THE COMMONWEALTH MARRIAGE POWER AND THIRD PARTIES IN CUSTODIAL PROCEEDINGS

VITZDAMM-JONES v. *VITZDAMM-JONES*
ST. CLAIRE v. *NICHOLSON*

1. Introduction

The Family Court of Australia, despite its general name, does not have jurisdiction over family law generally. The Family Court was created under s. 71 of the Commonwealth Constitution and was given its jurisdiction by the Family Law Act 1975 (Cth.). The jurisdiction of the Family Court is authorised by s. 77(i) by reference to the matter in s. 76(ii) which in turn attracts the substantive matters in s. 51(xxi), s. 51(xxii) and s. 122. The Family Court, as a Federal Court, can only be invested with jurisdiction over matters connected with marriage (s. 51(xxi)) and matrimonial causes (s. 51(xxii)). State Courts retain jurisdiction over residuary areas of family law.

In two recent cases, the High Court was called upon to decide whether the Family Court could validly entertain custodial proceedings between a third party to the marriage and the surviving party of the marriage (*Vitzdamm-Jones* v. *Vitzdamm-Jones*[1]) and between two third parties when the surviving party to the marriage is joined as co-defendant (*St. Claire* v. *Nicholson*[2]).

The purposes of this case note are to compare and contrast the judgments in both cases in the light of preceding authority and to discuss the legal principles established by both decisions.

2. The Facts

(1) *Vitzdamm-Jones* v. *Vitzdamm-Jones*

In this case the contest was concerned with the custody of the boy Felix who was the child of the marriage between Alfred Athol Vitzdamm-Jones (Alfred) and Bronwen Ruth Vitzdamm-Jones (Bronwen). The Family Court had ordered by decree that the marriage be dissolved. Later, in October 1978 the Family Court ordered that the parties have joint custody of the child. Alfred married the applicant Wendy Jane Vitzdamm-Jones

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[1] (1981) 55 A.L.J.R. 193.
[2] (1981) 55 A.L.J.R. 193. The two cases under consideration were heard at the same time and the decisions were handed down together.

(Wendy). On 5th September 1979 Bronwen made an application for the sole custody of the child who had been throughout in her care. The hearing was set to be held in February 1980. However, Alfred died on 1st December 1979. On 6th December Wendy applied to the Family Court for an order to, *inter alia,* give her sole custody or access to the child.[3] Bronwen argued that the Family Court had no jurisdiction to make the order sought by Wendy. The case was removed into the High Court under s. 40 of the Judiciary Act 1903 (Cth.).

(2) *St. Claire* v. *Nicholson*

In this case the contest was concerned with the custody of the boy Shane who was the child of the marriage between Maxwell Francis Sweep (Sweep) and Judith Ann Nicholson (Judith). The parents had separated and the mother was given custody of the child and sufficient maintenance under the Maintenance Act 1964 (N.S.W.). The marriage was later dissolved but no custody order was made by the Supreme Court. Judith married the plaintiff Edward St. Claire but the child remained throughout in her custody. Judith died and the maternal grandparents took Shane. The plaintiff commenced proceedings in the Equity Division of the Supreme Court of New South Wales. The father, Sweep, was joined as party to the proceedings but he did not apply for custody of the child. He merely filed an affidavit in which he stated that the Family Court did have complete jurisdiction to deal with the custody of the child. The proceedings were removed to the High Court under s. 40 of the Judiciary Act 1903 (Cth).

The central problem was whether the marriage power was sufficiently wide to permit the Commonwealth to legislate validly with regard to custodial proceedings between a third party and the surviving party of the marriage and custodial proceedings between two third parties with the surviving party as co-defendant.

3. Earlier Authorities

Earlier authorities had held that the marriage power extended beyond the mere regulation of the formalities of the act of marrying.

In the *Marriage Act Case*[4] the High Court held that a law concerned with bigamy was a valid exercise of the marriage power. More importantly, the High Court held that laws concerned with the legitimization of children by a subsequent marriage or legitimization out of a putative marriage were valid. These laws were valid because legitimization flowed from, and was the consequence or effect of, the act of marriage.

In *Russell* v. *Russell*[5] a majority of the High Court held that the Commonwealth could validly enact provisions within s. 51(xxi) concerned with the enforcement of rights arising and flowing from the act of marriage (independent of matrimonial causes) such as maintenance or the custody of children of the marriage. However, the Commonwealth could not make

[3] The application was made under s. 61(4) of the Family Law Act 1975. See Part 4 *infra.*
[4] *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529.
[5] (1976) 134 C.L.R. 495.

laws for the settlement of property owned independently of the marital relationship. In that case, Jacobs, J. stated:

> Custody and guardianship and maintenance of children of a marriage are aspects of the nurture of children within the marriage relationship.[6]

The assertion of these rights was, it seemed, confined to the marriage relationship.[7]

In *R.* v. *Demack; ex parte Plummer*[8] the High Court followed *Russell* v. *Russell* and held that the jurisdiction of the family Court was limited in the instant case to the regulation of the affairs of the parties of the marriage. Thus, a Family Court order which determined custodial rights between parents did not affect the State Director of Children's Services in Queensland.

However, in *Dowal* v. *Murray*[9] it was held that rights which arose from, or were the consequences of, a marriage could be asserted against third parties. In this case, the parents were divorced and the mother received custody of the child under the Matrimonial Causes Act 1959 (Cth). She later died, and there followed a custodial contest between the father of the child and the maternal grandparents. This raised the question of the validity of s. 61(4) of the Family Law Act which provided that where the party who had custody of the child died, the surviving party to the marriage could apply for custody "and upon such an application any other person who had the care and control of the child at the time of the application is entitled to be a party to the proceedings."[10]

A majority of the High Court held that the section was valid. Gibbs, A.C.J. and Stephen, J. held that the custodial application by the surviving parent was a pendent proceeding linked to the main custodial proceedings by the death of the successful parent. Jacobs and Murphy, JJ., however, spoke sweepingly about the marriage power facilitating laws with respect to the custody of children of a marriage *per se*.

A general principle may be extracted from the case, *viz.*, that s. 51(xxi) permits the Commonwealth to legislate upon matters that are a consequence of the marriage relationship. Therefore, the surviving party of a marriage could assert rights derived from the marriage relationship, such as a right to the custody of a child of the marriage against a third party.

This brief survey shows that the established principle was that a law enacted under s. 51(xxi) was valid provided that it regulated rights which

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[6] *Id.* at 549.

[7] Note however that Jacobs, J., unlike other members of the majority, took a broad sociological approach. See Part 6 (2) (b) *infra.*

[8] (1977) 137 C.L.R. 40.

[9] (1978) 53 A.L.J.R. 134.

[10] S. 61(4) of the Family Law Act 1975 was originally in the following terms: "On the death of a party to a marriage in whose favour a custody order has been made in respect of a child of the marriage, the other party to the marriage is entitled to the custody of the child only if the court so orders an application by that other party and, upon such an application, any other person who had the care and control of the child at the time of the application is entitled to be a party to the proceedings." S. 61(4) of the Family Law Act was amended in 1979. See Part 4 *infra.*

flowed from the marriage relationship. In *Dowal* v. *Murray,* the custodial rights which flowed from the marriage relationship were successfully asserted by the surviving party to the marriage against the maternal grandparents.

4. The Constitutional Problem

Vitzdamm-Jones v. *Vitzdamm-Jones* and *St. Claire* v. *Nicholson* are clearly distinguishable from *Dowal* v. *Murray.* In *Dowal* v. *Murray,* the surviving party to the marriage was the applicant to the Family Court in the custodial proceedings. In *Vitzdamm-Jones,* a third party was the applicant to the custodial proceedings. In *Dowal* v. *Murray* the father was an interested party in the proceedings. In *St. Claire* v. *Nicholson* the father was a co-defendant but had made no application for the custody of the child.

The relevant legal question, for present purposes, was whether s. 61(4) of the Family Law Act in its amended form was valid under s. 51(xxi) of the Constitution.

Section 4(1)(f) of the Family Law Act defines "matrimonial cause" as:

> any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of the paragraphs (a) to (e), including proceedings of such a kind pending at, or completed before, the commencement of this Act.

Section 61(4) of the Family Law Act permitted the application for a custodial order by third parties. If s. 61(4) was valid it would probably constitute a proceeding contemplated by s. 4(1) (f).

Section 61(4) provides as follows:

> On the death of a party to a marriage in whose favour a custody order has been made in respect of a child of the marriage—
> (a) the other party to the marriage is entitled to the custody of the child only if the court so orders;
> (b) the other party to the marriage or any other person may make an application to the court for an order placing the child in the custody of the applicant; and
> (c) in an application under paragraph (b) by a person who does not, at the time of the application, have the care and control of the child, any person who, at that time, has the care and control of the child is entitled to be a party to the proceedings.

The High Court had to decide, *inter alia,* the validity of s. 61(4), and in particular the validity of the words, "or any other person" in s. 61(4) (b).

5. The Decision

The High Court (Gibbs, Stephen, Mason and Murphy, JJ; Barwick, C.J., Aickin and Wilson, JJ. dissenting) held that s. 61(4) of the Family Law Act was valid. In the opinion of the majority, the Commonwealth has power under s. 51(xxi) to make laws which deal with proceedings regulating rights arising from the marital relationship, not only between the

parties of the marriage themselves, but also between a party to the marriage and a third party. In properly constituted custodial proceedings, the surviving party to the marriage could be a respondent or a mere co-defendant. It was unnecessary that the surviving party to the marriage be the applicant in the proceedings. In short, a third party could make an application for the custody of a child of a marriage against the surviving party to the marriage.

6. The Judgments: Analysis and Comment

In order to understand fully the significance of the majority judgments, in particular the leading judgment of Gibbs, J., it is convenient to discuss the dissenting judgments first.

(1) *The Dissenting Judgments*

(a) *Barwick, C.J.*

His Honour held that in *Vitzdamm-Jones* s. 61(4) was not operative on the ground that a joint custody order under s. 61(1) was not an order in favour of either party as required by s. 61(4). Bronwen was the surviving party under a joint custody order and was entitled to the custody of the child.

In *St. Claire* v. *Nicholson,* however, there had been an order for sole custody of the child in favour of one parent and it was necessary to consider s. 61(4). His Honour held that the proceedings were unrelated to the earlier matrimonial cause proceedings. Moreover, the father's presence in the fresh proceedings would not aid the defendant's case. He stated:

> . . . the father raises no interest or concern of his own for adjudication in the proceedings. But, more fundamentally the death of the mother renders it impossible for the father to raise a matrimonial question . . .[11]

Barwick, C.J. conceded that legislation based on s. 51(xxi) could deal with custody matters which were independent of matrimonial cause proceedings. Yet he also contemplated that the marriage and matrimonial causes powers "are not mutually exclusive . . . they are each to be construed in a document which includes both."[12]

Unlike other members of the High Court, Barwick, C.J. read both powers as closely related ones. Indeed the major theme of his judgment was that "the existence and nature of the marital relationship sets the parameters of the legislative power under pl. (xxi) and pl. (xxii)."[13]

Therefore a matrimonial cause could not be raised without the involvement of the two parties of the marriage and the marriage power could only regulate the relationship and rights of the two spouses in that marriage. The custody of the child of the marriage was a right which was related to the marriage relationship but not exclusive to this relationship.

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[11] *Supra* n. 1 at 197.
[12] *Id.* at 198.
[13] *Ibid.*

Barwick, C.J. noted that an order for the custody of a child "remains effective after the death of the other parent not because the legislative power continues to support it but because that power did support it when made".[14]

In short, he held that the Commonwealth legislative power and the Family Court's jurisdiction under s. 51(xxi) and s. 51(xxii) were limited to the joint lives of the parties to the marriage. Therefore, s. 61(4) was invalid because it purported to give the Family Court power over custodial proceedings which involve third parties. Furthermore, s. 4(1)(f) of the Family Law Act was invalid because it contemplated proceedings other than between the two parties of the marriage.

Despite the fact that this approach is, with respect, a narrow and artificial one in the light of the other judgments, it has some commendable aspects.

First, this approach settles a difficult jurisdictional problem. His Honour stated that his approach "provides that certainty of jurisdiction (and) . . . a clear cut division of the jurisdiction between the Family Court and the Courts of the States".[15]

Second, this approach was entirely consistent with the viewpoint which Barwick, C.J. expressed in an earlier case. His Honour stated in *R.* v. *Lambert; ex parte Plummer*[16] that the decision in *Russell* v. *Russell*[17] "should be restrictively confined and not used as a base for any extension of what is comprised within the concept of a law in respect to marriage".[18]

Certainly, it would be incongruous to uphold the validity of a law which entitled the surviving party to the marriage to assert his rights arising from the marital relationship against a third party, and yet declare that *Russell* v. *Russell* should be read restrictively.

Third, it is obvious that two situations must exist under his Honour's formulation before the power under s. 51(xxi) and s. 51(xxii) may be exercised validly. Either a marriage relationship must exist or, where divorce proceedings have taken place, the former spouse must be alive. His Honour's analysis suggests that on the death of a party to a marriage the rights which arise are residuary and have an independent and changed purpose. Wilson, J. expressed a similar view.

(b) *Wilson, Aickin, JJ.*

Wilson, J. pointed out that "the death of a parent who has custody of a child of the marriage radically alters the context in which the welfare of that child falls to be considered".[19]

His Honour concluded that the custody of a child rather than the marriage of the parents was the central consideration in such a case.

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[14] *Ibid.*
[15] *Id.* at 199.
[16] (1980) 55 A.L.J.R. 71.
[17] *Supra* n. 5.
[18] *Supra* n. 16 at 72.
[19] *Supra* n. 1 at 210.

Therefore the Supreme Court of each State would have the appropriate jurisdiction. However, his Honour felt constrained by the authority of *Dowal* v. *Murray* which had held that s. 61(4) in its original form was a valid law of the Commonwealth. He pointed out that in that case, the surviving party brought the custodial proceedings against the maternal grandparents. Nevertheless he distinguished *Vitzdamm-Jones* and *St. Claire* v. *Nicholson* from *Dowal* v. *Murray*.

In *Vitzdamm-Jones* a third party had applied for a custodial order from the Family Court. His Honour held that a third party "cannot by a law with respect to marriage be authorised to invoke the jurisdiction of the court".[20]

Therefore Wendy could not apply under s. 61(4) to the Family Court for the custody of Felix.

In *St. Claire* v. *Nicholson,* Wilson, J. held that the surviving party was not an interested party and his rights were not at stake:

> He has not sought the custody of his child. The contest is between the step-father of the child and the child's grandparents. If Mr. Sweep were to institute proceedings for custody in the Family Court then on the authority of *Dowal* v. *Murray* that court would have exclusive jurisdiction to hear and determine the application; but unless and until he does I see no obstacle to the Supreme Court of New South Wales determining the application that is before it.[21]

Wilson, J. held that s. 61(4) as amended was an invalid law of the Commonwealth. His Honour clearly limited the jurisdiction of the Family Court to cases where the surviving party of the marriage applied for a custodial order and therefore by implication was an interested party to the proceedings.

Aickin, J. decided the cases on different grounds. His Honour concurred with Barwick, C.J. that s. 61(4) was inoperative where a joint custody order had been made. Therefore Bronwen automatically had sole custody of Felix. In *St. Claire* v. *Nicholson* he held that the instant proceedings were not related to the completed matrimonial causes proceedings and therefore the Family Court did not have jurisdiction.

Nevertheless he concurred with Wilson, J. that s. 61(4) as amended was beyond the power of the Commonwealth and suggested that the words "or any other person" were severable under s. 15A of the Acts Interpretation Act 1901 (Cth.).[22]

The effect of both of these judgments was to restrict Commonwealth power to that upheld in *Dowal* v. *Murray*.

(2) *The Majority Judgments*

(a) *Gibbs, Stephen, Mason, JJ.*

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[20] *Ibid.*
[21] *Ibid.*
[22] *Supra* n. 1 at 208.

The judgment of Gibbs, J., with whom Mason, J. completely concurred and Stephen, J. generally concurred, is the leading judgment in the cases under consideration. The judgment clarified and established the law in this area.

In *Vitzdamm-Jones,* Gibbs, J. held that s. 61(4) applied not only to sole custody orders, but also to custody orders made in favour of both parties to the marriage. The death of one joint custodian could necessitate the operation of s. 61(4). The words "in whose favour" meant little more than "to whose advantage" or "for the benefit of whom", and therefore a custody order could be made in favour of both parties to the marriage.[23] Thus the outcome of both cases depended on the validity of s. 61(4).

Gibbs, J. followed *Dowal* v. *Murray* unequivocally. His Honour stated:

> . . . there is no reason in principle why a power which extends to the creation, declaration or definition of the rights and duties which arise from the marriage relationship should exist only as between the parties to the marriage and the children of the marriage and should not be enforced against other persons.[24]

He noted that in *Dowal* v. *Murray* he had held that proceedings under the original s. 61(4) had come within s. 4(1)(f) of the Family Law Act. He stated that if such proceedings did not come within the matrimonial causes under par. (f), s. 61(4) in its amended form "would perform the double function of creating the right to bring the proceedings and give the Court jurisdiction to hear them".[25]

His Honour contemplated that one party to the custodial proceedings would be the surviving party to the marriage. Although the subsection did not specify that the surviving party to the marriage should be a party to the proceedings, the proceedings would not be properly constituted unless the surviving party to the marriage was joined as a party to the proceedings.[26]

Barwick, C.J. and Wilson, J. held that the addition of the father as co-defendant in *St. Claire* v. *Nicholson* was insufficient to constitute valid proceedings (apart from the question of the validity of s. 61(4) itself). This was due to the fact that the father's custodial rights were not the real subject matter of the proceedings. Gibbs, J., however, held that despite the fact that the father had made no application for custody of the child, his interest in the child was at stake. He was rightly made a party to the proceedings and had satisfied the necessary requirement that the surviving party to the marriage must be a party to the custodial proceedings.

Gibbs, J. held that the Family Court had jurisdiction to entertain proceedings in which a third party was the applicant and where the

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[23] *Supra* n. 6 at 202.
[24] *Id.* at 203.
[25] *Id.* at 201.
[26] His Honour also suggested that proceedings may be properly constituted when the whereabouts of the surviving lawful parent cannot be ascertained and therefore he or she cannot be joined as a co-defendant. It is submitted that the suggestion of Gibbs, J. is at most a minor qualification to the principle that the surviving lawful parent must be a party to the proceedings.

surviving party to the custodial proceedings was a mere co-defendant. In both situations the Family Court would regulate rights which arose out of the marital relationship.

His Honour held that in *Vitzdamm-Jones* the Family Court had *prima facie* jurisdiction but Wendy's application to intervene in the proceedings between Bronwen and Albert was refused. These proceedings abated on Alfred's death. In *St. Claire* v. *Nicholson* his Honour unequivocally asserted that the Family Court had jurisdiction to entertain the proceedings.

In contrast to the judgment of Wilson, J., Gibbs, J. extended the principle established in *Dowal* v. *Murray*. Nevertheless, he carefully qualified and clarified the capacity of the Family Court to entertain proceedings which involved third parties. Three main qualifications were made.[27]

First, a third party cannot apply to the Family Court for custody of a child where no custody order has been made in favour of a party to a marriage.

Second, if both parties are dead, a third party cannot apply to the Family Court for the custody of a child of a marriage.

Third, as stated previously the surviving party to the marriage must be joined as a party to the proceedings.[28]

These limitations strictly prohibit the development of custodial proceedings *per se*. Indeed, Gibbs, J. stressed that the Commonwealth did not possess the power to make laws for the custody of children: "... a law is not a law with respect to marriage simply because it has some operation with respect to the child of a marriage".[29]

Stephen, J. completely concurred with the general principles enunciated by Gibbs, J. However he agreed with Barwick, C.J. that s. 61(4) had no operation where an order for joint custody had been made. Therefore, in *Vitzdamm-Jones,* Wendy's application was not authorised by the Act. Bronwen, as surviving party to the marriage, had the custody of the child Felix.

(b) *Murphy, J.*

The judgment of Murphy, J. exhibited a broad and uncompromising approach under which the marriage and matrimonial causes powers are untrammelled by the major preoccupations evident in the other judgments.

Murphy, J. agreed with Gibbs, J. that a custody order may favour one or both spouses. Thus the validity of s. 61(4) would decide the result of *Vitzdamm-Jones* and *St. Claire* v. *Nicholson.*

His Honour swiftly dismissed as "untenable" the view that the joint lives of the parties to the marriage set the limits to the Family Court's jurisdiction under the marriage and matrimonial causes powers. Instead,

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[27] *Supra* n. 1 at 203.
[28] *Supra* n. 26.
[29] *Supra* n. 1 at 203.

Murphy, J. endorsed the view articulated by Jacobs, J. in *Russell* v. *Russell,*[30] that the Commonwealth has power to make laws concerning the custody of children of a marriage although one or both parties to the marriage are dead. Murphy, J. restated the opinion he expressed in *Dowal* v. *Murray:*

> The power to make laws with respect to marriage enables parliament to protect the child if one or both parties die, or become incapable or unwilling to promote the well-being of the child, or if the parties separate or divorce.[31]

The general effect of this interpretation is that the Commonwealth could make laws concerning the custody of the child of a marriage whether the marriage relationship actually exists or whether the marriage relationship is a mere historical fact.

Despite the obvious dissimilarities in the approaches taken by Barwick, C.J., Gibbs, J. and Wilson, J., their judgments were based on the supposition that marriage is primarily a relationship between two people in which rights and duties arise. In contradistinction, Murphy, J. adopted a sociological approach in which marriage is perceived as a social institution:

> Parliament is entitled to treat marriage as an institution concerning the community and the offspring as well as the parties. If it chooses, it may limit its laws to those dealing only with the mutual rights and obligations of the parties. However, it is not constitutionally limited to such a narrow approach and may make laws on a much wider basis.[32]

In effect, this interpretation gives the Commonwealth the power to deal with the custody of children of a marriage *per se.*

It is submitted, with respect, that it is unlikely that this interpretation could become the predominant one at present. The other members of the High Court clearly contemplated that the marriage and matrimonial causes powers could not give the Commonwealth power to legislate for the custody of children of a marriage *per se.*

7. Third Parties

The approaches taken by Barwick, C.J. and Wilson, J. are understandable in the light of the High Court's concern that the powers under s. 51(xxi) and s. 51(xxii) should not be used unduly to extend or limit the rights of third parties. Indeed, all the judgments (with the exception of that of Murphy, J.) recognise the Commonwealth's limited powers in this area.

In *R.* v. *Lambert; ex parte Plummer,* Gibbs, J. held that the Family Court could not authorise custodial orders which would prevail over an order by a State Court whereby a child was placed in the care of an officer of a State. His Honour stated that the relevant section (s. 10 of the Family Law Act) "seems to me to go beyond merely defining and providing for

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[30] *Supra* n. 5.
[31] *Supra* n. 1 at 205.
[32] *Ibid.*

the enforcement of the custodial rights that flow from the marriage relation".[33]

Gibbs, J. was careful to limit the Commonwealth's legislative powers and the Family Court's jurisdiction to matters arising from the marital context. In *Vitzdamm-Jones* and *St. Claire* v. *Nicholson* he stated that the decision in these cases did not detract from the correctness of *R.* v. *Demack*[34] and *R.* v. *Lambert*.[35]

8. Conclusion

The judgment of Gibbs, J. in *Vitzdamm-Jones* and *St. Claire* v. *Nicholson* accurately represents the law with regard to third parties and custodial proceedings with respect to a child of a marriage. These two cases are probably not great watersheds in Federal Constitutional Law. Nevertheless, the decisions clarified the law relating to custodial proceedings and third parties. Moreover, the narrow literal approach taken by Barwick, C.J. will no longer represent the law in this area.

Postscript

In *Fountain* v. *Alexander*[36] the High Court upheld the decisions in *Vitzdamm-Jones* and *St. Claire* v. *Nicholson* and followed the latter case.

The facts of *Fountain* v. *Alexander* arose as follows.

The marriage of the defendants (Mr. and Mrs. Jackson) was dissolved by the Supreme Court of New South Wales and the wife was awarded custody of the child of the marriage. The wife lived with Mr. Fountain (the first plaintiff) from whom she later separated. Subsequently, the first plaintiff married the second plaintiff. Mrs. Jackson remarried (to become Mrs. Alexander). The child lived with Mrs. Alexander and the plaintiffs alternately. The plaintiffs made an application to the Supreme Court of New South Wales for orders that the child, who was born of the marriage between the defendants, be declared a ward of the court and be placed in the care and control of the plaintiffs. The case was removed to the High Court under s. 40(1) of the Judiciary Act 1903 (Cth.).

The High Court (Gibbs, C.J., Stephen, Mason, Murphy, Aickin, Wilson and Brennan, JJ.) held that the Supreme Court did not have the jurisdiction to entertain the proceedings. The application was, in effect, an application for the custody of a child of a marriage.

All the judgments, with the exception of Murphy, J., pointed out that the proceedings fell within s. 4(1)(f) of the Family Law Act. Under s. 4(1)(f), a third party may commence proceedings for the custody of a child of a marriage where the proceedings are in relation to the earlier

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[33] *Supra* n. 16 at 74.

[34] *Supra* n. 8.

[35] See cases concerned with s. 51(xxii), the matrimonial causes power and third parties: *R.* v. *Dovey; ex parte Ross* (1979) 141 C.L.R. 526 and *Ascot Investments Pty. Ltd.* v. *Harper* (1981) 55 A.L.J.R. 233. For an analysis of the latter case see Freckleton, "The Jurisdiction of the Family Court over Third Parties" (1982) 9 *Syd.L.R.* 688.

[36] (1982) 56 A.L.J.R. 321.

proceedings within the meaning of paragraph (f). The Court held that s. 4(1)(f) is a valid law of the Commonwealth because it regulates rights which arise from the marriage relationship. The Commonwealth may make laws under s. 51(xxi) which provide for the adjudication of a claim made by a third party to the marriage against a party to displace the earlier order giving custody of the child of the marriage to that party.

Murphy, J. pointed out that the decisions in *Vitzdamm-Jones* and *St. Claire* v. *Nicholson* established that the Family Law Act validly invested the Family Court with the exclusive jurisdiction to deal with the custody of the defendants' child.

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