to define the phrase "void marriage" by its consequences, thereby begging the question of which fact situations will lead to the label "void marriage" and especially a marriage void for lack of formalities?[63] To say that a marriage is void for lack of formalities is to say that between a man and woman only a limited legal marriage status exists because the parties failed to go through the prescribed

[59] The term could be used to describe a larger group or single-sex couple.

[60] E.g. *Dukov* v. *Dukov* [1969] Q.W.N. 9; *Milder* v. *Milder* [1959] V.R. 95.

[61] E.g. *Vidovic* v. *Vidovic* (1967) 10 F.L.R. 189; *Ungar* v. *Ungar* (No. 2) (1968) 11 F.L.R. 301; *Willmore* v. *Willmore* (1968) 11 F.L.R. 204; *In the marriage of Lynch and Slater* (1977) F.L.C. 90-309; *Corbett, supra* n. 41 (all cases where ancillary orders were made to benefit one of the parties to a void marriage).

[62] E.g. Family Law Act 1975 (Cth.), ss. 60, 71, 5(4).

[63] Marriage Act 1961 (Cth.), ss. 23(1)(c), 48.

ceremony and formalities. A void marriage has *no* legal status at least to the extent that the parties can marry again without firstly obtaining a divorce and this remarriage will not amount to bigamy. However many "void" marriages have limited marriage status in that maintenance, property and custody rights and duties flow from the void marriage.[64]

**Argument That Some *de facto* Marriages Come Within the Present Jurisdiction of the Family Law Act**

Using these definitions, which non-marriages, *de facto* and invalid marriages should be called marriages void for lack of formalities? In order to begin to answer this question it is necessary to consider the express wording of the Australian legislation which specifies that some marriages are void for defective formalities.

The grounds upon which a marriage is void are listed in s. 23 of the Marriage Act 1961-1976 (Cth.)[65] which provides that a marriage celebrated in Australia will be void if "s. 48 of the Marriage Act provides it is not a valid marriage".[66] However, the cumulative effect of ss. 40-48 of the Marriage Act seems to be that a marriage celebrated in Australia will only be void for lack of formalities in two or perhaps three situations. That is, where either (i) no person purporting to be a celebrant was present at all the ceremony or the alleged commencement of the marriage status;[67] or (ii) a person purporting to be an authorized celebrant was present at the ceremony or the alleged commencement of the marriage status, but *both* parties *actually* knew that he/she was not an authorized celebrant;[68] or (iii) perhaps,[69] if despite the presence of an adequately authorized celebrant, he/she fails to take sufficient initiative to solemnize the marriage by either making a declaration prescribed by his/her religious denomination[70] or alternatively the parties fail to publicly declare that their marriage is in existence.[71]

Thus on a literal reading of the Marriage Act, most *de facto*

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[64] E.g. Family Law Act 1975 (Cth.), ss. 60, 71.

[65] Formerly contained in Family Law Act 1975 (Cth.), s. 51, which section was repealed by Commonwealth Act No. 209 1976, s. 12.

[66] S. 23(1)(c).

[67] Marriage Act 1961 (Cth.), ss. 41, 48(1).

[68] *Id.*, ss. 48 (1), (3). It is not enough that the parties can both be imputed with knowledge as reasonable persons that the celebrant was unauthorized.

[69] The Act is far from clear on this point — see ss. 45 and 48.

[70] What is sufficient to amount to "solemnization" or "celebration?" *Quick* v. *Quick* [1953] V.L.R. 224 (Exchange of consent is the essence; further Anglican requirements of a ring and priestly declaration are non-essentials); *Beamish* v. *Beamish* (1861) 9 H.L. Cas. 274 (*Obiter* that "mere" presence of officiating clergyman is not sufficient; the necessary consents should be expressed to and received by him; or there must be sufficient "intervention" by the officiating clergyman); *R.* v. *Bham* [1966] 1 Q.B. 159 (Islamic marriage ceremony not a "solemnization" for purposes only of criminal statute).

[71] S. 45(2): ". . . it is sufficient if each of the parties says to the other, in the presence of the authorized celebrant and the witnesses, the words—

> I call upon the persons here present to witness that I A.B. (or (C.D.), take thee, C.D. (or A.B.), to be my lawfully wedded wife (or husband), or words to that effect."

marriages are marriages void for lack of formalities.[72] They lack the presence of an authorized celebrant at any stage of the relationship before whom the appropriate ceremony is performed.[73] Moreover not only are most *de facto* marriages literally marriages void for lack of formalities, but they are usually also "purported" marriages.[74] They are "purported" marriages at least in the sense that they look like and objectively function in the same manner as traditional marriages. In other senses of the phrase, they may not be "purported marriages". For example, the parties may never have held themselves out to be married, and may subjectively not wish to have the label "married" attached to them.[75]

Why is it then that many applications were not made under the repealed Matrimonial Causes Act 1959 (Cth.) or are not being made under the present Family Law Act to have *de facto* marriages declared void for lack of formalities? Where are the cases testing this possibility?[76] One hypothesis is that many of those influenced by the cultural popularity of informal cohabitation are also eager to avoid litigation almost at any cost. Nevertheless, no doubt there are some broken *de facto* relationships where the parties are wealthy and one at least (usually the female) would welcome the Federal discretionary jurisdiction over property under s. 79 of the Family Law Act; or where the

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[72] Many *de facto* marriages may also be void for one of the other reasons listed in s. 23 of the Marriage Act, e.g. s. 23(1)(a) "where either of the parties is, at the time of the marriage, lawfully married to some other person". See *infra* text at nn. 251-2 for argument that *some* ceremony is necessary to create a void marriage.

[73] A similar proposition seems to follow from the provisions of the Marriage Act, 1949 (U.K.), ss. 24, 49 which provide that a marriage shall be void if the parties "knowingly and wilfully" disregard certain requirements. However it is not clear whether it is sufficient if the parties know *in fact* that the formality has not been observed, or whether they must also know that this will *in law* invalidate the marriage. E.g. *Greaves* v. *Greaves* (1872) L.R. 2 P. & D. 423 at 424-425 *per* Lord Penzance.

[74] S. 5(4). The definition of "child of the marriage" applies "in relation to a *purported* marriage that is void as if the purported marriage were a marriage."

[75] *Cf.* Clark, *op. cit. supra* n. 28 at 133 when discussing statutes which legitimize the children of void marriages states:

> If words are given their usual meaning, a void marriage is a non-existent marriage. This being so, the literal meaning of the statutes is that all children of non-existent marriages are legitimate. Presumably no court would so construe the statutes. The most sensible construction, and the one most in accord with the statutory purpose, is that of *Santill* v. *Rossetti,* 178 N.E. 2d 633 (1961), namely, that such statutes legitimize the children of all *de facto* marriages, of all relationships which look like marriages and in which the parties behave as husband and wife.

[76] In jurisdictions where divorce is freely available, nullity decrees have become a rarity. E.g. in Australia in 1976, there were only 13 nullity decrees as compared to 63,267 divorces; in 1977, 25 nullity decrees, 41,303 divorces; in 1978, no nullity decrees recorded, 40,625 divorces; *per Third Annual Report of the Family Law Council* (1979) at 8-10. Judicial decrees for restitution of conjugal rights or jactitation of marriage are no longer available in Australia *per* s. 8 of the Family Law Act 1975 (Cth.). But once these could be used to attract ancillary jurisdiction, e.g. *McIntosh* v. *McIntosh* [1964] V.R. 738; *Shepherd* v. *Shepherd* [1968] 1 N.S.W. R. 64; *Vincent* v. *Vincent* [1969] 1 N.S.W. R. 221.

parties would welcome Federal custody jurisdiction over the children of the relationship.[77]

This possibility is analogous to the question raised for discussion in the cases of *In the marriage of Read*[78] and *In the marriage of Tansell.*[79] Those cases dealt with the problem of an application for principal relief, namely for a declaration of validity of marriage under the Family Law Act,[80] in order to attract the Act's discretionary powers of property division[81] where there was no objective or subjective doubt as to the *validity* of the marriages concerned. Here we are faced by the converse issue — an application for principal relief under the Family Law Act[82] in order to attract discretionary property jurisdiction,[83] where there is little or no objective doubt as to the *invalidity* (or less than full legal status) of the marriages concerned. Such ancillary orders have regularly been made in relation to void foreign marriages. That is, there are a substantial number of reported cases were marriages celebrated outside Australia have been declared void for total lack of, or defects in formalities as prescribed by the law of the place of celebration.[84] Furthermore, there is an abundance of clear authority that void marriages commenced outside Australia are also subject to federal jurisdiction over property, maintenance and custody.[85] Yet there seems to be virtually no reported cases of marriage relationships commenced *within* Australia which have been held to be void for lack of formalities.[86] Thus arguably, an informal marriage commenced outside Australia readily attracts the label "void marriage" and yet an informal marriage inside Australia readily avoids that label and attracts that of "*de facto* marriage". Does this occur due to initial respect for and ignorance of foreign customs, thus raising some initial possibility that the informal marriage is valid by the law of the place of celebration?[87]

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[77] Ss. 5(4), 60, of the Family Law Act 1975 (Cth.).

[78] (1977) F.L.C. 90-201.

[79] (1977) F.L.C. 90-307; comment J. H. Wade (1978) 16 *Law Soc. J. (N.S.W.)* 233.

[80] S. 4(1) definition of "matrimonial cause", para. (b).

[81] S. 79.

[82] Namely for a nullity decree or declaration of invalidity of marriage.

[83] S. 79.

[84] E.g. *Fokas* v. *Fokas* [1952] S.A.S.R. 152; *Grzybowicz* v. *Grzybowicz* (1963) 4 F.L.R. 136; *Milder, Dukov, supra* n. 60; see generally P. Nygh, *Conflicts of Law in Australia* (1976).

[85] E.g. *Ungar, Vidovic, Willmore, Lynch, supra* n. 61; *Khan* v. *Khan* (1962) 3 F.L.R. 496.

[86] One example is *Hodgson* v. *Stawell* (1854) 1 V.L.T. 51 where a marriage celebrated in Van Diemen's Land by a Presbyterian Minister was not recognized in Victoria for the purposes of succession to reality, due to lack of an episcopally ordained priest.

[87] It is arguable that for marriages celebrated outside of Australia, the doctrine of common law marriages is at least theoretically applicable whereas such a doctrine is unlikely to be applicable to marriages celebrated within Australia; e.g. Nygh, *op. cit. supra* n. 84, at 289-300. See discussion *infra* text under "Common Law Marriage" at nn. 162-177.

**Results of the Argument that Some *de facto* Marriages are Void Marriages**

If a *de facto* marriage can also be called a "void" marriage, the consequences are of course startling. Five notable results will be mentioned.

First, any property disputes between *de facto* spouses have traditionally been adjudicated according to the law of gifts, estoppel, trusts and contract.[88] One notable factor in these four areas of law is that they usually do not allow a judge to apportion property between *de facto* spouses according to some broad notion of "fairness" or "justice".[89] However conversely, once a marriage is declared to be void, property can be apportioned between the parties upon those very concepts of justice and equity.[90]

Secondly, concerning inter spousal maintenance, there has traditionally been no legal duty for *de facto* spouses to maintain one another upon the commencement of or during the relationship. One clear exception at present is found in Tasmania where there is a maintenance duty between *de facto* spouses after a period of cohabitation.[91] However once again where a *de facto* marriage is called a "void" marriage, each party has a duty to maintain the other basically according to the criteria of need and ability to pay.[92] Clearly if the *de facto* relationship has only lasted a very short time, a court may decide that no maintenance at all is payable.[93]

Thirdly, where there is a question concerning custody of the biological children of a *de facto* relationship, the traditional position has been that such disputes normally come within the jurisdiction of the states.[94] However if the de *facto* marriage is classified as a void

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[88] *Supra* nn. 2, 3.

[89] *Ibid.*

[90] Family Law Act 1975 (Cth.), ss. 71, 79; *In the marriage of Olliver* (1978) F.L.C. 90-499 (Contributions made by a *de facto* wife during the 10 years cohabitation before formalized marriage were taken into account under s. 79). The question of when is a *de facto* marriage a void marriage is also relevant in other jurisdictions. For example under the Matrimonial Property Act 1976 (New Zealand), the definition of "marriage" includes ". . . a purported marriage that is void" (s. 2(1)). Yet the original proposal in the draft Bill to include *de facto* marriages was not enacted. Comment by R. L. Fisher, *The Matrimonial Property Act* (1976), para. 25.

[91] Maintenance Act, 1967 (Tas.), s. 16 (12 months' cohabitation); W. H. Caig and M. F. Scott, "The Maintenance of Concubines" (1962) 1 *U. Tas. L. Rev.* 685. In South Australia no maintenance duty has yet been effected under the Family Relationships Act, 1975 (S.A.); Bailey, *supra* n. 2.

[92] Family Law Act 1975 (Cth.), ss. 71, 72, 75. It is anomalous that a party to a void marriage *per se* has no equivalent maintenance rights under T.F.M. or intestacy legislation in Australia, when such a person is entitled to *inter vivos* maintenance. Comment by E. J. Cohn (1948) 64 *L.Q.R.* 533 at 538-539. Today in England, the surviving party to a void marriage can claim provision: Inheritance (Provision for Family and Dependants) Act 1975 (U.K.).

[93] S. 75(2)(j),(k),(o) of the Family Law Act 1975 (Cth.)

[94] For example under the Maintenance Act, 1964 (N.S.W.); 1965 (Qld); 1964 (Vic.); 1967 (Tas.); Community Welfare Act, 1972-1975 (S.A.); Family Court Act, 1975-1979 (W.A.); the Infants Custody and Settlements Act, 1899

marriage, the biological and adopted children of that relationship will be "children of the marriage" under the Family Law Act.[95] Thereby custody disputes will be adjudicated in courts with jurisdiction under the Family Law Act[96] but basically according to the same broad legal principle as exists in state legislation, namely the best interests of the child.[97]

Fourthly, a further result to note is that due to court delays, a judge at first instance will be in some difficulties when these issues are argued before him. For example, an applicant who is seeking property orders and who alleges that he/she is a party to a void *de facto* marriage will not be able to have the nullity issue decided immediately unless the "facts" are dressed up somewhat without a respondent present to refute them. That is, the applicant may falsely allege an attempted ceremony before an unauthorized celebrant in order to obtain a quick declaration of nullity.[98] However it would be far more normal for the allegation of "voidness" to be disputed by the respondent and the case would wait in the defended list for many months. Meanwhile no doubt the applicant would request interim property orders under s. 114(1)[99] and perhaps interim custody and maintenance orders. Thus the judge would be forced to make some interim decision on jurisdiction over ancillary matters to cover the time of adjournment until the issue of "voidness" can be fully litigated on the facts. For example, in *Corbett* v. *Corbett (No. 2)*[100] Ormrod, J. decided that the court had jurisdiction to make interlocutory financial orders pending a nullity hearing which eventually decided that a marriage was void due to both parties being of the same sex. He concluded that this was a convenient result and noted the considerable difficulties of trying to distinguish between an "ineffective" and void marriage at the preliminary hearing before the case was

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Footnote 94 (Continued).

(N.S.W.); Maintenance Ordinance, 1968 (A.C.T.); 1971 (N.T.); and the *parens patriae* jurisdiction of the Supreme Court, e.g. *Selke* v. *Ray* [1973] 2 N.S.W.L.R. 282. See generally Finlay, *op. cit. supra* n. 1 at 168-181.

[95] Ss. 60, 5(4); s. 4 definition of "matrimonial cause" para. (c).

[96] If the custody application is defended, courts other than magistrates' courts will have jurisdiction — s. 46(1), (2), (5) of the Family Law Act 1975 (Cth.).

[97] E.g. s. 64 of the Family Law Act 1975 (Cth.). H. Finlay, "First or 'Paramount'? — the Interests of the Child in Matrimonial Proceedings" (1968) 42 *A.L.J.* 96.

[98] Such a property order would probably be later set aside under s. 79A of the Family Law Act due to "giving of false evidence" or "the suppression of evidence"; *In the Marriage of Taylor* (1979) F.L.C. 90-674.

[99] E.g. *In the marriage of Tansell* (1977) F.L.C. 90-307 ("temporary" and "personal" orders affecting the home are possible); *In the marriage of Sieling* (1979) F.L.C. 90-627; or s. 114(3); *In the marriage of Mazein* (1976) 10 A.L.R. 540; F.L.C. 90-053 (an order relating to occupation of property can be granted where it is primarily a matter involving maintenance); *In the marriage of D'Agostino* (1976) F.L.C. 90-130 (use and occupation order both incidental to a custody order and also related to matrimonial home); *In the marriage of McCarney* (1977) F.L.C. 90-200 (property orders are possible where they are "vital" to the welfare of children).

[100] *Supra* n. 41 at 197.

properly prepared and argued.[101] No doubt this may provide a tactical incentive to a well-advised applicant *de facto* spouse to use this procedure to prevent a house being sold and to improve his/her bargaining position.

Following from this preceding point, a fifth and final result of some *de facto* relationships coming within the ancillary jurisdiction of the Family Law Act is the likelihood of jurisdictional clash and forum shopping. That is, legal proceedings concerning the same issue may be commenced in two different court systems for either tactical reasons or because the substantive law in each jurisdiction is different. For example, in relation to property, a *de facto* husband may commence proceedings in a State Supreme Court for a declaration of ownership based on the law of gifts, estoppel, trusts and contract.[102] Meanwhile, his *de facto* partner may commence proceedings for a nullity decree[103] or proceedings for a declaration as to the validity of marriage[104] with ancillary property orders also requested.[105] If the application for the nullity decree is a "proper" or "appropriate" one (and therein lies the dilemma of when is the application "proper") then the federal jurisdiction ousts the state jurisdiction[106] at least for a period of time when arguably the state jurisdiction revives.[107] Because of the present delays in the hearing of defended cases under the Family Law Act, the pending federal nullity proceedings may hold up the state property proceedings for over a year. And of course, the State Supreme Court judge will normally be somewhat reticent to make a preliminary decision on the facts whether this is a "proper" case for the Family Court to later make a declaration of nullity and then to exercise its ancillary jurisdiction.[108]

Furthermore, the potential jurisdictional clash may also occur in the areas of maintenance of the *de facto* spouses and care of their children. However, at present, only in Tasmania is there the possibility

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101 *Ibid.*

102 E.g. *Allen* v. *Snyder; Valent* v. *Salamon, supra* n. 3.

103 S. 4(1) definition of "matrimonial cause" para. (a) (ii); Reg. 34 of Family Law Act Regulations.

104 S. 4(1) definition of "matrimonial cause" para. (b); s. 113 of Family Law Act 1975 (Cth.).

105 *Id.* para. (ca).

106 E.g. *Horne* v. *Horne* [1963] N.S.W.R. 499; (1962) 3 F.L.R. 381; *Re Gilmore and the Conveyancing Act* [1968] 1 N.S.W.R. 247; affirmed in [1968] 3 N.S.W.R. 675; *Cattarossi* v. *Cattarossi* (1976) F.L.C. 90-106; cf. Jacobs, J. in *Tansell* v. *Tansell* (1977) F.L.C. 90-280 at 76,506 where he suggests that state property jurisdiction may terminate even *before* an application for principal relief is filed.

107 E.g. s. 44(3)-(4) of the Family Law Act 1975 (Cth.); *In re Gilmore and the Conveyancing Act* [1968] 3 N.S.W.R. 675 where it was held that the state Supreme Court again had jurisdiction to appoint a trustee for sale of the jointly owned matrimonial home under state legislation only *five* years after divorce; *cf. Lansell* v. *Lansell* (1964) 110 C.L.R. 353; [1965] A.L.R. 153 where property orders were made under federal legislation *fourteen* years after divorce without comment by the High Court; A. Bissett-Johnson, "The Interaction of State and Federal Provisions in Matrimonial Property Disputes" (1970) 1 *A.C.L.R.* 143; see now *In the marriage of Grist and Ford* (1978) F.L.C. 90-515.

108 Compare the dilemma over jurisdiction for the State Supreme Court judges in *Tansell* v. *Tansell, supra* n. 106; *Grist and Ford, supra* n. 107.

of commencing interspousal maintenance actions under both state[109] and federal legislation.[110] With regard to custody and maintenance of the illegitimate biological children of a *de facto* marriage, state actions can be commenced under the various Maintenance Acts[111] or the *parens patriae* jurisdiction of the Supreme Courts[112] at the same time as applications are commenced under the Federal Family Law Act[113] for custody of the children of a void marriage.

It is submitted that the judges, especially in the Family Court, will try to limit this potential for forum shopping and jurisdictional clash. Although the original hope was to have a family court system with wide jurisdiction,[114] the High Court has not always interpreted the Australian Constitution in such a way as to advance that grand plan.[115] Probably most judges of the Family Court will rather tentatively interpret the scope of their powers in order to minimize the number of constitutional challenges to the validity of the Family Law Act.[116] Thus it is likely that they will try to narrow down the concept of a marriage void for lack of formalities to thereby exclude as many *de facto* relationships as possible. Or, alternatively, to be willing to call most *de facto* marriages "void marriages" but then to have a strict test concerning when it is appropriate or proper to exercise ancillary jurisdiction over such void *de facto* marriages.

**Constitutional Considerations**

It may be argued that one reason why some or all *de facto* marriages have not come within the terms of the federal Family Law Act is because such an interpretation would be unconstitutional.[117] However in rebuttal, such a conclusion has never been reached by the High Court and there are weighty historical arguments to the contrary.[118]

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[109] Maintenance Act, 1967 (Tas.), s. 16 (*de facto* wife has a right to apply for maintenance after 12 months of cohabitation).

[110] Family Law Act 1975 (Cth.), ss. 71, 72 (party to a void marriage has a right to apply for maintenance).

[111] *Supra* n. 94.

[112] E.g. *Selke* v. *Ray*, *supra* n. 94; *Chignola* v. *Chignola* (1974) 9 S.A.S.R. 479; Supreme Court Act, 1970 (N.S.W.), s. 33(3)(j); S. C. Rules 1970, Part 12, Rule 5.

[113] S. 4(1) definition of "matrimonial cause" para. (c)(ii); ss. 60,5(4).

[114] E.g. Wade, *supra* n. 13.

[115] E.g. *Russell* v. *Russell; Farrelly* v. *Farrelly* (1976) 50 A.L.J.R. 594; 9 A.L.R. 103; F.L.C. 90-039; for a softening of the High Court's initial reaction to centralized federal power, see *In the marriage of Dowal and Murray & Anor* (1978) F.L.C. 90-516; *Re Dovey; ex parte Ross* (1979) F.L.C. 90-616; *Sieling*, *supra* n. 99.

[116] E.g. *McCarney*, *supra* n. 99 at 76,057; *cf. In the marriage of Tansell*, *supra* n. 99 (*personal* and *temporary* orders affecting the home are possible under s. 114(1)); *Sieling*, *supra* n. 99.

[117] E.g. Note in (1978) 52 *A.L.J.* 172.

[118] E.g. *A-G for Victoria* v. *The Commonwealth*, *supra* n. 50 at 576-77; s. 6 of the Family Law Act includes polygamous marriage as a marriage for the purpose of both ancillary and principal relief — certainly this would not be within the concept of "marriage" by the weight of opinion in Christendom for nineteen centuries, e.g. *Hyde* v. *Hyde and Woodmansee* (1866) L.R. 1 P. & D. 130 (a potentially polygamous Mormon marriage is not a marriage as understood in Christendom).

Moreover, it is submitted that the argument that legislation concerning the consequences of *de facto* marriages is *ultra vires* the Federal Parliament begs the question again — when is a *de facto* marriage a void marriage? And underlying that question is the more crucial question namely, in what fact situations does a *de facto* marriage relationship have sufficient connection with the word "marriage" as contained in the Australian Constitution for the Federal Parliament to exercise ancillary jurisdiction in relation thereto? Or what are the probable and possible limits to the Federal "marriage" power?

Under the marriage power[119] the Federal Parliament clearly has power to declare marriages void and make ancillary orders in respect to the parties to the marriage.[120] Then over *which* marriages void for lack of formalities does Federal Parliament have power? Very clearly the framers of the Constitution did not intend to give Federal Parliament power over "non-marriages" in the sense that a male has non-marriage with almost every female in Australia. That the constitutional concept has limits is quite certain — but what are the limits? When interpreting a word like "marriage" as contained in the Constitution[121] the High Court has sought to discover some central type of core meaning of the word "marriage".[122] Power over marriage includes at least power over two areas. First, those circumstances in which the legal status of marriage will begin and end; secondly, the legal consequences which flow from the marriage status. Are there central or essential types of marriage ceremony, relationship and consequences? A judge, if he uses the measuring stick of tradition, presumably must receive expert historical evidence in order to decide upon the central English historical type(s) of marriage ceremony, type of "marriage" relationship and the common moral, legal and actual consequences which have flowed from the marriage status.[123] Presumably a judge could undertake the very difficult task of determining when traditionally throughout English history lack of formalities did not result in a marriage being called "void". For example, it is submitted that the legal status between a couple who had never exchanged marriage or betrothal promises and never cohabited would not historically have been described as a "void"

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119 S. 51(xxi) of the Constitution.

120 *A-G for Victoria* v. *Commonwealth*, *supra* n. 50; *Russell* v. *Russell*; *Farrelly* v. *Farrelly*, *supra* n. 115; R. Sackville & C. Howard, "The Constitutional Power of the Commonwealth to Regulate Family Relationships" (1970) 4 *F.L.R.* 30; P. Lane, "Federal Family Law Powers" (1978) 52 *A.L.J.* 121; H. Finlay, *op. cit. supra* n. 1 Ch. 2. Power to make property orders ancillary to a nullity decree existed for example in the Matrimonial Causes Act, 1859, 22 and 23 Vict. c. 61.

121 S. 51(xxi).

122 See esp. Lane, *supra* n. 120.

123 E.g. Windeyer, J. in *A-G for Victoria* v. *Commonwealth*, *supra* n. 50; *cf.* the controversial judicial analysis of marriage history in *R.* v. *Millis* (1843-4) 10 Cl. & Fin. 534 and criticism thereof in Dicey & Morris, *The Conflict of Laws* (9th ed. 1973) at 241-246; Cheshire, *Private International Law* (9th ed. 1974) at 324-335; L. Cherniack & C. Fien, "Common Law Marriages in Manitoba" (1974) 6 *Manitoba L.J.* 85; Bryce, *supra* n. 17 at 815.

marriage. Thus such non-marriages would not fall within the meaning of void marriages or have any sufficient connection with the concept of marriage.

But even after excluding "non-marriages" from the core meaning of "void marriage", the dominant historical meaning of "marriage" and "void marriage" still includes a wide range of relationships. For example in England, for at least five hundred years before 1753, a legal full status marriage could be contracted by the exchange of promises without the presence of any celebrant or witnesses.[124] Of course for the purpose of clear evidence in case of a later property dispute, and for the purpose of social approval of the union, a public ceremony before a clergyman was a desirable extra. However to repeat, a ceremony was not legally mandatory in England in order to create a full status marriage at least between 1200 and 1753, and possibly before that time also.[125] Moreover, a substantial period of cohabitation where the couple were known in the community as husband and wife, would lead to a very strong presumption that they had expressly or impliedly exchanged the necessary promises to be legally married.[126]

Thus it is submitted that the *de facto* or cohabitation marriage of today, where the cohabitation is of public repute and reasonable duration, is within the core historical meaning of marriage. Thereby it can be strongly argued that it is sufficiently associated with the concept of "marriage" in s. 51(xxi) of the Constitution to attract federal jurisdiction. Less persuasively, it can be argued that Parliament has already exercised this broad marriage jurisdiction by the indirect method of giving an unrestricted definition to marriages void for lack of formalities. Even if Parliament has not done this consciously (as is probably the case), it is difficult to argue that a broad *judicial* interpretation of a marriage void for lack of formalities[127] would be unconstitutional.

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[124] *Ibid;* J. Jackson, *The Formation and Annulment of Marriage* (2nd ed. 1969) at 1-77, esp. 14-16; Bryce, *supra* n. 17; Pollock and Maitland, *History of English Law* (1895, reissued C.U.P. 1968) Vol. II at 364-399; *Quick, supra* n. 70 at 236-7; *The Church and the Law of Marriage,* report of a Commission appointed by the Archbishops of Canterbury and York (London: S.P.C.K., 1955) at 24; *Dalrymple* v. *Dalrymple* (1811) 2 Hag. Con. 54 at 64-65, 68-69, 81. It is sometimes argued that before about 1200, English secular and ecclesiastical courts agreed that marriage at the church door was necessary to create an endowed marriage. But thereafter there was apparently a dispute between secular and ecclesiastical courts over the legal requirements for a valid marriage, with the latter not insisting upon church ceremony. E.g. D. Engdahl, "English Marriage Conflicts Law Before the Time of Bracton" (1967) 15 *Am. J. of Com. Law* 109 esp. at 125-135; R. Burn, *Ecclesiastical Law* (1809) esp. at 464-478.

[125] In 1753 Lord Hardwicke's Act for the Better Preventing of Clandestine Marriages, 26 Geo. II, c. 33 was passed. Absence of public ceremony resulted in a void marriage in Roman Catholic countries after the Council of Trent (1545-1563) (the decree "Tametsi").

[126] After 1066, the English civil courts "often evaded the question of whether there had been a canonically valid marriage by finding that, as a matter of fact, the parties had been generally taken to have been duly wedded, and by proceeding to give effect to this finding", *per* Bryce, *supra* n. 17 at 813; *Dalrymple, supra.* n. 124 at 84, 88-89.

[127] Marriage Act 1961 (Cth.), s. 23(1)

Thus the writer is arguing that the core meaning of the concept of marriage is much broader than is popularly thought of today and that the Constitution can without strain embrace such a broad meaning.[128]

Nevertheless, it is submitted that despite the preceding arguments, until Parliament directly redefines the concept of "marriage" in the Marriage Act and Family Law Act, the courts will often be reticent to indirectly redefine marriage via the phrase "void marriage" and thereby cause such radically unexpected results. Rather the courts will almost certainly only be willing to bring a limited number of *de facto* marriages within the ancillary jurisdiction of the Family Law Act via the phrase "void marriage". However in order to effect such a wish, the judges will still have to devise a workable series of tests to decide over which *de facto* marriage they will exercise jurisdiction.

**The Variety of *de facto* and Invalid Marriages**

Obviously there can be a large variety of different fact situations which fit within the concepts of *de facto* and invalid marriages.[129] However some classification of different kinds of *de facto* and invalid marriages may assist in deciding which will fit within the meaning of a void marriage under the Family Law Act.[130] Naturally such classifications can be endless as there are many "different" *de facto* and invalid marriages as there are imaginable fact situations. Thus the classification of types of *de facto* and invalid marriages to some extent will be arbitrary.

In many areas of life where tight conceptual definitions are not humanly possible and/or helpful, we hear the proposition "I may not be able to define it, but I know it when I see it". Perhaps "void marriages" have this tendency and thus a listing of examples may distil some of its meaning by inclusion or exclusion. It is important to remember that in this discussion a vast number of "non-marriages" have already been excluded from possibly being void marriages.[131] That is, where there is a total absence of even a possibility of a marriage status under any involved legal system and also a total absence of the performance of any of the traditional marriage functions, then that is not a void marriage. To repeat then, the proposition which a court will almost certainly accept is that there are *some* invalid marriages over which the Federal Parliament presently exercises no ancillary power under the Family Law Act and Marriage Act, and furthermore over which the Federal Parliament probably has no power under s. 51(xxi) and (xxii) of the Constitution.

At least seven distinctions need to be made:

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[128] See especially *A-G for Vic.* v. *Commonwealth*, *supra* n. 50 esp. Windeyer, J.

[129] See definitions of *"de facto"* and "invalid" *supra* text at nn. 16, 57, 59.

[130] Ss. 60, 71, 5(4).

[131] *Supra* text at nn. 57, 123.

(1) *Single Sex Marriages*

Certain relationships analogous to marriage which clearly have *no* special legal status, are clearly not "void" under the present meaning of that term in the Family Law Act.[132] For example, a marriage that is declared to have no legal status, that is, to be totally invalid, on the basis that both parties are found to be of the same sex is not a "void" marriage under Federal legislation.[133] This is because s. 23 of the Marriage Act provides that "[a] marriage that takes place after the commencement of this Act is void" on five specified grounds *"and not otherwise"*. This exclusive list does not include single sex marriages, whether commenced by a form of ceremony or not. Furthermore, no doubt an Australian court administering Federal legislation would be slow to give any degree of legal status to a single sex marriage due to the dual sex definition of marriage contained in s. 43(a) of the Family Law Act.[134] It is true that now under the Family Law Act, a once radical and deviant form of marriage, namely polygamy, is recognized as long as it was celebrated outside Australia and was then valid according to the law of the domicile of both parties.[135] Thus it might be argued, with some doubts of success, that a single sex marriage celebrated and recognized outside of Australia is at least within the constitutional scope of the Federal "marriage" power.[136]

Meanwhile, how can such a single sex marriage be dealt with both procedurally and substantively under the present legislative provisions? Probably a court could make a declaration under s. 113 of the Family Law Act in "proceedings" for a declaration as to the *validity* of a marriage[137] and declare the marriage to be invalid rather than void. However, if so, this would mean that ancillary maintenance, property or custody relief could not be granted under the Family Law Act to the parties to a single-sex marriage. Although some judges and legislators might want to grant ancillary relief to a *de facto* or ceremonial single-sex marriages, the present wording of the Family Law Act would make this very difficult to do. Moreover, it is probable that due to the core historical meaning of "marriage", the Federal Parliament would not even have constitutional power in relation to either *de facto* or ceremonial single sex marriages *per se*.[138] This conclusion should be compared to the present English position which is untroubled by the

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[133] Compare the position in England where at least a ceremonial single sex marriage has been held to be "void" and ancillary financial relief could thereby be awarded. E.g. *Corbett, supra* n. 41; *Matrimonial Causes Act* 1973, ss. 23-24. Noted by Cretney, *supra* n. 23 at 48.

[134] S. 43(a): "the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all other voluntarily entered into for life" — adopted from *Hyde, supra* n. 118.

[135] S. 6, presumably coupled with the common law rules concerning marital capacity; Marriage Act 1961 (Cth.), s. 22.

[136] *Supra* text at nn. 117-128.

[137] S. 4(1) definition of "matrimonial cause" para. (b).

[138] *Supra* text at nn. 117-128.

constitutional division of powers present in Australia. In *Corbett* v. *Corbett (No. 2)*[139] Ormrod, J. decided that for reasons of convenience he would exercise ancillary jurisdiction over at least a ceremonial single sex marriage. Joseph Jackson Q.C. counsel for the husband[140] submitted:

> [that] on the true view of the law there is no power to award alimony to the wife in this case. While conceding that a "wife" in a suit for nullity on the ground of bigamy, non-age or because the parties were within the prohibited degrees, could be awarded alimony pending suit, [here] . . . the wife being a male, was a different case and could never in any circumstances be a "wife".

Ormrod, J. responded,

> [W]hile I fully appreciate the force of that submission, the difficulties which would follow if it were to be accepted as correct are considerable. Until the trial had been concluded this fact would be in issue and, therefore, undetermined at the time when interlocutory orders of various kinds had to be made so that there would be no basis on which to make or refuse to make them. I cannot, therefore, accept that submission.[141]

Moreover, even after the marriage was held to be invalid, Ormrod, J. was willing to make permanent ancillary orders. It is not clear that he would have been so willing if the marriage had also been a non-ceremonial one, for it then would have been doubly void as both a single sex marriage *and* an informal marriage. To recognize such *de facto* marriages would have opened a much larger floodgate.

Presumably Australian courts are also likely to make at least *interlocutory* ancillary orders in relation to properly celebrated single sex marriages. However, if and when the alleged single sexedness is proven, it would be difficult on both present legislative and constitutional arguments to make these ancillary orders permanent.

Alternatively, in rare fact situations, a single sex relationship could be declared void on the grounds of fraud or mistake and thereby attract ancillary jurisdiction under the Family Law Act.[142]

(2) *Legislatively Validated Marriages*

There are some male-female relationships which once had no legal

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[139] *Supra* n. 100 at 197.

[140] Also author of *Formation and Annulment of Marriage* (2nd ed. 1969).

[141] *Supra* n. 139. A similar proposition was suggested in *Foden* v. *Foden* [1894] P. 307, however it was not clear there whether *"de facto"* meant *de facto* ceremony or function. But in *Langworthy* v. *Langworthy* (1886) 11 P.D. 85 the court clearly had jurisdiction to award alimony to the wife and maintenance to the child despite proof of complete absence of a marriage ceremony. *Cf. Blackmore* v. *Mills (falsely called Blackmore)* (1868) 18 L.T. 586.

[142] Marriage Act 1961 (Cth.), s. 23(1)(d)(i) (fraud); (1)(d)(ii) (mistake); *C* v. *D* (1979) F.L.C. 90-636 (marriage held void for mistake where husband was an hermaphrodite); comment R. Bailey (1979), 53 *A.L.J.* 659; H. A. Finlay, "Sexual Identity and the Law of Nullity" (1980), 54 *A.L.J.* 115.

marriage status[143] due to insufficient formalities but which today have been given *full* legal status.[144] That is, certain arguably invalid marriages have been declared to be valid. Thus s. 48(3) of the Marriage Act 1961 (Cth.) provides:

> A marriage is not invalid by reason that the person solemnizing it was not authorized by this Act to do so, if either party to the marriage, at the time the marriage was solemnized, believed that that person was lawfully authorized to solemnize it, and in such a case the form and ceremony of the marriage shall be deemed to have been sufficient if they were such as to show an intention on the part of each of the parties to become thereby the lawfully wedded spouse of the other.

Thereby the purported marriage becomes valid if at least one of the parties subjectively believed[145] that the celebrant was properly authorized.

(3) *De Facto Marriages Presumed to be Valid*

There are some invalid marriages which are void under the Family Law Act and Marriage Act for lack of proper formalities[146] which however for lack of evidence will be declared valid. First, where *some* ceremony took place followed by marital cohabitation of the parties, there is a presumption that a legally *proper* ceremony and thus a valid marriage took place.[147] Secondly, where the parties have cohabited as man and wife for some time there is a weaker presumption that a legally proper ceremony and thus valid marriage occurred at sometime.[148] Though it is said that hard cases make bad law, there are some examples where cohabiting couples have been declared to be legally married though arguably reasonable doubts existed as to the occurrence of the required marriage ceremony.[149]

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[143] Such a status was denied to marriages with defective or no ceremony in England between 1753 and 1823. But see *R. v. Millis supra* n. 123; Jackson, *supra* n. 124.

[144] D. Tolstoy, "The Validation of Void Marriages" (1968) 31 *M.L.R.* 656 at 658-9.

[145] *Cf.* Canadian provincial legislation discussed in *Alspector* v. *Alspector* (1957) 7 D.L.R. (2d) 203 (Ont. H.C.); aff'd. 9 D.L.R. (2d) 679 (C.A.) (Some sort of ceremony plus intention that some legal consequence follow plus cohabitation results in full status marriage); also *Hobson* v. *Gray* (1958) 13 D.L.R. (2d) 404 (Alta. S.C.); *Friedman* v. *Smookler* (1964), 43 D.L.R. (2d) 210 (Ont. H.C.) (In order to establish that the parties "cohabited as man and wife", it is sufficient to show that they had lived together in the community as husband and wife, and were taken as such by the community. Proof of more intimate relationships is not required).

[146] Marriage Act 1961 (Cth.), s. 48 — probably only total absence of celebrant or presence of a subjectively known unauthorized celebrant will render the marriage void for improper formalities. See *supra* text at nn. 65-72.

[147] E.g. *Sheludko* v. *Sheludko* [1972] V.R. 82; F. Bates, "Formal and Essential Validity of Marriage — Some Reflections on the Presumption of a Valid Marriage" (1975) 49 *A.L.J.* 607; Finlay, *op. cit. supra* n. 1 at 85-88.

[148] *Ibid; supra* n. 126.

[149] Eg. *Piers* v. *Piers* (1849) 2 H.L. Cases 331; 9 E.R. 1118; *In re Shephard; George* v. *Thyer* [1904] 1 Ch. 456; *Spivak* v. *Spivak* (1930) 46 T.L.R. 243; *Hill* v. *Hill* [1959] 1 W.L.R. 127.

As a matter of historical interest in Australia, it is also worth noting that until 1976 marriages voidable under the Matrimonial Causes Act 1959 (Cth.), became valid upon the death of either party. That is, a certain small number of *de facto* marriages were given full legal recognition. One commentator has noted that:

> [t]he novelty of the post-Reformation law was that it allowed certain of these spineless marriages to acquire posthumous backbones: if these associations could escape being examined in the courts while the parties to them were alive and living together in what, from the premises, were sinful unions, then the common law courts, in any case which came before them, would bury the past simultaneously with the interment of one or both of the spouses so-called, and would give to them as a parting gift at the grave unimpeachable and retrospective reputation, valid in England and Wales at any rate, of having lived together in holy wedlock.[150]

(4) *De Facto Marriages Validated for Limited Purposes*

Fourthly, there is a variety of invalid or second class marriage relationships which are "valid" or given legal status for *some limited purposes*. None of these have the legal consequence of preventing a monogamous formal re-marriage. That is, none in this category are valid to the extent that they require a legal divorce to terminate the limited marriage status. But they do have automatic legal consequences such as legitimating children, or giving an entitlement to workers' compensation benefits. This tendency repeats the English historical pattern of having first class "legal" marriages to which a list of rights and duties attach, and second class marriages which are legally recognized for most purposes, but which will usually lose in a competition with a first class one.[151] Thus for example:

(i) Certain children are declared to be legitimate despite the marriage relationship of their parents having limited legal status. Section 91 of the Marriage Act 1961 (Cth.) provides:

> Subject to this section, a child of a marriage that is void shall be deemed for all purposes to be the legitimate child of his parents as from his birth or the commencement of this Act, whichever was the later, if, at the time of the intercourse that resulted in the birth of the child or the time when the ceremony of marriage took place, whichever was the later, either party to the marriage believed on reasonable grounds that the marriage was valid.[152]

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[150] Jackson, *op. cit. supra* n. 124 at 54; referred to in Cretney, *op. cit. supra* n. 23 at 31-32.

[151] E.g. Mueller, *supra* n. 8; Engdahl, *supra* n. 18; Bryce, *supra* n. 17.

[152] The section raises difficult questions of interpretation for the subjective belief in validity must be on "reasonable grounds". When is it reasonable to have an incorrect understanding of the law? See H. A. Finlay and A. Bissett-Johnson, *Family Law in Australia* (1st ed. 1972) at 254-256; *Sheward* v. *A-G.* [1964] 2 All E.R. 324; *cf. Hawkins* v. *A-G.* [1966] 1 All E.R. 392. See Clark,

(ii) State and Federal legislation also give *some* status to marriage-like relationships normally after a period of qualifying cohabitation.[153] For example (a) in N.S.W. after three years of cohabitation a *de facto* wife can apply for a worker's compensation award upon the death or injury of her husband "worker";[154] (b) in Western Australia, a *de facto* widow in certain circumstances can apply for provision from the estate of her deceased spouse under the Inheritance (Family and Dependant's Provision) Act, 1972;[155] (c) in Tasmania, a deserted *de facto* wife may apply for personal maintenance after one year of cohabitation;[156] (d) the Social Services Act 1947 (Cth.) recognizes *de facto* marriages to the extent that a widow cohabitating with a male will lose her widow's pension;[157] for the purposes of entitlement to a widow's pension, the term "widow" includes a woman who for more than three years prior to her partner's death had been maintained by him and had lived with him on a permanent and bona fide basis;[158] for the purposes of obtaining a supporting parent's pension, a "supporting mother" includes a woman who for at least six months has not been living with her former *de facto* husband;[159] (e) the Student Assistance Act 1973

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Footnote 152 (Continued).

*op. cit. supra* n. 28 at 132-135 for discussion and criticism. "This form of statute has the doubtful virtue of making it plain beyond question that the law's purpose when dealing with illegitimate children is to punish them for their parents' wrongs".

153 See Bailey, *supra* n. 2. It could well be argued that a layperson could plead confusion concerning the varying degrees of legal recognition given to cohabitation marriages. Thus it arguably becomes far more credible for a layperson to say "I thought I was married in the eyes of the law" and thereby justify him/her seeking a nullity decree, declaration or divorce.

154 E.g. Workers Compensation Act, 1926 (N.S.W.), ss. 6 definition of "dependants"; 9 (6) (c); *Baker* v. *Thomas Robinson* (1955) 29 W.C.R. 90.

155 S. 7(1); see R. J. Davern Wright, *T.F.M. in Australia and New Zealand* (3rd ed. 1974). The Law Reform Commission of N.S.W. in *Working Paper on Testator's Family Maintenance and Guardianship of Infants' Act* (October, 1974) paras 6.6(5); 6.24-6.32 recommended that a *de facto* spouse should be an eligible T.F.M. applicant where he/she has a reasonable expectation of the deceased's bounty and at any time during the lifetime of the deceased, must have been a dependant of hers/his and a member of hers/his household. Note Administration Act, R.S.B.C. 1936, ch. 5, s. 102; *Manson* v. *Heaslip* [1949] 1 W.W.R. 717 (Brit. Col. S.C.) (kept mistress held to be a "concubine" regardless of whether she was or was not able to enter into a legal marriage with him); also Inheritance (Provision for Family and Dependants) Act 1975 (U.K.), s. 1(1); C. E. Cadwallader, "A Mistresses' Charter" [1980] *Conv.* 1.

156 Maintenance Act, 1967 (Tas.), s. 16; *supra* n. 91.

157 Social Services Act 1947 (Cth.), s. 59; M. J. Mossman, "The Baxter Case: De Facto Marriage and Social Welfare Policy" (1977) 2 *U. of N.S.W.L.J.* 1; R. Sackville, "Social Security and Family Law in Australia" (1978) 27 *I.C.L.Q.* 127 at 156-159; R. Sackville, "Cohabitation and Social Security Entitlement" in *Essays on Bail and Social Security* (A.G.P.S. 1976); J. Hughes, "Domestic Purpose Benefit: Lessons from the Furmage Case" (1979) *N.Z.L.J.* 32.

158 Social Services Act 1947 (Cth.), s. 59(1) definition of "widow" and "dependent female"; see also Superannuation Act 1976 (Cth.), s. 3 definition of "spouse".

159 *Id.* Social Services Act s. 83AAA(1). The Australian Legal Aid Office also recognizes *de facto* relationships for the purposes of determining eligibility for legal aid: P. Nygh and R. Turner, *Australian Family Law Service* (1976) "Legal Aid". See also *Re Sullivan and Minister for Immigration and Ethnic Affairs* (1977) 17 A.L.R. 600 (*de facto* relationship recognized for the purposes of a recomendation against deportation under the Migration Act 1958 (Cth.), s. 13).

(Cth.) further recognizes *de facto* relationships in that the married rate of tertiary student assistance is paid after two years of cohabitation or after one year of cohabitation where one partner is dependent on the other and where they are caring for a biological child of one or the other or both.[160]

Thus to repeat, it is often misleading to blandly declare that a marriage is invalid (or void) or that another is valid. For it is clear that many marriage relationships have no legal status for certain purposes, and yet do have legal status for other purposes. However many laypersons do not make that distinction. Much publicity has been given to the legal "recognition" of *de facto* marriages and public ignorance of the details of legislation is notorious.[161] Therefore some applicants could honestly and credibly assert before the Family Court that they subjectively thought that their marriage would be "recognized" after three years of cohabitation. Distinctions between different kinds of recognition may well not have been made by non-lawyers. Should such a once-held subjective belief in the "validity" of a cohabitation marriage, be sufficient to give the court jurisdiction to make a declaration of nullity and thereby ancillary orders?

(5) *Canon Law and Common Law Marriage*

There are some functioning marriage relationships which until at least 1753 in England and 1563 in Europe would have been legally recognized as "common law" or "canon law" marriages.[162] Traditionally, a common or canon law marriage could be created in one of two ways—

(i) an agreement between parties, each possessing capacity (e.g. single, sane, not within the prohibited degrees of consanguinity or affinity) expressed in the present tense to monogamously marry. This created an instant marriage and was known as *sponsalia* (espousal) *per verba de praesenti;*

(ii) an agreement between parties, each possessing capacity, to marry monogamously and expressed in the future tense. This

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[160] Regulations under the Student Assistance Act 1973 (Cth.), Commonwealth Statutory Rules 1974 No. 179 definition of "spouse". For a discussion of further legislation recognizing *de facto* marriages in Australia, see Bailey, *supra* n. 2; also Tasmanian L.R.C., *op. cit. supra* n. 4. Note that the trustees of many superannuation schemes have a discretion to distribute benefits to a "dependent" *de facto* widow; e.g. Superannuation Act 1976 (Cth.), s. 110, s. 3 definition of "spouse"; and the recognition of a *de facto* relationship for purposes of Family Law Act, s. 79; *In the marriage of Collins* (1977) F.L.C. 90-286.

[161] E.g. S. A. Ozdowski, *The Family Law Act 1975 and the Family — A Study in Knowledge and Attitudes* (Sociology Dept., Uni. of New England, Armidale, Aust., 1978).

[162] See Finlay, *op. cit. supra* n. 1 at 88-92; Nygh, *op. cit. supra* n. 84 at 293-300; Cheshire, *op. cit. supra* n. 123 at 324-325; Dicey and Morris, *op. cit. supra* n. 123 at 240-246; Cherniack and Fien, *supra* n. 123; Weyrauch, *supra* n. 28; Stein, *supra* n. 24; A. Hilton, "The Validity of 'Common Law' Marriages" (1973) 19 *McGill L.J.* 577; Nygh, *supra* n. 16; Bryce, *supra* n. 17; *Pollock* and Maitland, *op. cit. supra* n. 124.

then became a marriage only upon consummation and was known as *sponsalia per verba de futuro cum copula.*

In neither case was any other form, such as the presence of a clergyman, necessary.[163] Technically, cohabitation and common repute only raised a presumption that the parties had exchanged matrimonial consent and this was a mode of proving, rather than constituting a marriage. In practice however this distinction sometimes became blurred.

In Australia today, for a variety of reasons, it is very doubtful whether a common law (or canon law) marriage *per se* would ever be recognized as a full-status legal marriage.[164] The position may well be different in more hetrogeneous cultures.[165]

At least the following series of questions would have to be answered before one could hope to argue for the complete validity of a common law marriage commenced in Australia.

(i) Were the social conditions at the time of the commencement of the marriage relationship such that compliance with the requirement of an authorized celebrant[166] impossible, or perhaps very difficult?[167]

(ii) If an affirmative answer is given to question (i), what were the formal requirements of a common law or canon law marriage in England? Was *R.* v. *Millis*[168] correct when it allegedly held that for all purposes the presence of an episcopally ordained priest was necessary for a valid common law marriage?[169]

(iii) Assuming an affirmative answer to (ii), was the *Millis* concept of a common law marriage applicable to the circumstances in the colony of New South Wales in 1828?[170]

(iv) Whatever the pre-requisites for a valid common law marriage, has the codification of Australian marriage laws in the Marriage Act

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[163] *Contra R.* v. *Millis, supra* n. 123.

[164] Clark, *op. cit. supra* n. 28 at 49-50; also *International Encyclopaedia of Comparative Law,* Vol. III, Ch. 16 "Marriage and Divorce", at 30-31; see Finlay and Nygh *op. cit. supra* n. 162.

[165] E.g. *Isaac Penhas* v. *Tan Soo Eng* [1953] A.C. 304 (In Singapore in 1937 a Jewish man and Chinese woman agreed to become man and wife before an Old Chinese man. The Privy Council held that this was a valid common law marriage and that *R.* v. *Millis, supra* n. 123 which allegedly required the presence of an episcopally ordained priest at a common law marriage, was inapplicable to Singapore).

[166] Marriage Act 1961 (Cth.), s. 48.

[167] *Cf. Savenis* v. *Savenis* [1950] S.A.S.R. 309 and *Fokas, supra* n. 84 in Australia; *Taczanowska* v. *Taczanowski* [1957] 2 All E.R. 563; [1957] P. 301 and *Kochanski* v. *Kochanska* [1957] 3 All E.R. 145; [1958] P. 147 in England.

[168] *Supra* n. 123.

[169] See *supra* n. 162 esp. Cherniack and Fien.

[170] *Catterall* v. *Catterall* (1847) 1 Rob. Ecc. 580 — No. Also *Wolfenden* v. *Wolfenden* [1946] P. 61; *Quick, supra* n. 70. But other cases suggest that the *Millis* requirement of the presence of an episcopally ordained priest is applicable to the colony, e.g. *Hodgson* v. *Stawell, supra* n. 86; *R.* v. *Byrne* (1867) 6 S.C.R. (N.S.W.) 302; *Kuklycz* v. *Kuklycz* [1972] V.R. 50; see Nygh, *op. cit. supra* n. 162; *cf. Re Sheran* (1885-1901) 4 North-West Territories 83 (marriage *verba de praesenti* in isolated area held to be invalid for succession purposes as Territories not in a "barbarous" state).

1961 (Cth.) by implication overruled the possibility of a common law marriage?[171]

Due to these multiple uncertainties surrounding the validity of common law marriages in Australia, it is submitted that unless some massive long term social disruption occurred, it is very unlikely that any traditional or *Millis* common law marriage would be recognized as a full-status marriage if commenced within Australia.[172] However if the relationship is commenced overseas, the possibilities of recognition as a full status marriage arguably increase. For example, it may be arguable that compliance with local law was impossible,[173] though this is of late rarely a successful submission.[174] Alternatively, it may be arguable that the law of the place of celebration of the marriage actually recognizes traditional common law marriage.[175]

Thus it is submitted that it would be very difficult for a party to a traditional common law marriage[176] which was commenced after 1961 within Australia[177] to argue that *objectively* there is some uncertainty about its invalidity. Of course this does not preclude one or both parties having subjective beliefs, or even subjective beliefs based on reasonable grounds, that the marriage is legally valid.[178] Moreover, presumably as a matter of policy, courts will always be slow to give any recognition to common law marriages based solely upon secret verbal agreement[179] as this is conducive to false claims. An added requirement of open marital cohabitation would provide some objective evidence to reduce the possibility of false claims.

(6) *Customary Marriages*

Analogous to, and substantially overlapping with, English common law marriages are customary marriages. A customary marriage is a marriage relationship and cultural status commenced by the observance of the customary forms of marriage of an identifiable cultural group by parties with a substantial connection to that cultural group. Clearly one such long-standing example in Australia is a marriage between Abori-

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171 The affirmative answer given by Nygh, *op. cit. supra* n. 84 at 299-300 is no longer so clear as s. 51(7) and s. 51(2) (c) of the Family Law Act, on which he develops his argument, have since been repealed without re-enactment in s. 23 of the Marriage Act. Probably now the question receives an affirmative answer if the promises were exchanged *within* Australia; Marriage Act, s. 40; and a negative answer if the promises were exchanged *outside* Australia; Marriage Act, s. 22.

172 E.g. an exchange of promises and consummation by a couple stranded in the Nullabor Plains.

173 E.g. *Kochanski* v. *Kochanska, supra* n. 167.

174 E.g. *Dukov, Milder, supra* n. 60; *In the marriage of Katavic* (1977) F.L.C. 90-296; Nygh, *op. cit. supra* n. 84 at 297-299.

175 E.g. *Isaac Penhas* v. *Tan Soo Eng, supra* n. 165.

176 I.e. exchange of promises with no celebrant.

177 Arguably the common law marriage is more of a legal possibility before 1961, being the date of commencement of the Matrimonial Causes Act 1959 (Cth.). See Nygh, *op. cit. supra* n. 84 at 299-300; *Dukov, supra* n. 60.

178 See discussion *infra* text at nn. 229-239.

179 *Cf. Dalrymple, supra* n. 124 where the secret agreement was fully evidenced by letters.

ginal people according to the customs of Aboriginal culture.[180] Apart from the Aboriginal people, there are many other minority groups within Australian society which may actually use, or wish to use alone, a customary form of marriage. Most of these minority groups have been catered for by the express recognition under the Marriage Act 1961 (Cth.) of a wide cultural range of acceptable celebrants.[181] A member of a cultural group not listed in the "religious" classification under the Act,[182] can still become an "authorized celebrant" by special permission of the Federal Attorney-General.[183] Thus most customary forms of marriage are indirectly encouraged as long as an appropriate celebrant is present.[184]

One apparently not infrequent situation is for members of certain cultural groups to divorce and then remarry according to their own customs before satisfying the divorce requirements of the Family Law Act. In some cases, such a civil divorce may subsequently never be obtained.[185] It may well be that a judge of the Family Court, if asked,[186] would attempt to attach some legal custodial and financial rights and duties to such a *de facto* marriage. This would probably be done by calling the arrangement a void bigamous marriage, rather than a void non-ceremonial marriage. No doubt having thereby established jurisdiction, the Family Court would have no small difficulty in determining

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[180] Aboriginal customary laws are presently under study by the Family Law Council (see 2nd *Annual Report* (1978 at 42) and the Australian Law Reform Commission (see [1979].*Reform* 22); also Berndt, Kirby *supra* n. 16. There seem to be many reasons why the validity of Aboriginal customary marriages and divorces have not been tested more often in European court systems. E.g. many customary marriages are also formalized in a church; there are not many wealthy aboriginal individuals whose estates are worthy of litigation; social pressure may resolve the dispute; the European court system generally is unattractive.

[181] S. 26: "The Governor-General may, by Proclamation, declare a religious body or a religious organization to be a recognized denomination for the purposes of this Act". S. 26 raises the historical and legal issue of what is a "religion"? e.g. *Malnak* v. *Yogi* 440 F. Supp. 1284 (1977) (Science of Creative Intelligence/ Transcendental Meditation is a religion); *cf. R.* v. *Registrar-General ex parte Segerdal* [1970] 2 Q.B. 697 (Chapel of the Church of Scientology was not "a place of meeting for religious worship"); R. Brow, *Religion — Origins and Ideas* (1966); C. L. Pannam, "Travelling Section 116 with a U.S. Road Map" (1963) 4 *Melb. Uni. L.R.* 41.

[182] *Ibid.*

[183] Marriage Act 1961 (Cth.), s. 39.

[184] Marriage Act 1961 (Cth.), s. 45(1) provides: "Where a marriage is solemnized by or in the presence of an authorized celebrant, being a minister of religion, it may be solemnized according to any form and ceremony recognized as sufficient for the purpose by the religious body or organization of which he is a minister."

[185] E.g. the facts in *R.* v. *Mohamed (Ali)* [1964] 2 Q.B. 350n (Already married Islamic male went through religious form of marriage in England. Held that this did not amount to a solemnization of matrimony under s. 39 of the Marriage Act, 1836); M. Humphrey, "Migrants and the Family in the Context of the Australian Legal System", paper delivered at Macquarie University Law School, mentioning *inter alia* this practice within at least first generation migrants in the Lebanese Muslim community in Sydney (May, 1979).

[186] As long as these divorces and/or marriages are effected between members of the same ethnic community, there will be strong social pressures to use the dispute settlement mechanisms within the community, rather than resort to the "foreign" Family Court.

what is a fair custodial and financial decision in the light of Islamic or other cultural concepts of fairness.[187]

Similarly, presumably some judges would initially feel a strong inclination to recognize Aboriginal customary marriages at least for some purposes, or to call them void marriages according to European definitions in order to exercise ancillary jurisdiction. However, it is submitted that such a step raises so many problems that most judges will refuse to exercise jurisdiction and will refer the matter to a government department. The issues include — which Aboriginal culture is each of the parties connected to? How substantial is their connection to that culture? How much contact have they each had with white culture? Is sufficient evidence available of each aboriginal "legal" system? It seems scarcely appropriate to impose European concepts of property, maintenance and custody as contained in the Family Law Act upon the native people.[188] To what extent can and ought the dominating culture tolerate radically different forms of lifestyle in isolated or nearby minority groups? What minimum level of morality and/or procedure must be complied with?

Thus it seems that ultimately judges with jurisdiction under the Family Law Act are likely to be very reticent to exercise jurisdiction of any kind over the customary marriages of a very different culture unless extensive expert evidence is available. However this conclusion may be balanced by the argument that if the Family Court, with its relatively sophisticated counselling assistance does not exercise jurisdiction, then who will?

(7) *Ethically Deserving De Facto Claimants*

The final category of *de facto* marriages to be mentioned is a rather vague one. It consists of those relationships which give rise to strong moral or ethical claims for some kind of remedy when the relationship is terminated by death or separation. Thus this category would include marriages from all of the other six overlapping categories of *de facto* marriage mentioned herein.

It may be said that this category of ethically deserving *de facto* claimants is not one traditionally recognized by the case law. Even if this is so, it is submitted that the common law has adapted slowly to social pressures before, and will do so again. Thus a study of certain judges over the last ten years indicates a great emphasis upon the facts in each

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[187] E.g. *El Oueik* v. *El Oueik* (1977) F.L.C. 90-224 (Parties took it for granted that children were being well cared for in Lebanon; but court wanted evidence). Will the court take into account strongly held community views about fault, saving face, e.g. *In the marriage of Caretti* (1977) F.L.C. 90-270 (Italian custom relevant to the meaning of living separate and apart), the cultural position of women, and marriage contracts? See generally Humphrey, *supra* n. 185; *Migrants and the Family Court*, Family Law Council, Working Paper No. 3 (July, 1978); A. H. Jakubowicz and B. Buckley, *Migrants and the Legal System* (1974).

[188] See generally Berndt, *supra* n. 16.

case before them. If the facts indicate that one of the *de facto* couple has a strong ethical claim to financial compensation then some effort will be made to fit the facts (often with strain) into the concepts of an existing remedy.[189] This ongoing process seems to reflect the traditional tension between fairness and predictability, or the justice and stability of the common law. Is it appropriate for a judge on these facts to be creative and "do justice", as he perceives it, without placing undue strain on existing legal principles? Judges and academics align themselves, verbally at least, and sometimes in action, at different ends of the flexibility — predictability spectrum. Often an alleged "clarification" of the law clarifies little and merely restates the tension. For example, at the predictability end—

> In any individual case, the appreciation of *Pettitt* v. *Pettitt*[190] and *Gissing* v. *Gissing*[191] may produce a result which appears unfair. So be it; in my view that is not injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity, the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate by precedent out of principle.[192]

At the flexibility end—

> The essential concern of equity is remedy where needed. In some contexts equity allows a bundle of remedies so cohesive and purposeful that the rights which they protect take on the appearance of an institution or of interests in property. To require of equity however that it should at all times underwrite a proprietary system is to forget its origins and to pervert its destiny.[193]

And perhaps in the middle, the statement endorsed by all—

> A resulting, implied or constructive trust, and it is unnecessary for present purposes to distinguish between these three classes of trust, is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui

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189 E.g. *Tanner, Pearce* (facts moulded with some imagination and awkwardness to fit the tradition concepts of contract), *Cooke* v. *Head* (facts arguably did not fit well into the arguably "established" principles of trust), *supra* n. 3 See generally Wade, *supra* n. 32.

190 [1969] 2 All E.R. 385.

191 [1970] 2 All E.R. 780.

192 *Per* Bagnall, J. in *Cowcher* v. *Cowcher* [1972] 1 All E.R. 943 at 948.

193 Helsham, C.J. in *Pearce, supra* n. 3 at 180-181 quoting from W. A. Lee's observations on *Commissioner of Stamp Duties (Qld.)* v. *Livingston* [1965] A.C. 694 in (1965-66) 5 *Uni. of Queensland L.J.* 210 at 217.

> que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.[194]

It has often been pointed out, sometimes with acrimony, that Lord Denning chooses to find flexibility in the latter statement above by Lord Diplock, by omitting the second qualifying sentence.[195] No doubt the flexibility school would argue that the second sentence can be read as an illustration of inequity, rather than a necessary prescription of it. The criticism raises recurrent issues concerning the interpretation of judicial statements.

The writer suggests that this is a helpful ongoing tension in the common law which enables ethical views to find gradual, if sometimes agonized expression in the law. It is proper that respect be shown for the values emphasized at both ends of the spectrum. No doubt, an outbreak of fictions and/or "reasonable persons" may be necessary to effect the transition to a new common law remedy. And no doubt some, especially the writers of text books, will find this conceptual untidiness irritating.[196]

It is of course appropriate to ask where does this group of reforming judges get its ethical values? From nature, nurture, natural law, intuition, peer opinion, public opinion, revelation or elsewhere? This article will not discuss the important questions of where *are* judicial values coming from, and where *ought* judicial values to come from? Instead fact situations will merely be suggested that have led to some judges concluding that the claimant *de facto* spouse was *clearly* a morally deserving one, and therefore an appropriate legal remedy was found.

Legally relevant moral factors include:

(1) How long has the relationship lasted?[197]

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[194] *Per* Lord Diplock in *Gissing* v. *Gissing, supra* n. 191 at 790.

[195] E.g. *Heseltine* v. *Heseltine* [1971] 1 All E.R. 952 at 955; *Binions* v. *Evans* [1972] Ch. 359 at 368; *Cooke* v. *Head, supra* n. 3 at 42; *Hussey* v. *Palmer* [1972] 3 All E.R. 744 at 747.

[196] *Cf. Hardwick* v. *Johnson and Anor* [1978] 2 All E.R. 935 at 940 *per* Roskill, L.J. ("the courts must, in my view, be careful when family arrangements are entered into not to try and force those family arrangements into an unfitting legal strait-jacket"); *Crabb* v. *Arun District Council* [1976] Ch. 179 at 193 *per* Scarman, L.J. ("I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance").

[197] *De facto* wives have been successful in claiming an equitable interest where for example the relationship has been happy and stable right up until the death of the *de facto* husband, e.g. *Horton* v. *Public Trustee, Olsen, supra* n. 3. Claimants have usually been successful where the relationship lasted for a lengthy period of time after the property in dispute was purchased. E.g. *McRae* v. *Wholley* (10 years), *Fraser* v. *Gough* (11 years), *Pearce* (20 years), *Pascoe* v. *Turner* (8 years), *supra* n. 3; *Re E., E.* v. *E., supra* n. 48 (*de facto* of 20 years successfully resisted T.F.M. claim by *de jure* spouse).

(2) Did the parties plan to marry eventually but never quite got around to it?[198]

(3) Have the parties cohabited, or is it more like a visiting arrangement?[199] Did the couple at any time jointly hold themselves out to be married?[200]

(4) How many children have been born to the relationship?[201] Who has looked after them?

(5) How well has the breadwinning spouse already supported the dependent family over the years?[202]

(6) Has the legal owner of the home made any express promises concerning the home or support of his *de facto* family? How convincing is the evidence of these express promises?[203]

(7) Has the legal owner of the home been intentionally deceptive?[204]

(8) How much money or unusual labour (or other acts of reliance) has one spouse expended in reliance upon the legal owner's promises to compensate her?[205] Did the legal owner stand by knowingly while these acts in reliance occurred, or did he knowingly accept the benefit for himself?[206]

(9) Was there any clear fault in the breakdown of the *de facto* relationship?[207]

(10) How needy is the claimant spouse, and what is the legal owner's ability to pay?

(11) Will any third person suffer substantially if the claimant spouse is awarded some compensation or an interest in the property?[208]

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198 E.g. *Richards* v. *Dove* (the arrangement was "merely one of convenience, with no thought of marriage"), *Cooke* v. *Head* (planned to marry when free), *Horton* v. *Public Trustee* (the woman at least made some *bona fide* efforts to enquire about divorce), *supra* n. 3.

199 *Horrocks* v. *Forray, supra* n. 38 (Visitation rather than cohabitation for 17 years. Also visits from other men); *Chandler* v. *Kerley* [1978] 1 W.L.R. 693.

200 *Tanner, supra* n. 3; *cf. ibid. Horrocks* v. *Forray* (relationship kept secret).

201 Claimants have often been successful where children have been born to the relationship. E.g. *Eves, Tanner, Pearce, Valent* v. *Salamon, supra* n. 3; *Re E., E.* v. *E., supra* n. 48; *contra Horrocks* v. *Forray, supra* n. 38.

202 *Ibid. Horrocks* v. *Forray* (male had lavishly supported female and child already for 13 years); *Chandler* v. *Kerley, supra* n. 199 (female had already received 3 years of free accommodation).

203 E.g. *Ibid. Chandler* v. *Kerley.*

204 E.g. *Pearce, Eves, supra* n. 3.

205 *Button* v. *Button* [1968] 1 All E.R. 1064 ("the ordinary kind of work which a wife might do in the matrimonial home"); *Murdoch, supra* n. 31 (the ordinary ranch wife); *Eves, Cooke* v. *Head, supra* n. 3 (*de facto* wives did more than "ordinary" manual labour); *Tulley* v. *Tulley* (1965) 109 *Sol. J.* 956 (insignificant weekly financial contributions to buy extras).

206 *Ibid. Eves, Cooke* v. *Head, Pascoe* v. *Turner, supra* n. 3.

207 E.g. *Tanner, supra* n. 3; *Chandler* v. *Kerley, supra* n. 199.

208 E.g. *Horrocks* v. *Forray, supra* n. 38. (The deceased's innocent and unaware *de jure* spouse would have been left destitute if the deceased's secret mistress had successfully claimed the home. Moreover, the deceased's illegitimate daughter could later apply against the estate under Testator's Family Maintenance Legislation); *Re E., E.* v. *E. supra* n. 48 (The deceased's *de jure* spouse would receive nothing from his small estate but she had previously been a vexatious litigant, had regularly been paid maintenance and had formerly been given a house).

(12) Do the claimant *de facto* spouse and family have any alternative people from whom they could claim some compensation or maintenance?[209]

(13) How old and how healthy are each of the parties?

In relation to this last question, it seems that many *de facto* marriages between older couples, especially if widowed, deserted or divorced, should not be against public policy but ought often to be positively encouraged. Aged people in a society of predominantly nuclear families are thereby given mutual help and companionship in times often filled with loneliness and sickness.[210] As the legal consequences of these relationships between older couples are often only tested after the death of one party (usually the male), courts may choose not to encourage evidence of the exact nature of the relationship, but rather to treat it as a platonic housekeeping affair, which it may well have been.[211] Whatever these "arrangements" be called, they still perform most of the classic functions of marriage.[212]

No doubt this weighing of the moral claims of the various parties claiming a slice of the *de facto* spouse's assets, makes the situation similar to the consideration of claims under the Testator's Family Maintenance legislation.[213] Although there are many similarities with the factors considered under Testator's Family Maintenance legislation, one difference is that it seems that judges will not go out of their way to "discover" enforceable trusts, estoppel or contracts unless the moral claims of the *de facto* spouse to compensation are very clear and persuasive. A mere tipping of the moral balance as against other potential beneficiaries will probably not be enough to encourage judicial creativity.

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[209] E.g. *Ibid. Horrocks* v. *Forray* (child could possibly bring an action against the driver who had killed her father).

[210] "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected", *Van Alst* v. *Hunter* 5 Johnson N.Y. Ch. Rep. 159 *per* Chancellor Kent.

[211] E.g. *Ogilvie* v. *Ryan, supra* n. 3; *Wakeham* v. *Mackenzie* [1968] 1 W.L.R. 1175; *Schaefer* v. *Schuhmann* [1972] A.C. 572; *cf. Maddison* v. *Alderson* [1881-85] All E.R. Rep. 742; (1883) 8 App. Cas. 467; *Horton* v. *Jones* (1935) 53 C.L.R. 475; *Boccalatte* v. *Bushelle* Jan. 12, 1980, Q. Sup. Ct. (Matthews, J.); see generally B.M. Sparks, *Contracts to Make Wills* (1956); comments in 87 *L.Q.R.* 358; 44 *A.L.J.* 391; 122 *New L.J.* 576; 88 *L.Q.R.* 320; 46 *A.L.J.* 191 and 522; 10 *Uni. of W.A. L.R.* 115 In New Zealand, the promisee spouse has an alternative avenue for a remedy under the Law Reform (Testamentary Promises) Act 1949; B. Coote, "Testamentary Promises Jurisdiction in New Zealand" in J. F. Northey ed., *A. G. David Essays in Law* (1965).

[212] Indefinite male-female cohabitation, companionship and mutual help; affection if not sexual fulfilment; rarely procreation.

[213] Davern Wright, Cadwallader, *supra* n. 155. See also recommendations of N.S.W.L.R.C., *Working Paper on T.F.M. and Guardianship of Infants Act, 1916* (1974) at para. 6.32, that the moral claim of some *de facto* spouses should be recognized. "In our view, a *de facto* spouse who can satisfy the three conditions . . . (reasonable expectation of the deceased's bounty, sometime dependency and sometime membership of the deceased's household) should be an eligible applicant. Under the head of the reasonable expectation, the Court can evaluate the claims of those who have lived together for, say, six months or six years: it can, without difficulty, distinguish between a casual liaison and a domestic household situation".

There is nothing unique in these seven suggested categories of invalid marriages. No doubt many subdivisions could be made in each, especially the last one. However categorization may help to predict which groups are likely to be called "void marriages". More importantly, it may help predict over which invalid marriages it is appropriate to exercise ancillary jurisdiction under the Family Law Act.

**When is it Appropriate to Exercise Ancillary Jurisdiction?**

There seem to be at least four conceptual opportunities for courts with jurisdiction under the Family Law Act to avoid exercising ancillary jurisdiction over most or some *de facto* relationships. It will be seen that there is an important distinction in these four methods of approach. That is the distinction between dismissing an application because the court has no jurisdiction,[214] and the more common situation of refusing to exercise the jurisdiction which the court has and therefore dismissing the application.[215] The former kind of dismissal amounts to saying "I cannot make an order" as compared to the latter, "I can make the order, but I *should not*". Using this basic distinction, the four lines of argument are as follows:

(1) The court has no jurisdiction over the application for principal relief by one or both of the *de facto* couple as either:
   (i) The Family Law Act only gives jurisdiction over void marriages. This is something else.[216]
   (ii) The court has inherent power to dismiss or stay frivolous, vexatious or abusive proceedings.[217] On some test the court concludes that these are "abusive" proceedings.
   (iii) The application is declared to be "improper" whereupon perhaps Regulation 16 of the Family Law Regulations may be utilized. Regulation 16 states "[a] Judge or Magistrate may, at any time after the institution of proceedings direct a stay or proceedings upon such terms as he thinks fit".

(2) The court has jurisdiction over the application for principal relief (i.e. to make a nullity decree or declaration) but in its discretion refuses to either make a declaration or nullity decree and so dismisses the application for principal relief. This course may be effected by—
   (i) Perhaps Regulation 16 of the Family Law Act Regulations.
   (ii) Use of s. 118 which provides that "[t]he court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious, dismiss the proceedings and make such orders as to cost as it thinks fit".

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[214] Situations (1) and (3) *infra* text at nn. 216-217; 221-222.

[215] E.g. *In the marriage of Tansell, supra* n. 99 at 76, 626; Comment J. Wade, *supra* n. 79; situations (2) and (4) *infra* text at nn. 218-220; 222.

[216] This argument is of course, based on the presumption that a reasonably clear distinction can be drawn between *de facto* and void marriages.

[217] See cases discussed *In the marriage of Tansell supra* n. 99 at 76, 625.

(iii) Seeking principal relief in the form of an application for a declaration[218] rather than proceedings from a decree of nullity.[219] Then the court is given a broad discretion in s. 113 to "make such declaration as is justified". Thus the court might in effect say, "In the exercise of our jurisdiction we refuse to make any declaration relating to nullity".

(iv) The court exercising jurisdiction to decide that this is not a void marriage; it is something else. Therefore the application for principal relief is dismissed.

It should be noted however that this second line of approach, namely where a court decides to exercise jurisdiction and then dismisses the application for principal relief, may then face the argument that this amounts to "completed" proceedings. If so, the court then arguably has jurisdiction to make at least ancillary *property* orders under the provisions of the Family Law Act.[220] It may be more difficult to argue from the present wording of the Act that a dismissed application for principal relief thereby confers ancillary jurisdiction over custody and maintenance.[221]

This leads to the third and fourth conceptual opportunities for raising the basic question, "Over which *de facto* marriages is it appropriate to exercise ancillary jurisdiction under the Family Law Act?"

(3) A sufficiently clear distinction cannot be drawn between *de facto* marriages and marriages void for lack of formalities. Therefore all *de facto* marriages are marriages void for lack of formalities under the literal wording of s. 51 of the Family Law Act and s. 23(1)(c) of the Marriage Act. However even though the marriage is declared to be void (i.e. principal relief is granted), the court may say in appropriate cases that it has no *ancillary* jurisdiction. Again such power may be derived from:
   (i) the inherent power of the court;
   (ii) Regulation 16.

(4) Again working from the premise that all *de facto* marriages are marriages void for lack of formalities, the court thereby always has *power* to grant ancillary relief, but in its *discretion* will refuse to do so in certain "appropriate" fact situations. Such a discretion may be derived from:
   (i) Regulation 16 discretion to stay proceedings;

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[218] S. 4(1) definition of "matrimonial cause" para. (b).

[219] *Id.* para. (a)(ii).

[220] *Id.* para. (ca). Note also pre-existing ancillary jurisdiction where a *bona fide* application for principal relief was dismissed under s. 89(2)(b) of 1959 Act as amended by Matrimonial Causes Act 1965 (Cth.), s. 15; see P. Toose, R. W. Watson, and D. G. Benjafield, *Australian Divorce Law and Practice* (1968) at paras 774-776; *Meyer* v. *Meyer* (1964) 5 F.L.R. 285; *contra Brown* v. *Brown* (1965) 7 F.L.R. 255.

[221] Ss. 60, 71, 5(4) all require a decision that a void marriage exists. However para. (f) of the definition of "matrimonial cause" in s. 4(1) could arguably be utilized as it too uses the phrase "completed proceedings".

(ii) Section 118 concerning frivolous or vexatious proceedings.[222]

Finally, it is important to emphasize that at whatever stage it is argued that no ancillary relief should be granted to this couple, and by whatever powers such a decision is contemplated, the basic question remains the same. That is, over which *de facto* marriages is it appropriate to exercise the ancillary jurisdiction under the Family Law Act over property, maintenance and custody? Naturally "appropriate" remains the slippery concept in this question and what is appropriate is a balance of many factors previously discussed herein.

It is important to restate that even if some reasonably clear test can be devised for deciding when a *de facto* marriage is void for lack of formalities, that does not end the matter. A judge may well say, "This is indeed a fascinating historical and ethical question about what is a void marriage, but I don't really care to continue it. Whatever you call it, this is just not an *appropriate* case to exercise ancillary jurisdiction under the Family Law Act over this couple".

What then makes it appropriate for the court to discover that it has jurisdiction to order ancillary relief? This question has already been indirectly examined by listing seven different categories of *de facto* marriages.[223] Having decided that one of these categories ought to be called a category of void marriages, a judge may simultaneously conclude that it is also an appropriate situation in which to grant ancillary relief, and therefore the ancillary jurisdiction ought to exist. Alternatively, the courts may develop several additional tests to decide whether they have jurisdiction to order ancillary relief. These following suggested tests overlap substantially with the previous attempts in this article to answer the initial question of when is a *de facto* marriage a "void" marriage?

The first possible test is to ask the question — "Was there a possibility at the time of the commencement of the *de facto* relationship that it may have been a valid full-status marriage?" The "possibility" of validity could be measured on three alternative standards.

(i) *Objective*

Would the reasonable legal practitioner (before or after extensive research?) have said that there is some chance that this relationship is a valid full status marriage? Thus if a man and woman began living together in Australia and no attempted form of ceremony before an authorized or purportedly authorized celebrant ever took place, no doubt the fictional reasonable lawyer would conclude that there is no chance of a valid marriage. Therefore no ancillary jurisdiction should be attracted.

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[222] *Supra* n. 217.
[223] See *supra* text at nn. 129-213.

One potential irony of this test would be that "reasonable Australian lawyers" off-the-cuff know little or nothing about foreign legal systems (at least prior to very extensive research). Thus there will be objective uncertainties, in one sense, attached to all *de facto* marriages commenced overseas especially in non-Commonwealth countries or countries of vividly hetrogenous cultures. Thus if an Australian lawyer in Sydney was asked to advise a Chinese girl and Australian male whether their marriage commenced in Indonesia was one of full-status in Australia, the objective possibilities of an affirmative answer increase due to the complexity of the law and facts. It may be recognized as a common law marriage[224] or under the various forms of local Indonesian law.

Thus it is submitted that wherever the *de facto* marriage was commenced overseas in a country where Australians are generally not familiar with its culture or legal system, there is a higher probability that the Family Court will exercise jurisdiction if the questions of nullity and ancillary relief are raised.[225]

(ii) *Subjective*

Did one or both of the parties at the time believe *subjectively* that the actual steps they went through, either by way of ceremony or period of cohabitation, resulted in a valid full status marriage? For example, if the woman had misunderstood media reports to the extent that she believed that the legal status of marriage resulted after three years of cohabitation, then that would be an appropriate case to call it a void marriage and exercise ancillary jurisdiction. Likewise in a case where one party subjectively believed that exchanging promises and consummation amounted to a valid marriage. That is, ignorance of the law would indeed be an excuse and a basis for enforceable marital obligations.

Such a test would certainly assist ill-informed cohabiting couples to come within the federal jurisdiction. However, it would be a difficult test as it would encourage perjury or exaggeration concerning former subjective beliefs, which may then be difficult to disprove. To adapt the words of the English Law Commission, such a law:

> May come close to leaving it to the option of the parties whether their marriage is to be treated as void [or non-existent], for if they allege that they had knowledge of an irregularity it will be virtually impossible to disprove it, and if they allege that they had not, it will normally be extremely difficult to prove the contrary. As a result the dishonest may be more favoured than the scrupulous. But it is not only the deliberately dishonest who may

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224 E.g. *Fokas, supra* n. 84 which doctrine at least is arguable in relation to foreign marriages; *supra* nn. 162-177; whereas even the existence of a doctrine of common law marriage if commenced in Australia is highly dubious.

225 E.g. *Lynch and Slater, Willmore, Vidovic, Ungar, supra* n. 61.

> benefit undeservedly for most people have no difficulty in sincerely convincing themselves that what they would like to have occurred is what in fact occurred, so that the nature of their subsequent testimony about their state of knowledge is likely to vary according to whether they wish to be relieved of the marriage [obligations or not].[226]

Moreover, many people believe subjectively (and correctly) that their cohabitation marriage is legally "valid" for some purposes, such as superannuation, social services and workers' compensation.[227] They may well not have understood that a marriage can be legally valid and invalid for different purposes at the same time. A general public inability to make such a distinction is quite likely given the wide media publicity concerning the "recognition" of *de facto* marriages and the widespread ignorance of the details of legislation.[228] Perhaps this could be overcome by a question to the cohabiting applicant, such as, "Did you personally believe at that time that in order to legally marry anyone else, you would first need a divorce?" or "Did you personally believe at the time that a church or registry marriage to anyone else would then amount to bigamy?" It may be objected that such questions are artificial and unhelpful to the real life needs of the applicant. However it can only be repeated that such needs can only be dealt with by federal legislation within constitutional power over "marriage" and/or "divorce and matrimonial causes". Therefore some distinguishing test, even perhaps an artificial one, needs to be devised.

(iii) *Subjective Belief, Reasonably Held.*

This category is an attempt to strike a balance between the previously mentioned two extremes of objective and subjective belief in the possible full status validity of a marriage.

This test would be — did one or both of the parties at the time subjectively believe on reasonable grounds, that the actual steps they went through, either by way of ceremony or period of cohabitation, resulted in a valid full-status marriage? Indirectly this test asks when it is reasonable to be mistaken about the actual state of the law? Perhaps this is an impossible question, but the concept of "reasonableness" may in effect give a judicial discretion to bring within jurisdiction more *de facto* marriages than the "objective" test, yet not as many as the "subjective" test.

A precedent for this kind of intermediate position can be found in s. 91(1) of the Marriage Act 1961 (Cth.) which section the High Court has held to be within the Federal "marriage" power.[229] Section

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[226] Bracketed portions altered from original to suit this context. Law Commission No. 53 U.K. Annex., para. 121.

[227] See discussion *supra* text at nn. 150-162.

[228] E.g. Ozdowski, *supra* n. 161.

[229] S. 51(xxi) of the Constitution; *A-G for Victoria* v. *The Commonwealth*, *supra* n. 50.

91 (1) states:

> Subject to this section, a child of a marriage that is void shall be deemed for all purposes to be the legitimate child of his parents as from his birth or the commencement of this Act, whichever was the later, if, at the time of the intercourse that resulted in the birth of the child or the time when the ceremony of marriage took place, whichever was the later, either party to the marriage believed *on reasonable grounds* that the marriage was valid.[230]

Thus a woman living in South Australia who had read press reports of the Family Relationships Act, 1975 (S.A.)[231] and understood them to say that *de facto* relationships are recognized perhaps might "reasonably" have a subjective belief that her cohabitation marriage was "valid", at least if it lasted for five years.[232] Therefore Federal ancillary jurisdiction under the Family Law Act over void marriages could be invoked. No doubt many judges would not be eager to adopt this "reasonable subjective belief" test due to the evidentiary morass it would create when deciding when is it reasonable to be mistaken about the law.

Naturally these latter two tests, based upon the subjective or reasonably-held subjective beliefs of one party, would have to be qualified by a degree of bona fides on the part of the applicant. That is, if the applicant stood in court and said, "At no stage of the relationship did I ever believe it was a full status marriage" *and additionally* there was no objective chance of it being a full status marriage, then the court would refuse to declare the marriage to be void and/or refuse to exercise ancillary jurisdiction.[233]

A second possible test whether to exercise jurisdiction over ancillary relief would not depend on the objective or subjective state of the *existing* law of marriage as did the permutations of the first test. Rather, it would turn on the predominant historical meaning of marriage. The question of whether the Family Court has jurisdiction would turn on the same constitutional question, already discussed,[234] of what is the meaning of "marriage"? Thus the second possible test would be, is the *de facto* relationship one which during most of English

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[230] Two English cases interpreting a similarly worded section in the Legitimacy Act 1959 (U.K.) are illustrative of when a subjective belief in validity might be deemed to be reasonable: *Sheward* v. *A-G* [1964] 2 All E.R. 324; *Hawkins* v. *A-G* [1966] 1 All E.R. 392; discussed in Finlay and Bissett-Johnson, *op. cit. supra* n. 152 at 255-6.

[231] See Bailey, *supra* n. 2 at 174-6.

[232] Presumably on this argument she could invoke Federal jurisdiction over a void marriage even if the relationship broke up before five years cohabitation had elapsed.

[233] Compare *In the marriage of Read supra* n. 78 and *In the marriage of Tansell, supra* n. 99 where the applicant openly admitted that there were no subjective or objective doubts concerning the *validity* of the marriage, but still wanted a declaration of validity in order to attract property jurisdiction. Comment J. Wade, *supra* n. 79; *supra* text at nn. 214-222.

[234] See detailed discussion *supra* text at nn. 117-128.

history A.D., would have been called a "marriage"?[235] (Alternatively, one could attempt to discover the meaning of the word "marriage" in Australian history presumably during European contact). Thus certainly *sponsalia de verba de praesenti* (exchanging promises with an intention to immediately have the rights and obligations of husband and wife) and *sponsalia per verba de futuro subsequente copula* (exchanging betrothal promises and later engaging in sexual intercourse) would be included.[236] Moreover, a reasonable period of public cohabitation and/or the acknowledged birth of a child to a relationship would give rise to a strong evidentiary presumption that such a traditional form of marriage had taken place.[237] Thus the relationship would historically be closely associated with traditional marriage, and would thereby justify a nullity declaration and the invoking of jurisdiction over ancillary relief.

Again, this secondly suggested test has numerous problems. For example many *de facto* couples (or at least one of the pair) would say, "We did not intend to be married, only to live together", and therefore we are not in the category of a traditional marriage by express or implied exchange of marriage promises. This objection opens a Pandora's box. The very important historical and recurrent question is thereby raised, "What is a legally acceptable motive for marriage?"[238] A doctrine of correct motives or mental reservations has always been particularly important in the Roman Catholic church and those jurisdictions where divorce is difficult to obtain.[239] That the investigation of subjective motives causes both conceptual and evidentiary problems can be illustrated by the litigation arising out of Scottish Law which recognized marriages *per verba de praesenti* (i.e. an exchange of promises in the present tense) until 1940.[240] The allegation of marriage by a merely imputed exchange of promises with no attendant solemnity is always open to the objection by one party (or perhaps both) "I did not really intend to marry, I only, or predominantly, wanted X, Y or Z".[241] By way of comparison, the English common law has recently been careful

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[235] *Ibid.*

[236] *Cf. R.* v. *Millis supra* text at n. 123.

[237] But note that for the vast majority of cohabitation marriages there can at least be *imputed* an exchange of promises. In Scotland, the Marriage (Scotland) Act 1939 terminated legal recognition of marriages *de praesenti*, but retained marriage by cohabitation with habit and repute, thereby clearly suggesting that there is a distinction between the two. See Clive and Wilson, *op. cit. supra* n. 29 at 37, 107-122.

[238] For a discussion of limited purpose marriages see *inter alia* Clark, *op. cit. supra* n. 28 at 114-118; Clive and Wilson, *id.* at 58-67; J. H. Wade, "Limited Purpose Marriage" (1981) *Mod. L.R.* (forthcoming); "Marriages of Convenience in Australia" (1980) *F.L.R.* 84.

[239] *Ibid.*; Rheinstein, *op. cit. supra* n. 8, e.g. at 174-175.

[240] The Marriage (Scotland) Act 1939. See discussion in Clive and Wilson, *op. cit. supra* n. 29 at 58-67.

[241] E.g. have sexual intercourse, have a pleasant companion, satisfy immigration or deportation requirements, benefit under a will, play a joke, confer or obtain pension benefits, climb the social ladder, avoid stamp duty (s. 90 of Family Law Act), etc.

to avoid these large conceptual and evidentiary problems inherent in the question "what is a legally acceptable motive for marriage?" It has done this since the nineteenth century by at least four methods. First, by normally only recognizing marriages solemnized by some specified public ceremony; secondly, by a very strong presumption that the right and acceptable motives are present, at least to some extent, at all solemnized marriages;[242] thirdly, where the question of proper motives is unavoidably raised, by deciding such cases under alternative concepts of duress[243] or fraud;[244] or declaring void only the improper motives rather than the marriage;[245] and fourthly, in the many factual situations where the question of motives could be raised, the parties do not raise it in court as they choose the less expensive and less complex alternative of divorce or *de facto* separation.

However, it is submitted that where objectively the couple's relationship has performed like a traditional marriage, then there may be good reasons to ignore subjective mental reservations such as are contained in the statement, "we didn't intend to marry, we only intended to live together". For that is in effect saying that "we intended to have the benefits of a traditional marriage relationship such as companionship, mutual help and genital sexual expression, as long as these worked out (i.e. potentially indefinitely), but without the law interfering" (i.e. without the "hassles" of paper work and if it doesn't work out, divorce proceedings). But in response to this proposition, it seems clear that marriage has been a status imposed by the law in "appropriate" or "just" fact situations and parties are not normally free to contract out the obligations legally attached to that status.[246] Today certain financial

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[242] "The maxim *capeat emptor* seems as brutally and necessarily applicable to the case of marrying and taking in marriage as it is to the purchase of a rood of land or of a horse" *per* Falconbridge, J. in *Brennen* v. *Brennen* (1890) 19 O.R. 327, 337-8; *In the marriage of Suria* (1977) F.L.C. 90-305 (hope of immigration was a major motivating factor, but not the only one; marriage valid); *R.* v. *Cahill* (1979) 22 A.L.R. 361 (no suggestion that marriages entered into solely for immigration purposes would be other than valid).

[243] Immigration marriages void not because of limited purpose to gain entry to the West but void due to absence of "real" consent due to fear for safety in Communist regimes, e.g. *H.* v. *H.* [1953] 2 All E.R. 1229; *Szechter* v. *Szechter* [1970] 3 All E.R. 905; *cf. Silver* v. *Silver* [1955] 2 All E.R. 614 (insufficient duress); *Truong* v. *Malia* (1977) 25 R.F.L. 256 ("desperate situation" in Vietnam held to amount to sufficient duress).

[244] *In the marriage of Deniz* (1977) F.L.C. 90-252 (limited immigration purpose of man amounted to fraud upon girl; marriage void); *Johnson* v. *Smith* (1968) 70 D.L.R. (2d) 374 (limited immigration motives of sailor amounted to fraud upon girl; marriage void); overruled by *Iantsis (falsely called Papatheodorou)* v. *Papatheodorou* (1971) 15 D.L.R. (3d) 53 (Ont. C.A.).

[245] E.g. *Brodie* v. *Brodie* [1917] P. 271; 33 T.L.R. 525; *Scott* v. *Scott* [1959] P. 103 (reservations *re* sexual intercourse void; marriage valid) *cf. Morgan* v. *Morgan* [1959] P. 92 (companionship agreement effective to the extent that it estopped male from pleading his own impotence as a ground for nullity).

[246] E.g. *Lieberman* v. *Morris* (1944) 69 C.L.R. 69 (it is against public policy to contractually surrender T.F.M. maintenance rights); *Hyman* v. *Hyman* [1929] A.C. 601 (it is against public policy to contractually surrender *inter vivos* spousal rights to maintenance).

obligations of marriage status can often be modified by a post-marriage contract, but only if court approval is obtained.[247]

The second test, namely to examine the historical meaning of "marriage", would have more serious problems with the modern form of engagement. A mutual agreement to marry, coupled with the fact that many engaged couples have sexual intercourse, would make many informal engagements look like traditional marriages. No doubt many judges would not want to exercise ancillary jurisdiction over consummated engagements, unless perhaps the couple had begun to cohabit.[248] Alternatively, a Family Court judge may wish to exercise ancillary jurisdiction over a consummated engagement, especially if cohabitation had commenced, in order to thereby divide property purchased in contemplation of marriage. Presumably in such a case, a judge should be very wary of maintenance and/or property claims under the Family Law Act[249] being used as an indirect form of action for breach of promise to marry.[250]

A third test which could possibly be used to decide whehter it is appropriate to exercise ancillary jurisdiction under the Family Law Act, is to ask, "Did the parties go through a form of ceremony symbolizing an intention to assume traditional marriage functions?" If so, the Court will declare the marriage void and exercise ancillary jurisdiction. That is to say, it is not enough for the *de facto* relationship to be an objectively purported marriage in *function,* rather it must be an objectively purported marriage in *ceremony* at the time of its commencement.[251] Of course, this test alone will exclude the majority of *de facto* relationships which are presumably commenced without any slight form

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[247] E.g. Family Law Act 1975 (Cth.), s. 87. See generally J. H. Wade, "Maintenance Agreements" in I. McCall, A. Dickey and J. H. Wade, *Family Law and Property — Three Essays* (1980).

[248] Very difficult questions are raised concerning whether the intercourse was "marital" intercourse in reliance upon the engagement promise or "merely" illicit or experimental intercourse. E.g. see Scottish cases on this problem in Clive and Wilson, *op. cit. supra* n. 29 at 114-115.

[249] Ss. 72-79.

[250] Marriage Act 1961 (Cth.), s. 111A — "heart balm" action abolished.

[251] That *some* kind of ceremony should provide the vital distinction between a void marriage and a non-existent marriage has been suggested by Jackson, *op. cit. supra* n. 124 at 85-86; Cretney, *op. cit. supra* n. 23 at 69-71 (apparently misquoting *Manson* v. *Heaslip* [1949] 1 W.W.R. 717 (Brit. Col.)); hinted at in *Merker* v. *Merker* [1963] P. 282 at 292 (Sir Jocelyn Simon). Also by implication, ss. 48 (1), 91 of the Marriage Act 1961 (Cth.) and the "Form of Application for Decree of Nullity" (Reg. 34 of Family Law Act Regulations), cl. 2, suggest that a void marriage needs some kind of "ceremony"; also *Lavery* v. *Lavery* (1978) Nova Scotia R. (2d) 22 (man and pregnant woman went through ceremony before bogus official. At least the man knew that the official was not proper. Declaration of nullity apparently granted to woman). *Cf. Langworthy* v. *Langworthy* (1886) 11 P.D. 85 (court had jurisdiction to award alimony *pendente lite* to the wife and permanent provision to the child of the union despite proof of complete absence of a marriage ceremony); *Re Estate of Liu Sinn Min, Deceased* [1974] 2 *Malaya L.J.* 9; [1975] 1 *Malaya L.J.* 145 (secondary Chinese marriage commenced during a tea ceremony held not to be a "void" marriage for purposes of intestacy entitlement as this would be contrary to clear intention of legislation).

of ceremony. Probably some judges would be attracted to this kind of test for that very reason. It provides a reasonably exact cut-off point and does not result in a large and unexpected influx of *de facto* marriages into the existing federal jurisdiction. The question of a positive legislative step to increase Federal jurisdiction over *de facto* marriages is thereby left in the hands of Parliament.

Naturally, this third possible test raises the question of what is a sufficient ceremony? Presumably the minimum requirements would be an element of publicity, at the time of or soon after the ceremony, some statement that it was a marriage ceremony, and some degree of solemnity. For purposes of *criminal* liability only, it has been held that going through an Islamic religious ceremony of marriage is not a form of "solemnization of marriage" as it had no possibility of itself creating a legal marriage bond.[252] However, this of course does not decide the issue of whether such a ceremony would have been sufficient to create a void marriage. Presumably the kind of ceremony as occurred in the facts of *Isaac Penhas* v. *Tan Soo Eng*[253] would qualify to render the marriage void and subject to ancillary jurisdiction. In that case, a Jewish male went through a form of ceremony with a non-Christian Chinese woman in Singapore in 1937. The bride and groom stood before an old Chinese man who asked them separately whether they were willing to become man and wife. They both responded affirmatively. During this time the woman was holding joss sticks, bowing and worshipping in Chinese fashion, while the groom had his head covered in a handkerchief while uttering phrases apparently in Hebrew. Of course many "ceremonies" are far less solemn and elaborate. What if the parties exchanged promises by the light of the full moon as was the family custom? What if a cohabiting couple held a party for their closest friends as a method to publicly announce their partnership? Would this be sufficient to amount to a void marriage over which the courts would exercise ancillary jurisdiction under the Family Law Act?[254]

The issue of whether to exercise ancillary jurisdiction would be further complicated if the group who conducted the ceremony was a particularly dangerous or disliked one. What if the ceremony had been conducted according to the rites of a separatist Tasmanian terrorist group or the Satanic occult? Perhaps a judge would thereby be influenced to refuse to exercise any jurisdiction[255] on the argument that

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[252] *R.* v. *Bham, supra* n. 70; *R.* v. *Mohamed Ali; supra* n. 185.
[253] *Supra* n. 165.
[254] Ss. 60, 71, 5(4).
[255] Refusal to exercise jurisdiction has been a traditional response of the English courts for "excessively" abnormal marriages. E.g. *Hyde, supra* n. 118 (the English matrimonial court could not exercise jurisdiction over a potentially polygamous Mormon marriage); also *Risk* v. *Risk* [1951] P. 50, and *Sowa* v. *Sowa* [1961] P. 70; *cf.* now complete legal recognition of certain polygamous marriages under the Family Law Act 1975 (Cth.), s. 6. But note generally the

granting ancillary relief to such broken relationships somehow encourages the dangerous organization.

To summarize, three tests have been suggested above to help answer the question of when is it appropriate to exercise ancillary jurisdiction under the Family Law Act over *de facto* marriages. Firstly based on the possibility, measured by different standards, that the *de facto* marriage may have been valid; secondly based on the dominant historical meaning of marriage; thirdly based on the occurrence of some kind of ceremony.

**Conclusion**

This article has sought to explore the question of when will a *de facto,* invalid or non-marriage be categorized a marriage "void" for lack of formalities under the Marriage Act 1961 (Cth.) and the Family Law Act 1975 (Cth.)? Clearly some test must be established. A list of tests has been presented in an attempt especially to distinguish which *de facto* marriages ought to be called void marriages. Furthermore, even if a *de facto* marriage is labelled as a void marriage, it remains a matter of uncertainty whether a court will therefore consider it "appropriate" to exercise ancillary jurisdiction.

What is needed is a workable test devised by the courts for the meaning of a marriage void for lack of formalities, and a test suggesting when it is "appropriate" to exercise ancillary jurisdiction in relation thereto. Until then, the extent of Federal constitutional power over *de facto* marriages remains a matter of some speculation. Moreover until then, the door must remain ajar for *some de facto* relationships to come within the Family Law Act's present ancillary jurisdiction over property, maintenance and custody.

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Footnote 255 (Continued).

difficulties when judges wash their hands of "illegal" behaviour under such principles as *ex turpi causa non oritur actio*; e.g. *id. Hyde.*