# CHILDREN AND THE FAMILY LAW ACT: THE 1988 CHANGES[1]

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## I. INTRODUCTION

Australian children's law since the 1960s has been characterised by an expansion of federal powers at the expense of those of the States and Territories. Until 1961 the custody, guardianship and maintenance of children was a matter for the States. In that year the Matrimonial Causes Act 1959 (Cth) came into force. Proceedings relating to children which were ancillary to proceedings for divorce or other 'principal relief' were now dealt with under the new federal Act, although the Act was administered by the State and Territory Supreme Courts. Proceedings relating to children which were not ancillary to divorce, and of course all proceedings relating to ex-nuptial children,[2] remained governed by State and Territory laws, which were largely based on earlier English legislation.

There was a major change in 1976, when the Family Law Act 1975 (Cth) came into operation. The Act drew on the constitutional power relating to "marriage"[3] and provided for child custody, guardianship and maintenance of children of a marriage whether or not there were proceedings for divorce or other "principal relief".[4] The Act was administered by a new Court, the Family Court of Australia, which became by far the largest court in

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2 Technically, children who were not "children of a marriage."

3 Section 51 (xxi) ("marriage") and (xxii) ("divorce and matrimonial causes . . . ")

4 This result was achieved through provisions creating jurisdiction over "matrimonial causes" (s. 39) and defining that term to include various proceedings relating to children of a marriage.

Australia, and operated everywhere except Western Australia, which had its own State family court.[5]

The Family Law Act was subjected to a number of constitutional challenges, in which the High Court wrestled with the task of finding the limits of the "marriage" power. That story does not need retelling here.[6] When the dust had settled, it appeared that the federal Act could validly provide for custody, guardianship and maintenance relating to children "of a marriage", provided that at least one of the parties to the marriage was a party to the proceedings. However it seemed that the marriage power did not authorise laws which dealt with child welfare, a matter traditionally covered by State laws.[7] Both adoption and child welfare law were in general reserved to the States by the terms of the Family Law Act itself,[8] although there were some problems associated with the definition of these areas of law.

Very broadly, then, the picture that emerged was of a federal court, specially designed for family law matters, which could deal under the federal Act with custody, guardianship and maintenance of children of a marriage. Ex-nuptial children remained under State and territory laws; as did adoption and child welfare.

One anomaly had been removed: no longer did the extent of Commonwealth jurisdiction turn on the whether proceedings for divorce had been commenced. But an anomaly remained: the system now drew a distinction between nuptial and ex-nuptial children, and even prior to the 1975 Act this distinction was coming to be seen as invidious. Why should the national specialist family court be available only to children of a marriage? The distinction between nuptial and ex-nuptial children, drawn as a result of a constitutional provision, clashed with a widespread feeling that the law should not draw distinctions between children on the basis of the marital status of their parents. This idea had emerged in the mid-1970s in legislation passed by most States and Territories seeking to equate the position of nuptial and ex-nuptial children. But by 1985 the High Court had made it clear that whatever the precise boundaries of the "marriage" power, it did not extend to ex-nuptial children.[9]

Commentators and committees of review agreed that the position was unsatisfactory. Pressure built up in favour of some measure, such as a constitutional amendment, that would enable the Commonwealth to extend the scope of the Family Law Act 1975 well beyond the most optimistic view of the available constitutional powers. The reasons, apart from the 'centralist'

5 The Family Court of Western Australia, established under Family Law Act 1975 (Cth) s. 41. The Western Australian legislation is the Family Court Act 1975.

6 See generally A. Dickey, *Family Law* (1985); O. Jessep and R. Chisholm, "Children, the Constitution and the Family Court" (1985) 8 *UNSWLJ* 152.

7 *R* v. *Lambert; ex parte Plummer* (1980) 146 CLR 147.

8 Family Law Act 1975 s. 10.

9 *Re Cook and Maxwell JJ; ex parte C* (1985) 60 ALR 661.

tendencies stimulated by the Whitlam years, appeared to include the following:

1. The Family Court of Australia was a specialist court, intended to be the best possible forum for family law matters. It was silly, and arguably discriminatory, to leave out of its reach a bundle of cases, such as proceedings involving the custody of ex-nuptial children, for which the new Court was equally suitable.
2. After *Russell*,[10] the Act was amended so that property proceedings had to be ancillary to an application for dissolution or other "principal relief". This was a great nuisance, since it seemed that resort must be had to State law until the ground for divorce was established, whereupon property matters could be re-litigated in the Family Court. The main point of basing the Family Law Act 1975 (Cth) largely on the constitutional "marriage" power had been the desire to avoid this kind of jurisdictional two-step, but until the 1980s it seemed impossible to solve the problem with the available constitutional powers. (It turned out in the mid-1980s that the problem could be solved, but by then the movement for a reference of powers was well advanced.)
3. It was confusing and embarrassing to have different laws applicable to children of a marriage and other children. It was seen as particularly unfortunate that in families where there were some children of each kind, it was necessary to deal with the different children in different courts, applying different law.
4. There seemed to be no end to what came to be routinely described as 'arid' or 'sterile' cases litigated in the High Court on jurisdictional and constitutional issues.

Given the notorious difficulties of getting the necessary majorities for a constitutional amendment, a reference of power was the preferred option of most commentators.[11] It was recommended as long ago as the mid-1970s by the Australian Constitutional Convention.[12] It was to include illegitimacy, adoption and maintenance. In 1977 a Standing Committee of Commonwealth and State Attorneys-General set up a Committee which drafted legislation containing a reference of powers. It was now to include custody guardianship and maintenance of ex-nuptial children and children of previous marriages, and property disputes between husband and wife where the ground for divorce was not established (a problem since solved by the 1983 amendments, and a reconsideration by the High Court of the judgments in

10 *Russell* v. *Russell*; *Farrelly* v. *Farrelly* (1976) 134 CLR 495.

11 See, for example, the then Chief Judge of the Family Court, the Honourable Elizabeth Evatt AO, in her Foreword to the special family law issue of this journal: (1985) 8 *UNSWLJ* v-vii. See also *Family Law in Australia: A Report of the Joint Select Committee on the Family Law Act* (1980) chapter 2, and especially the submissions noted at para 2.20 and following.

12 There is a good account of the process up to 1980 contained in *Family Law in Australia*, *id.*, chapter 2.

*Russell*).[13] Negotiations went on forever. A Joint Select Committee supported the reference of power in its 1980 report.[14] But it took until 1 April 1988 for the reference — in yet another version — to come into operation.[15] The impact of this final version of the reference, expressed in the new Part VII of the Act, is the subject of this article.

## II. THE REFERRAL OF POWERS

Section 51 of the Constitution provides that the Parliament shall have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

> (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law; . . .

It has been held[16] that when a State refers a "matter" the State does not thereby lose legislative power over what has been referred. The "matter" is simply added to the list of topics in section 51 about which the Commonwealth can make law. It does not become part of the Commonwealth's exclusive jurisdiction. The relationship between the Commonwealth exercise of its new power and State laws on the subject is determined by section 109 of the Constitution, under which the Commonwealth law will prevail to the extent of any inconsistency.

The Constitution does not expressly deal with the question whether powers once referred can be recaptured by the States. If a State simply referred a matter, and the Commonwealth passed legislation on that matter, and the State then purported to withdraw the reference, arguable questions could perhaps arise. However whether or not a reference, once acted upon, is revocable, there is no obstacle to the reference itself limiting the "matter" referred by reference to time or other factors.[17] This was done, as we shall see, in the reference of powers over children.

The 'referring states' of New South Wales, Victoria, South Australia, and Tasmania referred power by enacting virtually identical legislation.[18] The legislation provides, in brief, for a referral to the Commonwealth of the "matters" of child custody, guardianship, access and maintenance, and payment of child bearing expenses, but excludes adoption and child welfare, these remaining with the State. The effect of the legislation is only to *empower the Commonwealth*: by itself, it does not repeal or affect the

13 See *Fisher* v. *Fisher* (1987) 11 Fam LR 11 (High Court); *Dougherty* v. *Dougherty* (1987) 11 Fam LR 577 (High Court); discussed in Chisholm, Foreman and O'Ryan, *Australian Family Law* (1987) Vol 1, s. [4.27].

14 *Family Law in Australia*, note 11 *supra*.

15 The Family Law Amendment Act 1987 (Cth), which came into force on April Fools Day, 1988.

16 *Graham* v. *Paterson* (1950) 81 CLR 1. See generally, R. Lumb, *The Constitution of the Commonwealth of Australia Annotated* (4th ed, 1986) 192-196.

17 See to the same effect the discussion in Lumb, *ibid*.

18 Commonwealth Powers (Family Law — Children) Act 1986 (NSW).

operation of any State law. Nor, of course, does it limit any other constitutional powers the Commonwealth has, for example under the "marriage" power. This is of some consequence, for as we shall see, the amended Family Law Act continues to draw on the marriage power, so that if the reference was withdrawn, the Family Law Act would remain operative in relation to "children of a marriage". Change in the law is brought about by Commonwealth legislation based on the newly-acquired power, the Family Law Amendment Act 1987, amending Part VII of the Family Law Act.

## A. WHAT HAS BEEN REFERRED?

The operative provisions are virtually identical in each of the referring States. They are, to quote from the New South Wales legislation:-

> Reference of certain matters relating to children
>
> 3. (1) The following matters, to the extent to which they are not otherwise included in the legislative powers of the Parliament of the Commonwealth, are referred to the Parliament of the Commonwealth for a period commencing on the day on which this Act commences and ending on the day fixed, pursuant to section 4, as the day on which the reference under this section shall terminate,[19] but no longer, namely:
>
> (a) the maintenance of children[20] and the payment of expenses in relation to children and child bearing;[21]
>
> (b) the custody and guardianship of, and access to, children.

### 1. Exclusion From Reference of Adoption and Child Welfare

The States specifically excluded adoption and child welfare law from the reference. The relevant provisions are rather lengthy, but it is necessary to set them out:

> 3. (2) The matters referred by subsection (1) do not include the matter of the adoption of children or the matter of the taking, or the matter of provision for or in relation to authorising the taking, of action that would prevent or interfere with —
>
> (a) a Minister of the Crown, an officer of the State, an officer of an adoption agency approved under a law of the State, or any other person or body, having or acquiring the custody, guardianship, care or control of children under [a child welfare law];
>
> (b) the maintenance of, or the payment of expenses in relation to, children who are in such custody, guardianship, care or control;
>
> (c) the jurisdiction of the Supreme Court to make orders in respect of children who are in such custody, guardianship, care or control;
>
> (d) the jurisdiction of a court of the State, under a provision of [a child welfare law], to make orders, or take any other action, in respect of —
>
> (i) the custody, guardianship, care or control of children; or
>
> (ii) access to children or the supervision of children.

19 As noted below, the State legislation provides that the Governor may fix a day as the day on which the reference under this Act shall terminate.

20 The section goes on to define "children" as persons under 18 years of age.

21 The section goes on to provide that these terms include maintenance of persons over eighteen years who have special needs in respect of maintenance or expenses by reason of being engaged in a course of education or training or by reason of a physical or mental handicap.

This provision is clearly intended to preserve the operation of State adoption[22] and child welfare laws.[23] We will return to it below, in considering the impact of the Commonwealth legislation. "Child welfare law" is defined by reference to the particular legislation of each State, including any legislation replacing or amending that legislation.[24]

2. The Commonwealth Acts on the Reference

The Commonwealth acted on the reference by passing the Family Law Amendment Act 1987, which came into force on 1 April 1988. The main effect of the change is to expand the operation of the Family Law Act over custody, guardianship, access and child maintenance, so that it applies to all children, not merely to children of a marriage. Thus the Family Court can now deal with custody etc of ex-nuptial children, and step-children, as well as children of a marriage. In addition, certain provisions of the Family Law Act that create rules of law, as distinct from creating jurisdiction, now apply to children in general. Such rules include provisions about the initial allocation of guardianship and custody to parents, before any court order is made, and rules about the maintenance liability of parents and step-parents.

It might have been expected that the amendments would seek to expand the reach of the Family Law Act by amending the definition of "matrimonial cause" in section 4. Instead, a different approach was taken. All the provisions about children, both those that invest the Family Court with jurisdiction and those that deal with the principles, have been put in Part VII. Perhaps there is some advantage in having all the provisions about children in one Part. But it means that in order to identify the jurisdiction of the Family Court, one must look in two places: Part VII, for jurisdiction over children, and elsewhere (especially sections 4 and 39) for everything else.

3. Ending the Reference

Both the State and Commonwealth legislation deal with the termination of the reference. The State legislation provides that the Governor may, at any

22 There seems to be a reasonably clear distinction between adoption, and custody/guardianship. The former has many consequences, for example relating to inheritance, that the latter does not have. An argument that a custody application really amounted to adoption was rejected in *In the Marriage of Corcoran* (1983) 9 Fam LR 52. The High Court has held that the present injunctive powers of the Family Court of Australia cannot be used to prevent a person from proceeding in a state court for adoption, although there was a difference of opinion on whether redrafted provisions which authorised such orders would fall within the "marriage" power (the case being decided, of course, before the reference of power): *Re LSH; Ex parte LSH* (1987) 11 Fam LR 805.

23 It might perhaps have been arguable, were it not for sub-s (2), that adoption would be included in the matters referred under sub-s (1). Sub-s (2) makes it clear, however, that the Commonwealth does not acquire power to make laws relating to adoption.

24 In New South Wales, the Schedule refers to the Child Welfare Act 1939 (NSW) and the Community Welfare Act 1982 (NSW). Both (except for a few provisions of the former) have been repealed. They have been replaced by a series of Acts, of which the most important is the Children (Care and Protection) Act 1987 (NSW): See *Australian Family Law*, note 13 *supra*, State Legislation volume, under tab Child Welfare. It is clear that this Act 'replaces' the Child Welfare Act 1939 and thus is taken to be referred to in the Schedule by virtue of sub-s. (3)(b).

time, by proclamation published in the Gazette, fix a day as the day on which the reference under this Act shall terminate.[25] As suggested earlier, there seems no reason why the referring legislation may not contain its own limits for the power referred. Thus the reference in this Act is effectively limited by the provisions for termination contained in sections 3(1) and 4 of the State Acts.

In addition, however, the Commonwealth legislation acting on the reference, the 1987 amendment, itself provides that the power is available only while the States' referring legislation remains in force.[26] It seems clear, therefore, that the Commonwealth's power under the reference can be ended at any time by the State Parliament, by repealing the legislation, or by the State government (technically, the Governor, by making a proclamation under section 4, above). Equally, of course, there is nothing to stop the Commonwealth from amending the Family Law Act 1975 to confine it again to the limits of other heads of constitutional power. Thus the reference will remain operative in a referring State only so long as it is desired both by the Commonwealth and that State.

## III PARENTAL RESPONSIBILITIES AND PART VII

Part VII does more than extend jurisdiction under the Family Law Act. It also changes rules of substantive law. In this section we consider provisions relating to the identity and responsibilities of parents. These provisions raise some difficulties, since it is not always clear how far the rules apply, and how they interact with State laws.

The relevant provisions, to be found in Division 2, draw on the reference of power, but in some cases are also and independently based on the "marriage" and "matrimonial causes" powers, and indeed on a power relating to residents of different States. These other bases will not be discussed here: they are narrower than the reference of powers basis, and are therefore of limited importance in the Territories and in the referring States while the reference is in force.[27]

The key provision is section 60E, which provides that Part VII "extends

25 S. 4.

26 S. 60E(4) and (5).

27 S. 60F, with the accurate marginal note "Additional application of Part", says that without prejudice to its effect apart from s. 60F (ie without prejudice to the reference of powers basis, s. 60E) the Part has effect as provided by this section. By sub-s. (2), a rather complex provision, those provisions capable of being based on the "marriage" and "matrimonial causes" power are so based. (Some provisions, such as those relating to recovery of child bearing expenses from fathers of ex-nuptial children, are inherently unable to be brought within the marriage power.) In brief, much of the Part applies to children of a marriage. S. 60G creates jurisdiction under the Part in proceedings between residents of different States.

to" the referring States. This presumably means that those provisions that create rules of law apply in the State.[28]

## A. INITIAL ALLOCATION TO PARENTS OF CUSTODY AND GUARDIANSHIP RIGHTS

Section 63F provides that subject to any court order, the parents of a child are jointly entitled to custody of the child, and each is a guardian of the child. Since the Part applies now to children in general, this section applies to all parents, married or unmarried. It creates custody and guardianship rights, for example, in de facto partners who have children. Thus while section 63F is on its face very similar to the old section 61, its impact is much greater, because it creates rights in parents regardless of their marital status.

The section continues to apply when a parent remarries. For example, if a woman had an ex-nuptial child and later married another man, section 63F provides that the woman and the child's father are guardians and jointly entitled to custody.

### 1. Who is a "Parent"?

The word is not defined.[29] It would clearly include the father of an ex-nuptial child living with the mother. It would probably also include a father whose paternity was inadvertent and who took no interest in the child or the mother. It would presumably even include a man who became a father as a result of a rape. This is startling, but of course in any case where someone wished to argue that custody and guardianship should be differently allocated, the court could do so, and would of course apply the principle that the child's welfare is paramount. Fathers who had had no significant contact with the mother or the child would presumably receive short shrift.

Here is a trickier question: would "parent" include a donor of sperm to an artificial insemination program? If the mother was married, or lived in a de facto relationship, and the husband or partner consented, then under section 60B the child would be the child of the woman and her partner or husband. But suppose the mother was an unmarried woman not in a de facto relationship. The Family Law Act is silent on the matter. At common law, the sperm donor is presumably the father. Under New South Wales legislation, by contrast, the donor is deemed, irrebuttably, not to be the father.[30] Does this New South Wales provision apply to determine who is a "parent" within the meaning of section 63F? Arguably, the New South Wales provision would

28 The provision is subject to sub-ss (4) and (5). The effect of those sub-ss is that Part VII applies only while the States desire it. Sub-s. (4) provides that Part VII extends to a State only while there is in force State legislation referring to the Commonwealth the matters dealt with in Part VII or some of those matters; or legislation adopting Part VII. Such referring legislation is in force in the States, as we have seen. Sub-s. (5) provides that the extension of Part VII to the States is limited to the matters referred, or matters incidental thereto. The referring provisions of the State acts are set out above.

29 Although s. 60 provides that it means the adoptive parent in the case of an adopted child.

30 Artificial Conception Act 1984 (NSW) s. 6.

apply in Part VII proceedings by virtue of the Judiciary Act section 79.[31] Unless, of course, section 60B 'covered the field' of paternity of children born by artificial conception. We return to this problem below.

2. Does section 63F have an Operation Beyond the Family Law Act 1975?

There is no suggestion in the Act or the background material that the provision is limited to proceedings under the Act. Section 63F appears to 'cover the field' of the initial allocation of custody and guardianship rights to children in Australia. As a matter of Commonwealth law, which would under section 109 of the Constitution prevail over any State law purporting to allocate initial custody or guardianship rights in respect of children, the parents of Australian children are entitled to custody and guardianship. Of course this law does not in any way cut down the jurisdiction of courts or other authorities (eg under child welfare laws) to change the regime so created by making orders that re-allocate powers. This is the significance of the word 'initial' in the above description of the field covered by the section.

The new rule may have consequences under other laws. For example, the New South Wales adoption legislation says that consent is required from any person who is a parent or guardian. The biological father of an ex-nuptial child is now a 'guardian' by virtue of the Family Law Act, and thus it may be arguable that his consent is required under State adoption laws to the adoption of his child.[32] I suspect that the New South Wales adoption authorities would be startled if consent is now required from the biological fathers of ex-nuptial children. However this result could be averted by amending the provision in the Adoption of Children Act which states whose consent is required.[33]

Another difficult question arising from the interaction between section 63F and State law relates to the appointment of testamentary guardians. By State law, a person may acquire guardianship by virtue of being appointed as such under the will of a parent.[34] Is such guardianship inconsistent with the Family Law Act and thus inoperative under section 109 of the Constitution? The answer seems to depend on the 'field' which is covered. It is submitted, with some hesitation, that it is not the whole field of guardianship rights, but is limited to the *initial* allocation of parental rights under section 63F, and the re-arrangement of parental rights by way of court orders about custody,

31 As, for example, in *In the Marriage of McArthur* (1982) 10 Fam LR 962.

32 See eg Adoption of Children Act 1965 (NSW) s. 26(3), (3A). There may be room for debate about the correct interpretation of the NSW provisions, which are based on the assumption that some "putative" fathers will be guardians and some will not. They do not fit comfortably with the new situation created by Part VII, in which all fathers are initially guardians of their children. Whether the father's consent should be required, and the circumstances in which it should be dispensed with or the adoption order made against the father's wishes, has been the subject of considerable debate. Note the recent amendments to the Adoption of Children Act, ss 26, 31A-31D, 32.

33 See for example the analysis of the majority in the *Attorney-General (Victoria)* v. *Commonwealth (the Marriage Act case)* (1962) 107 CLR 529.

34 Testators Family Maintenance and Guardianship of Infants Act 1916 (NSW).

guardianship, and access (under other provisions in Part VII). On this view, it does not cover the whole field of parental or guardianship rights. In particular, it would not cover *guardianship rights arising by virtue of a provision in a parent's will*, and thus persons appointed guardians by will would validly acquire guardianship under the State legislation.[35]

3. Validity

Section 63F seems clearly enough within the reference of powers. What was referred was not jurisdiction to make custody and similar orders, but the 'matter' of the "custody and guardianship of, and access to, children". This would include the initial allocation of custody and guardianship rights, as well as the creation of a jurisdiction to re-allocate them by way of custody and guardianship orders.

## B. PRESUMPTIONS OF PARENTAGE

Sections 66P-66U, modelled largely on the 'status of children' legislation adopted by most of the States and Territories in the mid-1970s, provide that persons shall be presumed to be the parents of a child in certain circumstances. These are, in somewhat abbreviated form:

1. A child born to a married woman during the marriage is presumed to be a child of the marriage.[36] The same presumption arises where the child is born within 10 months after the husband's death, and in certain other situations (in which it was presumably thought reasonable to assume that the husband was the father).[37]
2. A child born to a woman who, for a period of at least 6 months ending less than 10 months before the birth, cohabited with a man to whom she was not married shall be presumed to be the child of that man.[38]
3. Persons shown as parents on birth registers are presumed to be parents.[39]
4. Findings by courts that a person is a parent (eg in affiliation proceedings) create a presumption that they are.[40]
5. A paternity acknowledgment made under a law of a State or Territory, or a Commonwealth law or a law of a prescribed overseas jurisdiction, creates a presumption that a man is the father.[41]

The presumptions are rebuttable, and where more than one applies, the one that "appears most likely to be correct" prevails.[42]

A range of questions, some of them quite difficult, arise about the scope and validity of these provisions, and their relationship to State law.

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35 The High Court has shown itself willing, in other contexts, to interpret the Family Law Act in a way that does not create s. 109 inconsistency with well-established state laws: *Smith* v. *Smith* (1986) 10 Fam LR 769.

36 S. 66P(1).

37 S. 66P(2) and (3).

38 S. 66Q.

39 S. 66R.

40 S. 66S.

41 S. 66T.

42 S. 66U.

There are State laws on these questions, and their provisions are not always the same as those of the Family Law Act. For example, the presumption from cohabitation under the Children (Equality of Status) Act 1976 (NSW)[43] applies if the parties have cohabited, even briefly, during the time when conception must have taken place, while the Family Law Act presumption arises only if there has been cohabitation for six months.

Is it possible, in proceedings under the Family Law Act, to rely on such provisions to raise the presumption from a short period of cohabitation?[44] The Family Law Act unfortunately does not say whether its presumptions are exclusive or not. This is a strange omission, and one that may cause unnecessary confusion. However, the better view is probably that the provisions apply exclusively: Parliament would hardly have intended to create such a nightmarish array of presumptions as would apply if a court attempted to use both sets of presumptions. The Explanatory Memorandum and the Attorney-General's Second Reading Speech indicate an intention that the presumptions should operate exclusively.[45] It seems therefore that the provisions 'cover the field' of presumptions of parentage in Part VII proceedings.

There is another question, namely whether the presumptions apply other than in proceedings under the Family Law Act. The rules are of apparently general application. For example, section 60P, setting out presumptions of parentage, does not seem limited to proceedings under the Act.[46] It simply says, to take one presumption, that a child born to a woman during a marriage shall be presumed to be a child of the marriage. On its face, this provision would apply in any legal context, for example where a person claimed to inherit property as the child of a person,[47] or where a question arose whether a sexual relationship was incestuous.

It might be thought that, read as a whole, the Act suggests that the provisions only apply in Family Law Act proceedings. That may well have been the intention of the Attorney-General,[48] but it is hard to see any basis in the legislation for such a narrow interpretation. Rather, section 60F says that Division 7 (where the presumptions are to be found) "operates according to its tenor", which seems to mean that it is not limited either to referred powers or to the "marriage" and "matrimonial causes" powers.

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43 Children (Equality of Status) Act 1976 (NSW), s. 10(3).

44 In the absence of anything to the contrary, the NSW presumptions would apply in Family Law Act proceedings by virtue of the Judiciary Act 1903 (Cth), s. 79. See, eg *In the Marriage of McArthur* (1982) 10 Fam LR 962.

45 Quoted by Broun and Fowler, *Australian Family Law and Practice* (1975) 24-810, also taking the view that the Family Law Act presumptions apply to the exclusion of State presumptions.

46 There is of course no doubt that the presumptions apply in proceedings under the Family Law Act itself: see the discussion in Broun *id.*, 28-810.

47 If they do apply outside the Act, it is arguable that they would operate exclusively. This would be a surprising result: for example, presumptions in the Family Law Act would govern a proceedings about succession under NSW law, in priority to presumptions contained in a NSW Act.

48 See the Explanatory Memorandum, para 132, quoted in Broun note 45 *supra*.

It is nevertheless necessary to read the provisions down to bring them within the reference of power. Part VII extends to a referring State only to the extent of the referred powers.[49] The provisions cannot be brought under the "marriage" or "matrimonial causes" power (they deal, among other things, with presumptions arising out of de facto relationships). They appear, therefore, to be invalid in the non-referring States of Queensland and Western Australia.[50]

The next question is whether they can be read down to the extent that brings them within constitutional power, either under the reference of power or otherwise. Even within the reference of power, it may be arguable that they can be read down in two ways. First, to limit them to proceedings in relation to the guardianship, custody or maintenance of, or access to a child. Second, to limit them to proceedings under Part VII. The difference between the two is that on the first approach they would be relevant to proceedings under State laws relating to custody and guardianship. There are still some such proceedings, namely those reserved to the State under section 60H, notably adoption proceedings. It might be relevant to know, in proceedings for adoption, whether a person is the father of a child. On the first approach to reading down, the Part VII presumptions would apply. On the second they would not. On either view, however, the presumptions would validly apply in Part VII proceedings relating to children.[51]

If the above analysis is right, the position may be summarised as follows. In the referring States, the presumptions in Division 7 apply in Part VII proceedings[52] to the exclusion of presumptions under State law. It is not clear whether they also apply in adoption and child welfare proceedings, and if they do whether they operate to the exclusion of presumptions under State law. It seems clear however that the presumptions have no application to other areas of law, such as succession.

In the non-referring States of Queensland and Western Australia the presumptions apply only to the extent that they can be brought within available powers, notably the "marriage" power.

In the Territories, it would seem that the presumptions apply quite generally, for there is no need to limit the very general terms of the provisions.

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49 Family Law Act 1975 s. 60E(5).

50 Broun note 45 *supra*, argue, correctly in my view, that the presumptions are intended to operate in the non-referring States, Queensland and Western Australia. But I can see no constitutional basis for them to operate, as the Act provides, "according to their tenor", and in those states the question is, therefore, whether they can be read down to bring them within the scope of Constitution s. 51(xxi) and (xxii).

51 As it happens, once proceedings have been initiated under Part VII, the presumptions may be of limited importance, given that the child's welfare, rather than parental rights, is the basis for the exercise of the court's jurisdiction. However even in custody etc cases parenthood seems at least a relevant factor, and it is important in relation to the obligation to maintain. It is also relevant to "child agreements" which can by definition be made only between parents: s. 60.

52 Strictly, Part VII proceedings relating to children (not including Division 9).

## C. PARENTAGE EVIDENCE: DIVISION 8

Division 8 deals with evidence about parentage, notably blood tests.[53] It does not pose all the problems discussed above, since it is expressly stated to be limited to proceedings under the Act. The question does arise whether it is intended to be exclusive of any State laws, but I think, for reasons similar to those given earlier, that it is.

Where the parentage of a child is in issue in proceedings under the Act, the Court may make an order requiring any person to give such evidence as is material: section 66W. In particular it may make an order requiring a parentage testing procedure to be carried out in relation to the child, a person known to be the mother of the child, or any other person where the Court thinks the information to be obtained might assist in determining the child's parentage: section 66V. It may make associated orders, eg for costs: sub-sections (3) and (4). Where an adult refuses a blood test, inferences may be drawn from the refusal: sub-section (5). Where it is ordered that a child be tested, the child's guardian's consent is required for the test to be carried out, but if the guardian does not consent inferences can be drawn: sub-sections (6) and (7). There are provisions for the protection of persons carrying out the tests, and for reports on the tests: sub-sections (7)-(11).

The details need not be canvassed here. In broad terms, the provisions are similar to those to be found in the State and Territory 'status of children' legislation.[54]

## D. PARENTAGE OF CHILDREN BORN BY ARTIFICIAL CONCEPTION PROCEDURES

Section 60B provides, in brief, that where a child is born to a married[55] woman as a result of artificial conception, in certain circumstances, whether or not the child is biologically a child of the woman and her husband, "the child is their child". The circumstances are that if either the procedure was carried out with their consent or "under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the man". The same rule applies to de facto couples.[56]

The provision applies in an obvious way under Part VII. Suppose a child is born to a married woman by artificial insemination, the husband consenting, using sperm of a donor. Section 60B makes the child the child of the husband and wife, and presumably makes them the 'parents'. They would therefore be entitled to joint custody, and each would be a guardian.[57]

There are however some difficult questions about the scope of this section. First, does it apply exclusively, or in conjunction with State laws about the

53 It might be thought that this topic should be treated later, as it relates more to the exercise of jurisdiction than the creation of substantive law. But it is so closely related to the previous topics that it is convenient to deal with it here.

54 Children (Equality of Status) Act 1976 (NSW) Part IV.

55 Part VII applies to void marriages: s. 60C.

56 S. 60B(4).

57 S. 63F.

parentage of children born by artificial conception? The Artificial Conception Act 1984 (NSW), for example, contains somewhat similar provisions,[58] although it does so through the language of presumptions, and there is a complex relationship, in some situations, between the presumptions under this Act and those under the Children (Equality of Status) Act 1976 (NSW). Second, does the section apply for all purposes, or only in Part VII proceedings? Third, if it purports to have operation beyond Part VII proceedings, is it valid? Fourth, if it is invalid, can it be partially saved by reading down?

The same issues have been considered above in relation to the presumptions of parentage in sections 66P-66U, and I think that the same analysis would apply to section 60B.

## IV. JURISDICTION IN CUSTODY AND CHILD MAINTENANCE

### A. CREATION OF JURISDICTION

The key provision creating jurisdiction is section 63(1), which confers jurisdiction on the Family Court "in relation to matters arising under this Part".[59] Section 63A provides that, after 1 April 1988, proceedings that may be instituted under Part VII "shall not . . . be instituted otherwise than under this Part".[60] This provision renders inoperative under section 109 of the Constitution any State law purporting to authorise proceedings that could be brought under Part VII. It is thus impossible, for example, to bring fresh proceedings in the wardship jurisdiction of the Supreme Court, or fresh proceedings for maintenance under State maintenance legislation. This is considered further below.

Other provisions deal with jurisdictional requirements such as Australian citizenship or residence (section 63B), with entitlement to bring proceedings (section 63C) and with the transfer of certain proceedings from courts of summary jurisdiction to the Family Court (section 63D).

What are "matters arising under" Part VII? I suggest they constitute the subject-matter of proceedings brought under Part VII.[61] The main matters are:

1. *Custody, guardianship and access.* The custody and guardianship of, and access to, children, arise under Part VII, especially Division 5. It provides for the court to make orders altering such rights, or granting access (section 64).

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58 Ss 5 and 6. This Act and the Children (Equality of Status) Act 1976 are set out in *Australian Family Law*, note 13 *supra*, State Legislation volume, under tab "Status of Children".

59 See also s. 60E: Part VII "extends to" New South Wales. The connection between s. 60E and s. 63 appears to be as follows. The court has jurisdiction in matters arising under Part VII (s. 63). Matters "arise" in NSW under Part VII because the Part "extends to" NSW (s. 60E). Perhaps, if it were not for s. 60E, no Part VII matters would arise in NSW and therefore s. 63 would not create any jurisdiction.

60 The equivalent provision in relation to proceedings by way of "matrimonial cause" is s. 8(1).

61 Compare s. 31, conferring jurisdiction "with respect to . . . matters arising under this Act . . . in respect of which matrimonial causes are instituted . . ."

2. *Child agreements.* The amendments introduce a new concept, "child agreements", which are enforceable (Division 10).
3. *Injunctions.* There is a wide power to make orders or injunctions for the welfare of the child, including injunctions restraining entry to the child's place of residence: Division 13.
4. *Child maintenance and recovery of child bearing expenses.* The maintenance of children arises under Part VII, Division 6: it provides for parental duties to maintain children (section 66B) and for court orders for child maintenance (especially sections 66F, 66J), setting out the criteria to be applied in determining child maintenance (especially sections 66C, 66D, 66E). Child maintenance is dealt with below.

As for child bearing expenses, there is provision for a father who is not married to the mother to be ordered to pay for child bearing expenses: Division 9. In the case of parties to a marriage, such matters would be included in the more general provisions relating to spousal maintenance. The reference of power did not give the Commonwealth power to award maintenance of one de facto partner to another: this remains a matter for State law.[62]

## B. EXERCISE OF JURISDICTION UNDER PART VII

This section considers some features of the jurisdiction under Part VII.

### 1. Who May Bring Proceedings?

Section 63C provides that proceedings under the Act in relation to a child[63] may be instituted by

(a) either or both of the parents;
(b) the child;[64] or
(c) any other person who has an interest in the welfare of the child.

This contrasts with the previous law, in which the constitution of the proceedings as to parties was important to link the proceedings to the constitutional "marriage" power. At first, custody and related proceedings under the Family Law Act had to be between the parties to the marriage, following *Russell* v. *Russell*.[65] By the mid-1980s, it had become clear that this was unduly narrow, and so long as a party to the marriage was a party to the proceedings the link with the marriage was enough for constitutional

62 Provision for such maintenance, of a limited kind, is made in NSW by the De Facto Relationships Act 1984: for details see *Australian Family Law*, note 13 *supra*, State Legislation Volume, under tab "De Facto Relationships".

63 This appears to include all Part VII proceedings except those under Division 9 (child bearing expenses): see s. 63C(2).

64 Continuing the policy of former paragraph (cc) of "matrimonial cause". For a (rare) example of such a proceeding by a child, in which a custody order was made by consent in favour of an older sibling, see *In the Marriage of Egan* (1985) 10 Fam LR 577. See also *In the Marriage of A* (1981) 7 Fam LR 439 (child's maintenance application).

65 Note 10 *supra*.

purposes.[66] Since the reference of power, this problem disappears, and the legislature has taken the view that there is no policy reason to limit the class of persons who may bring proceedings, beyond the minimal requirement that the person should have an interest in the child's welfare.

This provision brings to this jurisdiction one of the characteristics of the Supreme Court's 'wardship' or 'paternal' jurisdiction, namely open access. It makes it possible for persons such as welfare officers, distant relatives, and counsellors to bring proceedings seeking orders in relation to the children. For example, in a famous English case[67] an educational psychologist working with a handicapped child successfully applied to the wardship jurisdiction for an order preventing the parents from having an operation carried out on the child. Such an application might now be brought to the Family Court.[68]

2. Which Children are Included?

The jurisdiction relating to custody, guardianship, access and welfare, as well as child maintenance, is now applicable to children in general, not just children of a marriage. This is the result of the provisions creating jurisdiction over matters arising under Part VII, and amendments to the sections in Part VII making them refer to "children" as distinct from children of a marriage.

3. Jurisdictional Requirements

Jurisdictional requirements are now to be found in Division 4, section 63B. These are both familiar and minimal, and require no extended discussion. Proceedings may be instituted under the Act "in relation to a child"[69] if the *child*, or a *parent*, or a *party to the proceedings* is, on the relevant day,[70] either present in Australia, or an Australian citizen, or ordinarily resident in Australia.[71]

66 See especially *V* v. *V* (1985) 10 Fam LR 151, upholding the validity of the former para (ce) of "matrimonial cause" in s. 4.

67 *Re D (A Minor)* [1976] 1 All ER 326.

68 In two recent decisions the Family Court has made orders relating to the carrying out of hysterectomies on severely retarded girls: *In Re Jane* (1988) 12 Fam LR 662; *In Re a Teenager*, Family Court of Australia, Cook J, 15.11.88. The former decision, which accorded great weight to the parents' decision, attracted considerable controversy: see eg the critical comment, by the author, published in the Sydney Morning Herald, 22.11.88. The decision was not followed on this point by Nicholson CJ in *In Re Jane*. The issues relating to medical intervention in the case of children, especially non-therapeutic interventions, are difficult. There is an interesting legislative response in the Children (Care and Protection) Act 1987 (NSW), s 20B, inserted in 1988. For a recent discussion of medical treatment and consent issues, see the Western Australian Law Reform Commission's Discussion Paper, *Medical Treatment for Minors* (1988).

69 Clearly this includes Part VII proceedings, except proceedings under Division 9 (child bearing expenses). These proceedings may be brought by the mother: s. 63C(2).

70 That is, the day on which the application is filed or made: sub-s. (2).

71 See also s. 63B(e), by which proceedings may be instituted if it would be in accordance with a treaty etc for the court to exercise jurisdiction.

4. Courts of Summary Jurisdiction and Transfer of Proceedings

Jurisdiction under Part VII is given to "each court of summary jurisdiction of each State".[72] The jurisdiction must be exercised, however, subject to the provision for transfer of proceedings from the Local Court in certain cases, contained in section 63D. This section provides for the transfer of contested custody, guardianship and access proceedings from courts of summary jurisdiction to the Family Court in certain circumstances, essentially where a party does not consent to the lower court dealing with the matter, or where the lower court wishes the matter to be transferred. The policy is that the lower courts exercise jurisdiction by consent, and only where they feel competent to deal with the matter.[73]

The lower court is required, before it hears the proceedings, to inform the parties that it is required to transfer the proceedings unless they consent;[74] if they do not consent, it must transfer the proceedings.[75] It is only the parties whose consent is required: neither the child's consent nor the consent of a person representing the child is strictly required, although oppostion by a child or a child's representative might well be a reason for the lower court to elect to transfer the proceedings.[76] Once consent has been given, a party cannot without leave object to the lower court proceeding to hear and determine the matter.[77] If such leave is given, the proceedings must be transferred.[78] While the court of summary jurisdiction has a duty to comply with the section, failure to do so does not invalidate any order it makes in the proceedings.[79]

Before transferring proceedings, the court of summary jurisdiction may make such orders as it considers necessary pending their disposal by the higher court.[80] For example, it may order counselling under section 62(1). The court to which the proceedings have been transferred shall proceed as if they were commenced in that court.[81]

These provisions for transfer apply only to "proceedings in relation to the custody or guardianship of, or access to" a child. Thus they do not appear to apply to applications for injunctions under section 70C: in these matters courts of summary jurisdiction may exercise jurisdiction without consent.

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72 S. 63(2). The Governor-General may by proclamation fix a day on and after which proceedings may not be instituted in courts of summary jurisdiction of a specified State or Territory: sub-s. (3). Such a proclamation may be limited to certain classes of proceedings, or specified parts of a State or Territory: sub-s. (4). Such proclamations would have effect: sub-s. (2) is subject to sub-s. (5), which refers to sub-s. (3). Proclamations may be revoked, without prejudice to orders made before the revocation: sub-s. (6). No proclamations have been made under s. 63(3).

73 There is a somewhat similar provision dealing with matrimonial causes: s. 46.

74 S. 63D(1).

75 S. 63D(2).

76 Under s. 63D(4)(b).

77 S. 63D(4)(a).

78 S. 63D(5).

79 S. 63D(7), (8).

80 S. 63D(3).

81 S. 63D(6).

5. Pending and Interim Proceedings

What effect does the amendment have on pending proceedings under State law, such as pending proceedings in the Supreme Court's wardship jurisdiction? The question is not specifically addressed, and we must tease out the answer from various provisions and omissions.

Section 63 provides that jurisdiction is conferred on the Family Court in relation to matters arising under Part VII. Is a pending proceeding such a matter? Perhaps it is arguable that only a fresh application "arises" under Part VII. If so, there would be no obstacle to the State proceedings continuing. On the other hand, if "matter" is taken to refer to the subject-matter of the proceedings, then a matter arises under Part VII even if it is the subject of pending proceedings in a State court. On that view, it would appear that the Supreme Court would lack jurisdiction to deal with pending proceedings. Section 63, in my view, is therefore not conclusive.

Rather better guidance may be gleaned from section 63A, which provides: "proceedings that may be instituted under the Part shall not, after the commencement of this section, be instituted otherwise than under this Part."

This makes it clear that fresh applications cannot be instituted in the Supreme Court. It is strongly arguable that its silence on pending proceedings, and the lack of provision for transferring or otherwise dealing with pending proceedings under the Family Law Act, indicates that it was not intended to prevent pending proceedings from being completed under State law.[82] Interim orders may be made in such proceedings.[83]

It is therefore submitted that pending proceedings (and enforcement proceedings) may, be completed under State law. Proceedings instituted after 1 April 1988 must be dealt with under Part VII: section 63A.

Jurisdictional boundaries between the Family Court and State Supreme Courts have been considerably eased by cross-vesting legislation passed by the Commonwealth and the States and Territories.[84] The legislation came into force on 1 July 1988. It provides that the State Supreme Courts can exercise the jurisdiction of the Family Court, and the Family Court can exercise the jurisdiction of the State Supreme Courts. Exercise of the jurisdiction, however, is subject to rather complex provisions relating to transfer of procedings to the more appropriate court. Section 63A does not preclude the operation of the cross-vesting legislation.[85]

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82 As to whether the Supreme Court can deal with a cross-application made after 1.4.88 in proceedings commenced before that date, see *Bennett* v. *Knight* (1988) 12 Fam LR 401; [1988] FLC 91-917. Note that the cross-vesting legislation may now provide a solution to such problems, as noted in the text below.

83 *Belford* v. *Schreuders* (1988) 12 Fam LR 291.

84 The Commonwealth and State legislation, which is entitled "Jurisdiction of Courts (Cross-Vesting) Act 1987" is set out and discussed in *Australian Family Law*, note 13 *supra*, Volume 2, under guidecard "Related Commonwealth Legislation". For illustrations of its use, see *Mulhall* v. *Hartnell* (1988) 12 Fam LR 361; *In the Marriage of Gilbert* (1988) 11 Fam LR 503; [1988] FLC 91-966; *In Re Jane* (1988) 12 Fam LR 662.

85 For a neat example of the use of cross-vesting to avoid unnecessary expense and delay, see *Mulhall* v. *Hartnell* (1982) 12 Fam LR 361, where the Supreme Court used the cross-vesting powers to make consent orders relating to an ex-nuptial child.

## C. DOES ANY STATE JURISDICTION REMAIN?

A question of some importance is whether any jurisdiction relating to guardianship and custody and the like (apart from jurisdiction to enforce orders and to complete proceedings pending at 1 April 1988) is left in the referring States and Territories. In general, as we have seen, the answer is no, since section 63A provides that proceedings that may be instituted under Part VII shall not be instituted otherwise than under Part VII. But it is worth looking in more detail at the State jurisdictions.

### 1. Statutory Jurisdictions in Custody etc

First, there is a State statutory custody jurisdiction arising under State legislation.[86] It seems clear that all these have been displaced by the reference of power. They all use the familiar language of "custody", "guardianship" and "access", and this is precisely what was referred and dealt with in Part VII.[87]

### 2. Habeas Corpus

Second, there is the use of the writ of habeas corpus in relation to custody etc matters. Technically, this procedure enables the child to be brought before the court; it does not strictly result in an order for custody.[88] Even if it is arguable that this procedure may still be used to have a child delivered to the court, it is surely rendered virtually useless by the fact that once the child is before the court, the court may not make an order for custody, guardianship or access, for such matters are clearly covered by Part VII.

### 3. Supreme Court's "Paternal" or Wardship Jurisdiction

What of the Supreme Court's wardship jurisdiction?[89] In so far as that jurisdiction enabled the Court to make orders relating to guardianship, custody and access, there is no doubt that it has been displaced. However the jurisdiction has been used to make orders that are not expressed as orders for custody, guardianship or access. Such orders include orders about whether a child is to have a blood transfusion, or other medical procedures. Can it be argued that this sort of jurisdiction remains?

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86 For example, in New South Wales the jurisdiction arises under the Infants Custody and Settlements Act 1899 (NSW), the Maintenance Act 1964 (NSW) (ancillary to maintenance applications) and the Testators Family Maintenance and Guardianship of Infants Act 1916 (NSW). See generally *Australian Family Law*, note 13 *supra*, State Legislation Volume.

87 Insofar as the Testators Family Maintenance and Guardianship of Infants Act 1916 (NSW) creates a jurisdiction in guardianship, custody and access, the analysis in the text is clear enough. However the question also arises whether the provisions allowing for the appointment of a testamentary guardian remain effective. This is discussed above.

88 *Powell* v. *Anderson* [1977] FLC 90-235.

89 The Children (Care and Protection) Act 1987, ss 88(4) and 96, preserve the Supreme Court's wardship jurisdiction in relation to State wards. However in my view this is not protected by s. 60H, since the jurisdiction is not "under" a child welfare law. Compare the jurisdiction created by s. 88(1), which in my view is protected by s. 60H.

In my view the answer is no.[90] First, such proceedings are matters arising under Part VII because they involve aspects of the bundle of powers and responsibilities constituting guardianship and custody. Part VII places guardianship and custody initially in the hands of parents, and gives the Family Court power to modify this initial allocation by making orders.

This analysis is consistent with authorities holding, for example, that orders as to which school the child should attend,[91] or which name the child should have,[92] may be made under jurisdictions relating to "custody" and "guardianship".

There is another argument I should mention, though I do not want to make it. This is that such matters, even if they fall outside "custody", "guardianship", and "access", are caught by "welfare", and the "welfare" of a child is a matter arising under Part VII, because it is mentioned in the opening words of section 64. There are two reasons why I would hesitate to make this argument. First, I am not satisfied that there are in fact any matters that fall within "welfare" but outside custody, guardianship and access. Second, the reference did not in so many words include the "welfare" of children, so that if "welfare" does mean something outside the scope of custody and guardianship, there is a doubt about whether it was within the referred powers, and hence a doubt about the validity of Part VII to the extent that it deals with those aspects of "welfare".[93]

## 4. Jurisdiction Over State Wards

It is a question of some difficulty whether any State jurisdiction remains in relation to children who are State wards, or under the guardianship of State child welfare authorities. It is appropriate first to consider what the Family Law Act purports to do and then consider the constitutional basis. As noted above, the effect of section 63A is to create exclusive jurisdiction in courts applying the Family Law Act. Section 60H, however, operates to save the operation of State child welfare laws. The section provides as follows:

> 60H(1) A court having jurisdiction under this Act shall not make an order under this Act in relation to a child who is in the custody of, or under the guardianship, care and control or supervision of, a person under a child welfare law unless the order is expressed to come into effect when the child ceases to be in such custody or under such guardianship, care and control or supervision, as the case may be.
>
> (2) Nothing in this Act, and no decree made under this Act, affects:
>
> (a) the jurisdiction of a court, or the power of an authority, under a child welfare law to make an order, or to take any other action, by which a child

90 See however the comments of Gibbs CJ and Mason J in *Fountain* v. *Alexander* (1982) 8 Fam LR 67. See also *In Re Jane* (1988) 12 Fam LR 662, where Nicholson CJ purported to rely on cross-vested jurisdiction from the Supreme Court. On the argument presented here, there was no Supreme Court jurisdiction that could be cross-vested, and his Honour should have simply exercised jurisdiction under ss 64 or 70D of the Family Law Act.

91 *In the Marriage of Bishop* (1981) 6 Fam LR 882.

92 *In the Marriage of Chapman and Palmer* (1978) 4 Fam LR 462.

93 This is a variant of an argument developed by my colleague Owen Jessep: see O. Jessep and R. Chisholm, note 6 *supra*.

is placed in the custody of, or under the guardianship, care and control or supervision of, a person;

(b) any such order made or action taken;

(c) the jurisdiction of a court under a child welfare law to make an order in relation to the maintenance of the child;

(d) an order of the kind referred to in paragraph (c);and

(e) the operation in relation to the child of a child welfare law.

(3) Where it appears to a court having jurisdiction under this Act that another court or an authority proposes to make an order, or to take any other action, of the kind referred to in paragraph (2)(a) in relation to a child, the first-mentioned court may adjourn any proceedings before it that relate to the child.

In so far as the Supreme Court or other State courts exercise power "under a child welfare law", their jurisdiction is preserved by section 60H(2). However, there is no protection of jurisdiction or powers that cannot be so described. Thus, for example, the exercise of the Supreme Court's paternal or wardship jurisdiction is not saved by section 60H, because it does not arise "under a child welfare law".[94] Similarly, because State laws relating to child maintenance are not included in the definition of "child welfare laws" their operation is not saved by section 60H.

The next question is whether the Family Law Act is valid in so far as it purports to create exclusive jurisdiction relating to custody, guardianship and maintenance relating to State wards. The first possible constitutional basis is, in the referring States, the reference of power. However, the State legislation referring power appears not to include the 'matter' of custody, guardianship and maintenance of children who are State wards.[95] It seems to follow that even in the referring States, the Family Court has no jurisdiction over ex-nuptial State wards, or more precisely, over State wards who are not "children of a marriage".

The position relating to "children of a marriage" is less certain. The only possible basis, even in the referring States of New South Wales, Victoria, South Australia, and Tasmania, is the "marriage" power, section 51(xxi) of the Constitution. Whether this provides a firm basis must be determined in the light of the present High Court's likely attitude to the decision in *R* v. *Lambert*.[96] In that case, a 4-3 majority of the High Court held that the Family Law Act was invalid to the extent that it purported to enable the Family Court to make an order for custody over a child who was a State ward: such a law was not a law with respect to "marriage". If the Family Law Act is held invalid in relation to State wards who are "children of a marriage", questions of custody, guardianship and child maintenance can be dealt with under State legislation. If it is held to be valid, a curious difficulty arises. As a result of section 60H(1), the Family Court cannot make an order

94 This is so, it is submitted, even though the NSW legislation includes provisions to the effect that nothing in the child welfare legislation removes the Supreme Court's jurisdiction: see Children (Care and Protection) Act 1987 (NSW), ss 88, 96.

95 See s. 3(2) of Commonwealth Powers (Family Law — Children) Act 1986 (New South Wales, Victoria, South Australia and Tasmania).

96 *R* v. *Lambert; ex parte Plummer* (1980) 146 CLR 147.

as to custody, guardianship, access or maintenance that takes effect while the child remains a state ward. Yet the Supreme Court cannot make such an order either, for as we have seen section 63A makes jurisdiction under the Family Law Act *exclusive*. There would appear to be a hiatus, except insofar as there is provision for such jurisdiction in State legislation that falls within the definition of a "child welfare law" and is therefore protected by section 60H(2).

If this analysis is correct, legislative reform appears necessary. The solution appears to be in the hands of the States, which could, presumably, make provision for custody and maintenance of State wards under amended provisions of State legislation falling within the class of "child welfare laws" under section 60H. Alternatively, s 60H could be amended.

5. Supreme Court's Jurisdiction Under the Adoption Act

The Supreme Court also has jurisdiction under the Adoption of Children Act 1965 to make orders relating to a child after dismissing an application for adoption. The exercise of this jurisdiction is preserved by the Family Law Act section 60H, which preserves jurisdiction under "a child welfare law", a term defined so as to include State adoption legislation.[97]

### D. PRINCIPLES APPLICABLE

There is no change in the principles applicable to custody, guardianship, and access. The child's welfare remains the "paramount consideration", although this principle has been relocated from section 64 to section 60D. The guidelines in section 64 relating to factors to be taken into account, and the powers of the court, remain the same. Previous case-law remains relevant.

The relocation makes the principle applicable to "proceedings under [Part VII] in relation to a child", not only to the provisions relating to custody, guardianship and access. This is new and important, for it involves a considerable change in the law relating to injunctions and child maintenance. The impact of the principle on these other areas is considered below, where it is argued that the introduction of the "paramount consideration" principle in these areas is based on a fundamental misunderstanding. First, however, we examine a new legal creature, "child agreements".

## V. CHILD AGREEMENTS

Under the general law, it is not possible to transfer guardianship or custody by agreement. There is no objection to a parent or other guardian making appropriate arrangements for the care of a child. If those arrangements include payment, it may well be possible for the caregiver to sue for the money due. However the arrangement does not have the effect of transferring

97 See the definition of "child welfare law" in s. 60, and Family Law Regulations, reg. 12B(2), Schedule 5.

legal custody or guardianship. Nor, of course, can such arrangements exclude the courts' jurisdiction relating to custody and guardianship. The rationale for these rules is, it seems, that custody and guardianship are responsibilities given for the benefit of the child, and they can only be re-allocated by a court order or other legal authority.

The new provisions about child agreements, contained in Division 10, must be seen against this background. A "child agreement" is defined as an agreement in writing, made between the parents of a child (whether or not there are other parties to it), that makes provision in relation to "child welfare matters" in relation to the child (whether or not it also makes provision in relation to other matters).[98] "Child welfare matters" means "matters in relation to the custody, guardianship or welfare of, or access to, a child, but does not include matters in relation to the maintenance of a child".[99]

There is provision for child agreements to be registered in a court having jurisdiction under the Act.[100] The effects of registration are set out in section 66ZD, and are as follows:

1. So far as it makes provision in relation to child welfare matters, the agreement has effect as if it were a Part VII order of the court in which it was registered.[101] Thus, it can be enforced. However a court shall not enforce it if to do so "would be contrary to the best interests of the child".[102]
2. A party to the agreement may not institute Part VII proceedings seeking an order under section 64 in relation to child welfare matters dealt with in the agreement.[103]
3. A court in which the agreement is registered may by order vary the agreement, insofar as it makes provision in relation to child welfare matters, if it considers the welfare of the child requires the variation.[104]

A registered agreement may be set aside by the court in which it is registered only if the court is satisfied:

1. that the concurrence of a party was obtained by fraud or undue influence;
2. that the parties desire the agreement to be set aside; or
3. that the welfare of the child requires the setting aside of the agreement.

In exercising its power to set aside, the court shall have regard to section 60D (child's welfare paramount) and section 64.[105]

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98 S. 60.
99 *Ibid.*
100 S. 66ZC.
101 S. 66ZD(3).
102 S. 66ZD(4). This is surely bad drafting. Is "the best interests of the child" intended to be different from the "welfare" of the child? If it is, then the provision fails to indicate what the difference is intended to be. If it does not, as I suspect — see sub-s. (5) — then it is merely confusing to use the American phrase rather than "welfare", the latter term being used elsewhere in the Act, and of course being the subject of a great deal of case law.
103 S. 66ZD(1).
104 S. 66ZD(2). The ordinary principles of custody law apply: sub-s. (5).
105 S. 66ZE(2).

These provisions for child agreements appear to fit easily enough into the reference of power. It will be interesting to see what use is made of child agreements. It should be stressed that they relate to custody and related matters, not to maintenance. On the face of it, the provisions are a good idea: they avoid unnecessary use of consent orders, yet preserve the principle that the child's welfare is paramount. A question might arise relating to the onus of proof in subsequent custody proceedings: should the court commence with the assumption that the terms of the child agreement were in the child's interests? It is submitted that the correct view is that, even if it is correct at all to refer to onus of proof in such cases, the court should treat the making of the agreement as no more than a piece of evidence that might have a bearing on what the child's welfare requires.

## VI. INJUNCTIONS

Before the 1987 amendments, the injunction powers under section 114 could have been used in custody and related matters, although it is my impression that resort was seldom had to that section, since adequate powers were contained in section 64. We now have in Part VII, Division 13, provisions for injunctions or orders appropriate for the welfare of children. I do not propose to deal with these provisions in detail, but wish to consider two issues, namely the connection with the reference of power and the applicable principles.

### A. THE INJUNCTION POWER AND THE REFERENCE

Section 70C(1) provides that the court may make such order or grant such injunction as it considers appropriate for the welfare of the child "where proceedings are instituted in a court having jurisdiction under this Part for an injunction in relation to a child". Thus such an application may stand on its own, and does not need to be ancillary to other Part VII proceedings: the analogy here is with section 114(1), not section 114(3).

The section goes on to say that the injunction may be for the personal protection of the child and of a person having custody, to restrain persons from entering premises, and so on. Are these orders included in the reference? It will be recalled that custody, guardianship and access were referred, but not "welfare". In my view they are nevertheless included in the reference, at least to the extent that they are concerned with aspects of the bundle of rights and responsibilities constituting guardianship and custody.

### B. PRINCIPLES APPLICABLE

What principles apply in proceedings for an injunction? The answer is that the child's welfare is the "paramount consideration", because section 60D applies to all of Part VII, and yet the more specific guidelines for custody and related matters contained in section 64 do not apply.

In my view this represents an important misunderstanding of this area of law. The Family Court has said, I believe correctly, that in custody and

similar cases the "welfare" principle applies in a tough sense: if the court forms a view about what order is best for the child, it *must* make that order.[106]

But this principle is not necessarily appropriate, in my view, for injunction proceedings. Suppose a parent with custody moves into a rented house. The landlord, who also lives in the premises, constitutes a risk to the child. Somebody — remember, proceedings can be instituted by anyone — applies for an injunction excluding that landlord from his own home. If one applies the case law about "paramount consideration", it is difficult to avoid the conclusion that the court should consider *only whether the injunction sought would promote the child's welfare.* If it would, it should grant the injunction. On the assumption that it is for the child's benefit to stay with the parent in the premises, must not the injunction be granted? No doubt the courts will try to avoid this result, since they would find it hard to accept that the interests of the landlord should receive no consideration at all; but it may be at the cost of losing the force and clarity which has been given to the "paramount consideration" principle. The same problem, as we shall see, arises in relation to child maintenance.

## VII. CHILD MAINTENANCE

Part VII now includes child maintenance, a topic previously included in Part VIII. In the referring States and in the Territories, Part VII now governs the maintenance of all children, whether or not they are "children of a marriage". Only in Queensland and Western Australia is the Family Law Act still limited to children of a marriage, and in Western Australia the effect of this unfortunate limitation is considerably mitigated by the dual jurisdiction exercised by the Family Court of Western Australia.

Apart from extending the range of the Act to include the maintenance of ex-nuptial children, Part VII makes significant changes in the substantive law, and these will be discussed briefly here. There is a clear policy underlying most if not all of the changes, which form one part of the government's proposals for child support. This policy is that so far as possible children should be supported by their parents, as distinct from the community. The provisions give a new emphasis on parental liability to maintain children, and this is clearly intended to displace the amount of child support available through public funds (through social security payments), and also, though this is of lesser importance, to displace the support of children by step-parents.

In fact, the amendments form a rather modest and preliminary step

106 In custody and similar proceedings, it is now well established that the principle means that the court should make whatever order it thinks is best for the child, and should not dilute this to any degree by reference to other interests or policies. See eg *In the Marriage of Schenck* (1981) 7 Fam LR 170. The question is discussed in some detail in the commentary to s. 64 in *Australian Family Law*, note 13 *supra*, Vol. 1.

towards a much more fundamental change in child maintenance law. Of much greater practical importance is the Child Support Act 1988 (Cth) and further proposed legislation which will constitute 'stage two' of the government's child support proposals. The Child Support Act, which came into force on 1 July 1988, is essentially about the *enforcement* of maintenance. Responsibility for enforcement is in effect transferred from the custodial parent to the Taxation Department, which deducts the amount of maintenance from the salary of the payer and forwards it to the Department of Social Security, which pays the custodial parent. The details of this legislation are outside the scope of this article. It should be emphasised, however, that the award of child maintenance is still a matter for the courts: the new scheme relates to the enforcement of court-ordered child maintenance.

Stage 2 of the scheme, yet to be introduced, will involve a change that is in some ways more fundamental. The maintenance payable will not be determined by a court determining what amount is appropriate in all the circumstances of each case,[107] but by public servants applying a complex formula based essentially on the financial capacities and reasonable needs of the parents. Legislation embodying this phase has not yet appeared, but the government has indicated its general approval of a formula recommended by an expert committee chaired by Fogarty J of the Family Court.[108]

In view of the more fundamental changes to be wrought by stage 2 of the Child Support Scheme, the amendments to the legislative guidelines for court-ordered maintenance may be significant only for a limited period, and it will be sufficient to treat them rather briefly here.

## A. BASIC PRINCIPLES

A number of provisions set out basic principles of child maintenance. Section 66A states that the "principal object" of the Division is to ensure "that children receive a proper level of financial support from their parents"; and that:

> Particular objects of the Division include ensuring
> (a) that children have their proper needs met from reasonable and adequate shares in the income, earning capacity property and financial resources of both of the parents; and
> (b) that parents share equitably in the support of their children.

Section 66B deals with the duty of parents. Its evident concern is to ensure that the obligation to maintain children is not shifted from the parents to

107 This phrase refers to the legal principles, under which the court determines the amount of maintanence having regard to the matters set out in the legislation. A more accurate description of what actually happens might emphasise the importance of a conventionally set "going rate" rather than the thorough examination of all the facts that the theory requires.

108 *Child Support: Formula for Australia — A Report from the Child Support Consultative Group* (May 1988). See generally Regina Graycar, "Family Law and Social Security in Australia: The Child Support Connection" (1989) 3 AJFL 70.

others. The section first states that parents have, subject to the Division, "the primary duty to maintain the child". It goes on to provide as follows:

> (2) Without limiting the generality of subsection (1), the duty of a parent to maintain a child:
> (a) is not of lower priority than the duty of the parent to maintain any other child or another person;
> (b) has priority over all commitments of the parent other than commitments necessary to enable the parent to support:
> (i) himself or herself; and
> (ii) any other child or another person that the parent has a duty to maintain; and
> (c) is not affected by:
> (i) the duty of any other person to maintain the child; or
> (ii) any entitlement of the child or another person to an income tested pension, allowance or benefit.

These provisions distinguish between a "duty" and a "commitment". It would seem that "duty" here refers to a legally enforceable duty, while "commitment" has a wider meaning, probably including voluntary arrangements giving rise to what might reasonably be seen as a moral or ethical duty. The section must of course be read with other provisions of Division 6, but the significance of section 66B might be illustrated by some simple examples.

A husband, in paid employment, leaves his unemployed wife and two children, one of whom is severely handicapped, and, after divorcing his wife marries another woman who has a child. The husband's elderly mother also becomes a member of the new household. Section 66B preserves the husband's obligation to maintain his own two children and does not allow him to reduce this obligation by arguing any of the following:

1. that he has a moral obligation ("commitment") to support his mother;
2. that his handicapped child is eligible for a pension or benefit;
3. that his first wife is living with a wealthy man who has made a legally binding promise to support the two children;
4. that he has a moral obligation to support his second wife's child.[109]

The husband could argue that he had a legal obligation to maintain his second wife (depending of course on the financial circumstances): but this duty is not of higher priority than his duty to his children.

These principles change the law in the situations of 'serial monogamy'. Before the amendments, in the common situation of a man leaving his wife and children for a new household where there were children, the Family Court was inclined to say that the question of maintenance of the husband's children had to be approached 'realistically'. This tended to mean that the amount of maintenance would be small, having regard to the husband's obligations (whether moral or legal) to the children of the second household, and to the fact that his wife would be entitled to a widow's pension, but his second partner and her children would not generally have access to social

109 If the husband adopted the wife's child, he would become a "parent" of that child and would have an equal "primary duty" to maintain his adopted child as well as his other two children. See s. 60, defining "parent."

security.[110] Under the new principles, the husband's new commitments will be less likely to reduce his obligations to maintain his children. Only if he marries his new partner, or adopts her children, will he be able to rely on his duties towards them, and even these duties are not to be given a higher priority than his duties to maintain his children.

The theme of emphasising parental duties of support is continued in section 66G, which deals with the duties of step-parents. Step-parents as such have no duty to maintain their step-children. They acquire such a duty only in two ways. First, if they acquire guardianship or custody of the step-children, and second if a court having Part VII jurisdiction determines that it is 'proper' for them to have the duty. The section goes on to provide that in determining whether to create the duty, the court should have regard to the principles previously stated and to a number of circumstances, including the length of the marriage to the child's parent, the relationship between the child and the step-parent, and arrangements that have existed for the maintenance of the child.[111]

The primacy of the parents' obligations is further emphasised by the provision that even when the step-parent does have a duty of maintenance, it is "a secondary duty subject to the primary duty of the parents" and it "does not derogate" from the parents' primary duty.[112]

It is not necessary to canvass in detail the remaining provisions relating to child maintenance, many of which are similar to the previous law. However the provisions setting out the matters to be taken into account in determining maintenance are significantly changed, and require some comment.

Section 66C sets out the approach to be taken. The court is required (a) to consider the financial support necessary for the maintenance of the child; and (b) to determine the financial contribution, or respective financial contributions, that should be made by a party or parties to that financial support.[113] The following sections in turn define these concepts in more detail.

Section 66D spells out how the court should determine what is "the financial support necessary for the maintenance of the child". The court is to take into account only the following:

(i) "the matters referred to in sections 60D and 66A";
(ii) "the proper needs of the child"; and
(iii) "the income, earning capacity, property and financial resources of the child".[114]

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110 See in particular *In the Marriage of Axtell* (1982) 7 Fam LR 931. This position did not go unchallenged: see eg *In the Marriage of Ostrofski* (1979) 5 Fam LR 685.

111 S. 66G(2).

112 S. 66G(3). In determining quantum, the court is to consider among other things "the extent to which the primary duty of the parents to maintain the child is being, and can be, fulfilled".

113 Both this section and s. 66D appear to draw heavily on the decision of the Full Court in *In the Marriage of Mee and Ferguson* (1986) 10 Fam LR 971.

114 S. 66D(1).

These three matters require some discussion. It will be convenient to take them in reverse order, since (iii) is more straightforward that (ii), and (ii) is more straightforward than (i).

1. The Income etc of the Child

This matter is further explained in sub-section (3). The only apsect to be noted here is that the court, in general, is to disregard the financial resources of another person and must disregard any entitlement of the child to an income tested pension allowance or benefit. The first is consistent with the policy of insisting on the priority of the parents' maintenance obligations, and the second with the policy of reducing public expenditure on social security.

2. The Proper Needs of the Child

The court is to have regard to the age of the child, the manner in which the child is being educated, and the parents' expectation in this area, and any special needs of the child. The court may also have regard to findings of published research on the maintenance of children.[115]

3. The Matters in Sections 60D and 66A

Section 66A, stating the objects of the Division, has already been mentioned. It remains to be seen how the courts apply this section, but it would seem that it is an invitation to the court, having applied the more specific guidelines, to step back, as it were, and consider how far the result embodies the policy or objects expressed in section 66A.

Taking into account section 60D is far more problematical. It provides that "In proceedings under this Part in relation to a child, the court shall regard the welfare of the child as the paramount consideration".

The "paramount consideration" principle is very familiar, of course, in the context of determining competing claims to a relationship with the child (custody, access, etc). In that context, the courts in recent times have insisted that it means that the child's welfare is determinative. Once the court has formed a view about what order will best promote the child's welfare, it must make that order, even if doing so causes hardship or unfairness to other parties.

There is a good reason for this approach, namely that the purpose of parental rights (or, perhaps better, 'responsibilities') is to promote the welfare of children. That is the reason, and the only reason, why the law gives people the legal authority that is associated with custody, guardianship and access. Given this purpose, it makes perfectly good sense to base any re-arrangement of these parental rights on predictions about what will be best for the child.

When we move beyond parental responsibilities, however, the matter is

115 S. 66D(2). This provision clearly derives from the significance of Lovering, *Cost of Children in Australia* (1984).

quite different. Other areas of law involve competition between the interests of the child and the interests of others. When children's interests clash with other interests, there is no good reason to give an *absolute* preference to children's interests, and disregard others.[116] A neat example is the English Court of Appeal decision in *Re X*.[117] In that case, an application was made to prevent publication of a book which contained scandalous revelations about a child's deceased parent. The Court held that the public interest in freedom of expression outweighed the child's interest in being protected from the adverse impact of the facts becoming public. Whether or not one agrees with the court's conclusion, it was surely right for it to engage in the exercise of attempting to balance one interest against the other. The case involved more than competing claims about the child's upbringing, and so it would have been wrong to disregard all interests other than those of the child.

In my view the question of maintenance also involves a competition, a clash of interests. It involves a competition between the interest of the child in having (presumably) as much as possible of the good things money can provide, and the interest of the parent in retaining money for his or her own use. No doubt the interests of the individuals involved are more subtle than this, and interact with each other in complex ways, but my argument is that maintenance cases involve, among other things, a legitimate competition for resources. Resolving them involves, among other things, balancing the reasonable needs of the parent with those of the child, as is made explicit in the Act, for example in section 66B(2)(b)(i).

It represents a misunderstanding of what is at stake for the legislature to say that maintenance cases should be governed by the principle that the child's welfare is paramount, and it seems incoherent to say that the court should have regard to a number of matters, one of which is that the child welfare is to be paramount.[118] How can the paramount consideration principle be applied sensibly in this area? On the face of it, applying the principle that the child's welfare is paramount in maintenance cases should lead to the result that all the respondent's money should go to the child. And the principle is no help in situations where the a person is liable to maintain more than one set of children, for example where a man has children of a first marriage and of a second marriage. Indeed, in so far as it suggests that

116 There might be plausible arguments for giving children's interests considerable emphasis, as distinct from absolute priority. For example, it could be argued that children are typically least able to defend their interests; or that promoting children's interests has a special value for the future of the community.

117 *Re X* [1975] Fam 47. For a detailed discussion, see N. Lowe and R. White, *Wards of Court* (1979) 110-115.

118 A somewhat similar issue arises under the Matrimonial Causes Act 1973 (UK), as amended by the Matrimonial and Family Proceedings Act 1984 (UK). The difficulty is less acute, however, since s. 25(1) provides that the child's welfare is to be the "first consideration", a phrase that appears to allow other considerations to be taken into account: see Cretney, SM, *Principles of Family Law* (4th ed. 1984) 811. I am indebted to Rebecca Bailey-Harris for this point.

the court should treat as paramount the interests *of the children whose maintenance is in question* in the proceedings, the principle is absurd.

There is of course no chance that the courts will reach this absurd conclusion, but it may be significant how they avoid it. There at at least two available lines of reasoning. First, it may be said that the provisions of Division 6 make it clear that the child's welfare is only one of a number of factors to be taken into account. This argument needs careful formulation, however, to avoid the problem that the legislation appears to require the court to take into account not the child's welfare, but the principle that the child's welfare is paramount. This view, therefore, would have to circumvent the precise wording of the provisions and argue that, reading the Act as a whole, the reference in section 66D to section 60D must mean that the court should have regard to the 'matter' of the child's welfare, not the principle stated in section 60D.

There is a second possible strategy the courts could adopt. They could say that the principle in section 60D means that the child's welfare has special importance, but is ultimately only one of a set of factors to be taken into account. This would be a most unfortunate argument, I believe. It is difficult to see how the principle in section 60D can mean quite different things in different contexts. Thus adoption of this argument would threaten to undermine the force of the "paramount consideration" principle in areas where it has properly been applied with its full force, namely in custody, guardianship and access cases. If it became accepted in maintenance cases that the principle in section 60D meant only that the child's welfare was one of a set of relevant matters, it would be arguable that it had the same watered-down meaning in custody cases. In my view this would be regrettable, and would cast doubt on what is now a solid line of authority on the strong meaning of the principle in custody cases.

It is submitted, therefore, that the best judicial solution to the problems posed by sections 60D and 66D is to read section 66D as meaning that in maintenance cases the court should take into account the child's welfare. As such, the reference to section 60D will do no harm. Nor will it do much good, since it is hard to see how it can make any difference in the way child maintenance orders are made. It is submitted that the law would be more coherent, and no less satisfactory for children, if the Act was amended to restore the "paramount consideration" principle to section 64, where it belongs.