CHILDREN, THE CONSTITUTION AND THE FAMILY COURT

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I. INTRODUCTION

The constitutional limits of the Family Court's jurisdiction over children has been a persistently controversial matter since the Family Law Act 1975 (Cth) first came into operation at the beginning of 1976. Of the dozen or so constitutional challenges so far mounted against the Act, in its original and variously amended forms, some two-thirds have been concerned with the ambit of the federal "marriage" power (section 51(xxi) of the Constitution) in relation to children, especially in custody cases. The most recent set of amendments to the Act, introduced in 1983, has so far produced three High Court decisions, and further challenges are likely in the near future. At issue in these recent cases have been the categories of children and step-children who can properly be regarded as "children of the marriage", thereby allowing provision to be made for their custody, guardianship and maintenance, and whether third parties may bring Family Court proceedings concerning children of a marriage where the spouses themselves have not been in dispute.

In this paper we propose to discuss the background to the 1983 amendments to the Act, and then consider the effects and implications of the recent High Court decisions. Finally, we refer to several of the unresolved

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issues of legal principle[1] and of constitutional power which stand as obstacles to the development of a unified law, and a common jurisdiction, for the custody and support of children.

II. BACKGROUND TO THE 1983 AMENDMENTS

1. Matrimonial Causes Act 1959 (Cth)

The federal Parliament has power under section 51 of the Constitution to pass laws with respect to "marriage" (paragraph xxi), and "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants" (paragraph xxii). In reliance on the latter power, the Matrimonial Causes Act 1959 (Cth) covered custody and maintenance proceedings for children of a marriage, but only where such proceedings were related to a claim for "principal relief" (in practice, divorce or nullity). The term "child of the marriage" was defined in section 6 to extend to children of one only of the spouses (for example, ex-nuptial children, children of a prior marriage, children adopted by one spouse), if they were part of the marital household at the relevant time. No constitutional challenge to this broad definition of "child of the marriage" was ever launched. While the marriage was on foot, then, claims for custody or support of the children were a matter of State law. On divorce, however, these issues became exclusively a matter of federal law, and a court exercising jurisdiction under the Matrimonial Causes Act was empowered to make orders for custody, access, maintenance and the like in respect of all these "children of the marriage".[2]

*2. Family Law Act 1975 (Cth) and the Consequences of **Russell's** Case*

In its original form, the Family Law Act 1975 contained in section 5 a similarly wide definition of "child of the marriage". In contrast to the 1959 legislation, however, the Family Law Act was drafted largely in reliance on the "marriage" power, and sought to cover disputes over such children even where those disputes were unrelated to claims for principal relief.[3] In the first major test of the Act's validity, it was held in *Russell* v. *Russell*[4] that as a matter of constitutional interpretation, the scope of the marriage power (paragraph xxi) should not be limited or read down by reference to the

1 We have not discussed whether the Family Court can, in the exercise of "accrued" jurisdiction, make orders for the custody or support of step-children. See *e.g. Lye* (1983) FLC 91-324, *cf. Giammona* (1985) FLC 91-600; and P.E. Nygh, "The Accrued and Associated Jurisdiction of the Family Court of Australia" in J. Wade (ed.), *Family Law in 1984* (1985) 121-150, *cf.* A. Rogers, "Comment", *id.*, 151-158. The latest discussion of this topic is in *Smith (No.2)* (1985) FLC 91-604.

2 Matrimonial Causes Act 1959 (Cth): paragraph (c) of definition of "matrimonial cause" in s. 5, and ss 84, 85. See *e.g. Viney* v. *Viney* (1964) 6 FLR 417.

3 See Family Law Act 1975 (Cth) (Act No.53 of 1975): definition of "matrimonial cause" in s. 4, paragraph (c)(iii).

4 (1976) FLC 90-039. The broadest view of the extent of the marriage power was that of Jacobs J; Mason J. took an intermediate view, with which Stephen J. concurred, and which became the basis of the answers to the case stated to the High Court.

divorce and matrimonial causes power (paragraph xxii). Further, the marriage power extended to providing for the enforcement of the "rights, duties and obligations of the parties arising out of or in consequence of marriage", including those concerning custody and maintenance of children.[5] While the Act as drafted appeared to contemplate proceedings "unlimited as to parties", and to that extent was said to go beyond the limits of federal power, this difficulty could be cured by use of section 15A of the Acts Interpretation Act 1901 (Cth). As a result, the relevant jurisdiction was held to have been validly conferred "but only so far as it relates to proceedings between the parties to the marriage with respect to the custody, guardianship or maintenance of, or access to, the natural and adopted children of the parties to the marriage".[6] Although no discussion of the point appears in the judgments, the concluding reference to "natural and adopted children of the parties to the marriage" was apparently taken by the Commonwealth to mean that children of one only of the parties were beyond the reach of the marriage power.

The Act was soon amended (by Act No.63 of 1976) to bring it into line with the decision in *Russell*. Section 5(1) was amended to confine the definition of "child of the marriage" to children of both parties.[7] The new paragraph (c)(ii) of the definition of "matrimonial cause", relating to proceedings with respect to "custody, guardianship or maintenance of, or access to, a child of the marriage", was restricted to proceedings "between the parties to the marriage".

The somewhat curious result of *Russell* and the 1976 amendments, then, was that the Family Law Act conferred a jurisdiction in regard to natural or adopted children of both spouses in proceedings between the spouses during the marriage, and on divorce, but orders for custody or maintenance of children of one only of the spouses were not available under the Family Law Act even on divorce. In this last respect the coverage of the federal law from the latter part of 1976 until 1983 was narrower than that which had been achieved (although never constitutionally tested) under the Matrimonial Causes Act.

3. Later Decisions: the Problem of Third Parties

In the years following *Russell*, the High Court dealt with a number of cases bearing upon the limits of third party involvement in Family Court custody proceedings. Following the 1976 amendments, paragraph (c)(ii) of the definition of "matrimonial cause" did not enable a third party to initiate custody proceedings, because it was limited to proceedings between the spouses. Clearly, a dispute between both spouses on one side, and

5 *Id.*, 75,168-75,169 *per* Mason J.

6 *Id.*, 75,169-75,171 *per* Mason J. See also the Court's answers to the case stated at 75,178.

7 The wider definition was retained in s. 5(2) but only for the purposes of s. 63, which allowed the Court to prevent a *decree nisi* for dissolution becoming absolute if it was not satisfied that proper arrangements had been made for the welfare of the "children of the marriage".

grandparents or other persons with an interest in the children, on the other side, could be dealt with only under State law.[8]

Third parties were, however, not entirely outside the Family Court's jurisdiction. If Family Court proceedings under paragraph (c)(ii) had been instituted by one spouse against the other, a third party could seek to intervene under section 92 of the Act, and by section 64(2) the Court could, if it saw fit, award custody or access to that person. More importantly, in the light of later developments, paragraph (f) of the definition of "matrimonial cause" (which had survived *Russell*) was not in its terms limited to proceedings between the spouses, referring simply to "any other proceedings . . . in relation to concurrent, pending or completed proceedings" of various kinds, including those under paragraph (c)(ii). The possibility thus arose of a third party being involved in, and being able to institute, paragraph (f) proceedings seeking the variation or discharge of orders made in prior (c)(ii) proceedings between the spouses.

4. Third Parties and Paragraph (f)

In a series of decisions beginning in 1978 with *Dowal* v. *Murray*[9] and culminating in the 1982 case of *Fountain* v. *Alexander*,[10] the High Court addressed itself to this possibility and upheld the validity of paragraph (f), and other provisions of the Act such as section 61(4), which permitted third party initiative and participation in subsequent proceedings.[11] In the course of these cases two propositions were established.

First, the particular form of reading down which occurred in *Russell* was dictated merely by the way in which the relevant sections of the Act had been originally drafted, rather than by the limits of federal constitutional power.[12]

Second, the "marriage" power was not limited to providing for the resolution of child-related disputes as between the spouses. According to Gibbs J. in *Re Lambert; ex parte Plummer* (1980), the crucial question was

> whether the legislation creates, defines or declares rights or duties that arise out of, or have a close connexion with, the marriage relationship.[13]

Thus, in *Fountain* v. *Alexander*,[14] for example, all seven judges of the High Court held that paragraph (f) was properly applicable to a situation where a third party was seeking orders relating to a child whose custody had been formally granted to the wife in divorce proceedings ten years previously. The third party's application was thus within the Family Court's exclusive jurisdiction, because

8 *E.g. Powell* v. *Anderson* (1977) FLC 90-235.
9 (1978) FLC 91-516.
10 (1982) FLC 91-218.
11 These and other cases are discussed in more detail in O. Jessep and R. Chisholm, "Custody Jurisdiction in the Family Court" (1981) 12 *F L Rev* 281-307.
12 *Dowal*, note 9 *supra*, 77,726-77,727 *per* Stephen J., and *Re Lambert*; *ex parte Plummer* (1980) FLC 90-904, 75,697 *per* Mason J.
13 *Lambert, id.*, 75,691.
14 Note 10 *supra*.

> an order which gave some rights of custody to a stranger to the marriage would, if valid, necessarily defeat or diminish the rights given by an unqualified order for custody made in favour of the wife.[15]

5. The 1983 Amendments

Taking encouragement from several of the High Court cases on the scope of paragraph (f) of the "matrimonial cause" definition,[16] and following the 1980 recommendation of the Parliamentary Joint Select Committee on the Family Law Act to the effect that the Act should be

> amended to the fullest extent possible within the jurisdictional limits of the powers of the Commonwealth to ensure that the Family Court has jurisdiction in all matters affecting custody, guardianship and access to a child[17]

the federal government introduced into Parliament a Family Law Amendment Bill in 1981. After considerable discussion and revision, the proposed legislation came into effect in November 1983 as the Family Law Amendment Act 1983 (No.72 of 1983).

Under the 1983 amendments, the Family Court's jurisdiction in relation to children was enlarged in two directions. First, the definition of "matrimonial cause" in section 4 was expanded to include the following paragraphs:

> (cb) proceedings between the parties to a marriage with respect to the custody, guardianship or maintenance of, or access to, a child of the marriage;
>
> (cc) proceedings by or on behalf of a child of a marriage against one or both of the parties to the marriage with respect to the custody, guardianship or maintenance of, or access to, the child;
>
> (cd) proceedings instituted after the death of a party to a marriage in whose favour a custody order had been made in respect of a child of that marriage, being proceedings with respect to the custody of that child, other than proceedings for the making of an order, or the taking of any other action, of the kind referred to in sub-section 10(2) [which refers to State child welfare proceedings];
>
> (ce) proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, being proceedings to which one party to the marriage is a party (whether or not the other party to the marriage is also a party to the proceedings), other than proceedings for the making of an order, or the taking of any other action, of the kind referred to in sub-section 10(2);
>
> (cf) proceedings between the parties to a marriage with respect to the welfare of a child of the marriage;
>
> (cg) proceedings by or on behalf of a child of a marriage against one or both of the parties to the marriage with respect to the welfare of the child;
>
> (ch) proceedings with respect to the welfare of a child of a marriage, being proceedings to which one party to the marriage is a party (whether or not the other party to the marriage is also a party to the proceedings), other than proceedings for the making of an order, or the taking of any other action, of a kind referred to in sub-section 10(2) . . .

Of particular interest here is paragraph (ce), which in its terms allowed third parties to initiate or be a party to proceedings to which one or both spouses

15 *Id.*, 77,186 *per* Gibbs C.J.

16 Especially *Dowal*, note 9 *supra*; and *Vitzdamm-Jones* v. *Vitzdamm-Jones*; *St. Clair* v. *Nicholson* (1981) FLC 91-012; and later *Fountain* v. *Alexander* (1982) FLC 91-218.

17 *Family Law in Australia (Report of the Joint Select Committee on the Family Law Act)* (Canberra 1980) Vol. 1, 62.

were parties, without any requirement of prior proceedings between the spouses, but excluding those situations itemised in section 10(2) where the powers of State child welfare authorities would be affected.

Second, the definition of "child of the marriage" in section 5 was revised to read as follows:

> 5(1) For the purposes of each application of this Act in relation to a marriage-
> (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
> (b) a child of the husband and wife born before the marriage;
> (c) a child born to the wife, being a child who, under section 5A, is deemed to be the child of the husband;
> (d) a child born to a former wife of the husband, being a child who, under section 5A, is deemed to be the child of the husband, if, at the relevant time, the child was ordinarily a member of the household of the husband and wife;
> (e) a child of either the husband or the wife, including-
> (i) an ex-nuptial child of either of them; and
> (ii) a child adopted by either of them (whether alone or together with another person or other persons),
> if, at the relevant time, the child was ordinarily a member of the household of the husband and wife; and
> (f) a child (other than a child mentioned in any of the preceding paragraphs) who has been, and was at the relevant time, treated by the husband and wife as a child of their family, if, at the relevant time, the child was ordinarily a member of the household of the husband and wife,
> shall be deemed to be a child of the marriage and a child of the husband and wife (including a child born before the marriage) who has been adopted by another person or other persons shall be deemed not to be a child of the marriage.
> 5(2) For the purposes of sub-section (1), the relevant time, in relation to any proceedings, is-
> (a) if the husband and wife were not living together at the time when the proceedings were instituted – the time immediately preceding the time when the husband and wife separated, or, if they have separated on more than one occasion, the time immediately preceding the time when they last separated before the institution of the proceedings; or
> (b) if the husband and wife were living together at the time when the proceedings were instituted – the time immediately preceding the institution of the proceedings.
> 5A(1) A child born to a woman as a result of the carrying out, during the period in which the woman was married to a man, of a medical procedure in relation to that woman, being a child who is not biologically the child of that man, shall, for the purposes of section 5, be deemed to be a child of that man if-
> (a) the medical procedure was carried out with the consent of that man; or
> (b) under an Act or under a law of a State or Territory the child is deemed to be the child of that man . . .
> 5A(3) In this section, "medical procedure" means artificial insemination or the implantation of an embryo in the body of a woman.

In this awkwardly drafted form, section 5 goes even further than the original definitions of "child of the marriage" in the Family Law Act, and in section 6 of the Matrimonial Causes Act 1959. For example, section 5(1)(f) includes a child of *neither* spouse, if the child was ordinarily a member of the spouse's household and was treated by them as a child of their family.

One consequence of the 1983 amendments is that, at least on a literal reading of the Act, a child can be simultaneously a child of more than one marriage. If, for example, a mother divorced and remarried, the child on becoming a member of the new marital household would be both a child of the first and of the second marriage.[18]

Children who are thus the children of more than one marriage may consequently acquire multiple guardians and persons liable to maintain them. This result appears to follow when section 5[19] is read in conjunction with section 61(1), which provides that subject to any court order each of the parties to a marriage is a guardian and joint custodian of the children of the marriage, and section 73, which makes the spouses liable, according to their respective financial resources, to maintain the children of the marriage. Further complications might also arise in relation to the rights and obligations of persons under State legislation or at common law, for example the mother of an ex-nuptial child where the father had married and the child was living in his marital household. The scope for confusion and litigation as to the proper construction of section 5 was therefore considerable, even leaving aside the issue of constitutional validity.

To date, constitutional challenges have been brought against paragraph (ce) of the "matrimonial cause" definition, and sections 5(1)(e)(i) and (f) of the "child of the marriage" definition. These cases will now be considered.

III. HIGH COURT DECISIONS ON THE 1983 AMENDMENTS

In *Cormick* v. *Salmon* (1984)[20] a dispute arose between a woman and her daughter over custody of the daughter's ex-nuptial child (that is, the woman's grandchild). The child had been born in 1979, and had been looked after for some years by the grandmother and her second husband. In 1984 the grandmother applied to the Family Court asking that she and her husband be granted joint custody of the child. Her application was based on the claim that the child had become a child of her current marriage, by operation of section 5(1)(f). The woman's daughter objected to the Family Court's jurisdiction, and the proceedings were removed into the High Court.

The High Court, by a six to one majority, held that section 5(1)(f) could not be justified as an exercise of the marriage power. The main judgment is that of Gibbs C.J.,[21] who began by summarising what he took to have been

18 The child remains a child of the first marriage (see s. 4(3)), and becomes a child of the second marriage under s. 5(1)(e). This result has been noted by commentators. See *e.g.* R. Bailey, "The Amendments of 1983 to the Family Law Act 1975" (1984) 58 *ALJ* 369; R. Chisholm, "Children and the Family Law Act: an Overview" in J. Wade (ed.), *Family Law in 1984* (1985).

19 It should be noted however that the opening words of the section, "For the purposes of each application of this Act in relation to a marriage", are capable of more than one interpretation: see *e.g.* M. Broun and S. Fowler (eds), *Australian Family Law and Practice Reporter* (CCH) (1985) Vol.1, para. 15-504.

20 (1984) FLC 91-554.

21 Mason, Wilson, Deane and Dawson JJ. agreed with the judgment of Gibbs C.J. Brennan J. endorsed the views of Gibbs C.J. in a separate judgment. Murphy J. dissented.

established in the cases decided since *Dowal* v. *Murray* in 1978:[22]

> [t]he rights and duties of the parties to a marriage, with respect to the children of the marriage, arise directly out of the marriage relationship, and a law defining, regulating or modifying the incidents of the marriage relationship is a law with respect to marriage. This is so, although the law defines the rights of the parties to the marriage to the custody and guardianship of a child of the marriage, not only as between themselves, or between them and the child, but also as against other persons.[23]

Nevertheless,

> [t]he Parliament cannot bring a case within sec.51(xxi) by deeming a child to be a child of a marriage if the necessary connection between the child and the marriage does not in truth exist.[24]

Gibbs C.J. conceded that a child could become a child of a marriage other than by birth, for example by legitimation and adoption. In a formal adoption, he said, the child becomes a child of the adopting parents' marriage "in law and in fact". Thus a law regulating the rights of those parents to the custody or guardianship of the adopted child would be a valid law with respect to marriage. On the facts of the case, it was unnecessary to consider whether a similar result might follow in the event of a "de facto adoption not effected by legally recognized means".[25]

Turning to the wording of section 5(1)(f), Gibbs C.J. observed that the paragraph did not require that the child should have any relationship by blood or adoption to either spouse, nor that the household arrangement should have any permanence or be based on the child's acquiescence. Further the word "household" was wide enough to include any "relative, friend or servant ordinarily living in the house". Having outlined what he regarded as the difficulties of identifying the link between the factual situation addressed by the paragraph and any relevant "marriage", His Honour concluded:

> [t]he fundamental objection to the validity of sec.5(1)(f) is, however, that it seeks to render the provisions of the Act, such as sec.61, which deal, amongst other things, with the rights to custody and guardianship of children, applicable to a situation in which those rights do not arise out of, and do not have any necessary connection with, the marriage relationship. There is no sufficient connection between marriage and the extension of the law which sec.5(1)(f) attempts to effect.[26]

As there was no divorce or other matrimonial cause arising from the facts, Gibbs C.J. found it unnecessary to consider whether any reading down of section 5(1)(f) was possible under the divorce and matrimonial causes power (paragraph xxii).[27] Perhaps with a similar question in mind, Brennan J. in his concurring judgment stated:

> the rights and duties of husband and wife in respect of children who do not enjoy the status of children of their marriage – whether by birth, by legitimation or by adoption – are not, in my opinion, amenable to regulation by a law for which the marriage power alone provides support.[28]

22 Note 9 *supra.*
23 Note 20 *supra*, 79,472.
24 *Id.*, 79,473.
25 *Ibid.*
26 *Ibid.*
27 *Id.*, 79,472.
28 *Id.*, 79,476.

In contrast, Murphy J. in his dissenting judgment had no difficulty in upholding section 5(1)(f) as a valid law with respect to marriage. The issue was not whether Parliament could deem such a child to be a child of the marriage, since that was merely a convenient form of legislative drafting, but rather "whether Parliament is empowered to legislate for such a child".[29]

In His Honour's view,

> Parliament correctly considered that its legislative power with respect to marriage extended to the protection of all children who become part of the family which arose from the marriage . . . This reflects the realities of our society, that such a family often includes children who are not strictly born of the marriage, but are absorbed into it.[30]

In the result, however, the holding of the majority meant that the grandmother's application would have to be determined in a State court by the application of State law.

The Commonwealth fared better in the second case, *V.* v. *V.* (1985).[31] A grandmother made an application to the Family Court, seeking access to two children who had been legally adopted by her son and his wife. As the marriage was still on foot and there had been no previous proceedings between the son and his wife, the grandmother's claim was brought as a paragraph (ce) "matrimonial cause".[32] The case therefore squarely posed the question whether such an application by a third party had the necessary connection with "marriage". By a majority of five to one, the High Court held it did, and that paragraph (ce) was valid. Accordingly the application was remitted for hearing to the Family Court.

In a joint judgment, Gibbs C.J., Mason, Wilson, Brennan and Deane JJ. began by pointing out that the adopted children were "children of the marriage" by virtue of section 5(1)(a), and that, no doubt because of the observations of Gibbs C.J. in *Cormick*,[33] noted earlier, no challenge had been made to the validity of that paragraph.[34] Their Honours cited *Cormick* and earlier authorities, and stated:

> [a] law which provides for the adjudication of conflicting claims by a party to a marriage and a stranger to the custody of or access to a child of the marriage is a valid exercise of the marriage power, because such a law provides for the regulation of rights and duties (declared in the first instance by sec.61(1)) that arise out of the marriage relationship.[35]

While in the earlier cases there had been a requirement of previous proceedings between the spouses, that was merely a result of the wording of the particular definition of "matrimonial cause" (paragraphs (c)(ii), (f)) at that time:

> [t]he fact that there have been previous proceedings cannot possibly be a necessary condition of the constitutional validity of a law made under the marriage power.[36]

29 *Id.*, 79,474.
30 *Id.*, 79,475.
31 (1985) FLC 91-616.
32 Although paragraph (ce) had also been used in *Cormick's* case, the High Court there confined itself to ruling on the validity of s. 5(1)(f): (1984) FLC 91-554, 79,471 *per* Gibbs C.J.
33 Note 20 *supra*, 79,473.
34 Note 31 *supra*, 79,982.
35 *Id.*, 79,983.
36 *Ibid.*

In the sole dissenting judgment, Dawson J. reached the startling conclusion that the High Court authorities from *Dowal* v. *Murray* (1978) to *Fountain* v. *Alexander* (1982) were consistent with his own view that the marriage power was confined to "the regulation or definition of the rights of the partners to the marriage inter se",[37] and thus proceedings involving third parties could be justified only if they were incidental to the regulation of the rights of the spouses in previous proceedings. On this view paragraph (ce) was beyond the scope of federal power.[38] Even more surprisingly, given the decision in *Russell*,[39] Dawson J. considered that the specific reference to "custody and guardianship of infants" in the divorce and matrimonial causes power (paragraph xxii) must have a limiting effect on the interpretation of the marriage power (paragraph xxi) in relation to those matters.[40]

The third of the recent cases, *Re Cook and Maxwell JJ; ex parte C.* (1985)[41] again turned on the definition of "child of the marriage", here section 5(1)(e)(i), which refers to an ex-nuptial child of one of the parties who is part of the marital household. The mother of an ex-nuptial child born in 1973 subsequently married in 1979. The child lived with the mother and her husband until early 1985, when she ran away to the home of her maternal grandparents. The grandparents then sought a custody order in the Family Court. Their application was by way of a paragraph (ce) "matrimonial cause", and the child was said to be a child of the marriage of the mother and her husband by virtue of section 5(1)(e)(i). The married couple objected to the Family Court's jurisdiction, and the High Court by a majority of five to one upheld the objection. Consequently, the grandparents' application could be entertained only under State law.

Gibbs C.J. began by pointing to what he took to be an inherent difficulty of regarding an ex-nuptial child as a child of the marriage:

> [t]he very name indicates the truth of the situation that the child is outside the marriage relationship, if no other circumstances exist which would bring it within that relationship.[42]

Referring to the requirement of section 5(1)(e)(i) that the child should be ordinarily a member of the spouse's household, His Honour said that the reasoning in *Cormick's* case against the validity of section 5(1)(f) (which had required in addition that the child be treated as a child of the spouses' family) should apply a fortiori to section 5(1)(e)(i):

> [t]he connexion sought to be made between a marriage and an ex-nuptial child of one of the parties to a marriage is even more tenuous than that between a marriage and a child who was treated by the husband and wife as a child of their family . . .[43]

Nor was it possible Gibbs C.J. said, to read down the terms of section

37 *Id.*, 79,984-79,989.
38 *Id.*, 79,991.
39 Note 4 *supra.*
40 Note 31 *supra*, 79,991-79,992.
41 (1985) FLC 91-619.
42 *Id.*, 80,005.
43 *Ibid.*

5(1)(e)(i) to cover a situation of "de facto adoption", since the wording did

> not require that both parties to the marriage should have treated, and intended permanently to treat, the child as a child of the marriage or, if it matters, that the child should have regarded himself or herself as a child of the marriage . . . The question whether a sufficient connexion with marriage would exist if the law applied to children who had been adopted de facto must therefore be left open.[44]

Consequently, the provisions of the Act were found to be invalid insofar as they purported to create and deal with rights of spouses in relation to third parties concerning ex-nuptial children, which rights were said not to arise out of and not to have a sufficient connection with the marriage relationship.[45] The only possible operation for section 5(1)(e)(i), Gibbs C.J. concluded, might be in extending the relevant provisions of the Act "to the definition of the rights and duties of the parties to a marriage as between themselves".[46]

Apart from the dicta on "de facto adoption", Wilson J. expressly approved the reasoning of the Chief Justice, as did Dawson J. Mason J. delivered a short judgment along similar lines.[47]

The suggestion of Gibbs C.J. that the marriage power might extend to cover "de facto adopted" children gained cautious support from Mason J., who concluded:

> [i]t may be that if the provision were limited to an ex-nuptial child which is treated by both parties as a child of their marriage it would be valid.[48]

This view was however firmly rejected by Wilson and Brennan JJ. Brennan J. repeated the passage quoted earlier from his judgment in *Cormick* to the effect that the marriage power extended only to children who had the status of children of the marriage by birth, legitimation or by adoption.[49] He was not prepared to accept that anything less than formal adoption (which severs the legal ties to the natural parents) would be sufficient to attract that status.

> The connexion between marriage and a law which would alter or extinguish the relationship between a child and both its natural parents or would authorise a court to alter or extinguish that relationship is too tenuous, in my opinion, to support the validity of the law under sec.51(xxi) of the Constitution.[50]

The sole dissenting judgment is that of Deane J., who saw an important difference between section 5(1)(e)(i) and section 5(1)(f). Where the latter provision did not require the child to have any relationship "by blood or social convention with either party to the relevant marriage or, for that matter, with the marriage itself",[51] section 5(1)(e)(i) covered the position where a natural parent of an ex-nuptial child married someone and the child

44 *Id.*, 80,006.

45 *Ibid.* It might also be noted that as the Act is now drafted, the welfare of and arrangements for ex-nuptial children and other step-children are similarly beyond the consideration of the Family Court in determining under s.63 of the Act whether a *decree nisi* for divorce should become absolute. *Cf. Opperman and Opperman* (1978) FLC 90-432.

46 Note 41 *supra*, 80,006.

47 *Id.*, 80,007 *per* Wilson J., and 80,013 *per* Dawson J. The judgment of Mason J. appears at 80,006.

48 *Id.*, 80,006.

49 *Id.*, 80,008, quoted from *Cormick*, note 20 *supra*, 79,476.

50 *Ibid.*

51 *Id.*, 80,010.

lived in their home. Here,

> the child has a close and direct connexion with the marriage. It is not only that he or she lives in the matrimonial home as a child of one party to the marriage. It is that, as a matter of well-established social custom in this and other countries of the common law world, the child acquires a special familial relationship with the other party to the marriage by reason of the marriage itself . . . The relationship between step-parent and stepchild is one of affinity rather than consanguinity. The basis of the relationship is the marriage of the step-parent with the natural parent.[52]

His Honour then gave examples of criminal, tort, child welfare, and tax law where rights and obligations were imposed and account was taken of the step-parent and step-child relationship, and concluded that the

> interests, maintenance, care and custody of a previously born under-age child of one party to the marriage are properly and necessarily involved in the marriage relationship between husband and wife.[53]

For this reason, section 5(1)(e)(i) was a valid exercise of the marriage power at least insofar as it applied to ex-nuptial children born before the marriage. It was true that the application of provisions of section 61(1) would confer a "prima facie entitlement" to guardianship and custody upon the married couple while the child was a member of the household, subject to the Court's powers to make alternative orders, but this result represented "a considered legislative adjustment of rights and obligations of guardianship, custody and access" following upon the change in circumstances caused by the natural parent's marriage.[54]

Deane J. noted that an ex-nuptial child born *after* the marriage was not in ordinary language a "stepchild", and section 5(1)(e)(i) could if necessary be read down to exclude such children.[55] His Honour made no reference however to the position of a child of one spouse by a former *marriage* , who would also come within the opening words of section 5(1)(e), "a child of either the husband or the wife". We return to this point later.

IV. IMPLICATIONS OF THE HIGH COURT CASES

While further challenges to the 1983 amendments are very likely, it is already possible on the basis of the three recent High Court authorities to speculate on the constitutional validity of the remaining paragraphs of the definitions of "matrimonial cause" and "child of the marriage".

1. The Definition of "Matrimonial Cause"

(i) Paragraphs (cb) and (f)

Paragraph (cb) of the "matrimonial cause" definition is obviously valid, being identical with the former paragraph (c)(ii) inserted in 1976 to take account of *Russell's* case.[56] Similarly, the validity of paragraph (f) ("any other

52 *Ibid.*
53 *Id.*, 80,010-80,011.
54 *Id.*, 80,011-80,012.
55 *Id.*, 80,012.
56 Note 4 *supra.*

proceedings... in relation to concurrent, pending or completed proceedings" of various kinds, including those under (cb), and now (ce)) appears settled, as we have already noted.[57]

(ii) Paragraph (cc)

Paragraph (cc) refers to proceedings "by or on behalf of" a child of the marriage against one or both spouses concerning guardianship, custody, access or maintenance. Brennan J. in *Cormick* had no doubt that this was valid, being a provision facilitating the "enforcement on behalf of nuptial children of the duties owed to them by delinquent parents".[58] In a like way, Gibbs C.J. in the main judgment in that case observed that the marriage power allowed for a law regulating and enforcing the rights and duties of spouses towards children of the marriage "not only as between themselves, *or between them and the child*, but also as against other persons" [emphasis added].[59]

The only point left to be decided then is what proceedings can properly be said to be "by or on behalf of the child". Although in one sense this phrase could be applied to *all* proceedings for custody or support of children of a marriage, thereby making other paragraphs such as (cb) and (ce) almost superfluous, Gibbs C.J. queried in *Cormick* whether an adult could "without authority" assume to bring the proceedings on behalf of a five year old child.[60] Presumably the section can be construed to cover cases where the child is old enough to take the initiative or at least give instructions in regard to the proceedings and the form of orders sought. With the benefit of hindsight, it would seem in any event that all (cc) proceedings will also come within (ce), the validity of which was upheld in *V.* v. *V.* (1985).[61]

(iii) Paragraph (cd)

In the light of the cases discussed, paragraph (cd) is unfortunately drafted, being on one view too widely drawn, and in another sense simply unnecessary. It refers (with an exception relating to the actions of State child welfare authorities) to proceedings instituted

> after the death of a party to a marriage in whose favour a custody order had been made in respect of a child of that marriage, being proceedings with respect to the custody of that child . . .

This paragraph must be read with section 61(4), the present form of which was upheld by a majority of the High Court in *Vitzdamm-Jones* v. *Vitzdamm-Jones*; *St Clair* v. *Nicholson* (1981).[62] This section provides that a surviving non-custodial parent does not acquire custody unless the Court so decides, and that third parties may initiate or be a party to the subsequent

57 *Supra*, text to notes 9-15.
58 Note 20 *supra*, 79,476 *per* Brennan J.
59 *Id.*, 79,472.
60 *Id.*, 79,471.
61 Note 31 *supra*.
62 (1981) FLC 91-012.

proceedings. Proceedings to which section 61(4) applied were viewed by the High Court in that case as a valid example of a paragraph (f) "matrimonial cause".[63] Since a similar application today would still come within paragraph (f), as would applications for other orders such as access, paragraph (cd) is unnecessary. This is now doubly so, following *V.* v. *V.* (1985),[64] because the application would also come within (ce).

In its terms, however, paragraph (cd) may be too widely drawn, in that it appears also to cover custody proceedings following the death of a *surviving* spouse, if that spouse had a custody order. Clearly, on the approach of Gibbs C.J., which has found favour with the majority of the High Court, the marriage power would not extend to providing a jurisdiction once both spouses have died.[65] A related point is that (cd) does not specifically require any surviving spouse to be a party to the proceedings, a matter regarded by Gibbs J. in *Vitzdamm-Jones* to be virtually essential.[66] In summary, paragraph (cd) is likely to be declared valid only if read down according to the guidelines in *Vitzdamm-Jones*, but in such a case it is unnecessary since the proceedings would fall within (ce) and (f) in any event.

(iv) Paragraphs (cf), (cg) and (ch)

These paragraphs may be taken together. As a set, they run parallel to paragraphs (cb), (cc), and (ce), on which we have already commented, but refer to the "welfare" of a child of the marriage, rather than "custody, guardianship, access or maintenance". Paragraph (cf) refers to proceedings between the spouses, (cg) to proceedings by or on behalf of the child against one or both spouses, and (ch) to proceedings to which one spouse is a party (again excepting the actions of State child welfare authorities).

The insertion of these paragraphs followed upon the Watson Committee Report to the Family Law Council in 1982. The Report recommended that the Family Law Act should be amended to exclude the possibility of any residual *parens patriae* (wardship) jurisdiction remaining in the State Supreme Courts over children of a marriage.[67]

Under the wardship jurisdiction the Supreme Court can make a variety of orders for the welfare and protection of children, for example, relating to medical treatment. Would this jurisdiction persist, in the case of a child of a marriage, where the Family Court otherwise had exclusive jurisdiction in proceedings concerning the child's custody, guardianship, access or maintenance? In *Fountain* v. *Alexander* (1982), decided before the "welfare" paragraphs were inserted, Gibbs C.J. admitted the possibility of at least a "vestigial" wardship jurisdiction in the State Supreme Courts.[68] In response

63 *Id.*, 76,158 *per* Gibbs J., 76,162 *per* Stephen J., and 76,164 *per* Mason J. Murphy J. also formed part of the majority in upholding the validity of s. 61(4) (76,164).
64 Note 31 *supra*.
65 Note 62 *supra*, 76,161 *per* Gibbs J. *Cf.* Jacobs J. in *Russell*, note 4 *supra* for a wider view.
66 *Id.*, 76,160. For comment, see Jessep and Chisholm, note 11 *supra*, 288 n. 38 and 303 n. 13.
67 Family Law Council, *Watson Committee Report*, AGPS (Canberra 1982) 9. *Cf. Egan* (1985) FLC 91-608, 79,937 *per* Strauss J.
68 Note 10 *supra*, 77,189.

to such dicta, and the resulting proposals of the Watson Report, the 1983 paragraphs were no doubt intended to eliminate this possibility.

It can nevertheless be argued that this set of paragraphs may be either too widely drawn or unnecessary. According to Gibbs C.J. in *Fountain* v. *Alexander*,

> [t]he power of the Parliament to make laws with respect to marriage does not extend to laws for the protection or welfare of the children of a marriage except in so far as the occasion for their protection or welfare arises out of, or is sufficiently connected with the marriage relationship.[69]

It would follow on this view that if "welfare" in (cf), (cg) and (ch) is intended to extend to matters unrelated to the rights and duties of the spouses arising from the marriage, it would go beyond the scope of federal power. On the other hand, if "welfare" is confined to matters connected with those rights and duties of the spouses arising from the marriage, such as those set out in sections 61(1) and 73 of the Act, it is difficult to think of anything which is not already covered by the words "custody, guardianship, access, and maintenance". In our opinion, the Family Court in proceedings under (cb), (cc) or (ce) may if necessary make orders dealing with almost any aspect of a child's life and upbringing, such as his or her name, care and control, accommodation, diet, personal relationships, schooling, religion, and medical treatment.[70] All of these matters pertain to the child's custody or guardianship or maintenance, for which the spouses are in the first instance responsible, and thus, in addressing itself to such issues the Court is adjudicating upon and redefining or enforcing the rights of spouses arising out of the marriage towards the children of the marriage.

In *Fountain* v. *Alexander*, Mason J. doubted whether any residual wardship jurisdiction remained in the Supreme Court, since for example a Family Court order for medical treatment, made under section 64(1)(c), could operate to "qualify the rights and powers of a custodial parent". Thus, if the matter was a properly constituted "matrimonial cause", the State Supreme Court would then be deprived of its jurisdiction by operation of section 8 of the Family Law Act.[71] As we have indicated, we agree with the analysis of Mason J., and consequently doubt that (cf), (cg) and (ch) can operate so as validly to enlarge the jurisdiction of the Family Court. That is to say, to the extent that these paragraphs go beyond the existing jurisdiction under (cb), (cc) or (ce) in relation to custody, guardianship, maintenance or access, they are likely to be held to go beyond the constitutional limits of the "marriage power".

2. The Definition of "Child of the Marriage"

Following the decisions of the High Court in *Cormick* (1984) and *Ex parte*

69 *Ibid.*

70 *Cf.* ss 64(1)(c), 74. For examples, see *Bishop* (1981) FLC 91-016 (education), and *Chapman and Palmer* (1978) FLC 90-510 (name).

71 Note 10 *supra*, 77,192-77,193 *per* Mason J.

C. (1985),[72] it can be anticipated that a similarly constituted High Court would declare invalid several other aspects of the definition of "child of the marriage" in section 5. To reiterate, the majority judges in both cases, in construing the scope of the federal marriage power, emphasised the importance of "birth, legitimation or adoption" as the means whereby a child could properly achieve the status of a child of the marriage.[73] There can be no doubt that section 5(1)(b) ("a child of the husband and wife born before the marriage") is therefore valid, because such a child becomes legitimate by operation of section 89 of the Marriage Act 1961 (Cth).[74] The paragraphs dealing with children adopted by one spouse, and artificially conceived children, however, present more complex issues.

(a) Child Adopted by One Party

Section 5(1)(a) refers to "a child adopted since the marriage by the husband and wife or by either of them with the consent of the other". In contrast, section 5(1)(e)(ii) refers to

> a child adopted by either of them (whether alone or together with another person or other persons), if, at the relevant time, the child was ordinarily a member of the household of the husband and wife . . .

In both section 5(1)(a) and section 5(1)(e)(ii), we suggest, the term "adoption" refers only to adoption by law (see section 4(1)). We discuss later the question whether it would be constitutionally possible to bring children under the Family Law Act by virtue of a "de facto adoption".

The decision in *V.* v. *V.* (1985) shows that the most obvious application of section 5(1)(a) is valid: both children had been formally adopted since the marriage by the husband and wife, and thus were properly "children of the marriage".[75] The intended operation of the concluding phrase "or by either of them with the consent of the other" is however unclear. Conceivably, it is directed to a case of step-parent adoption, that is, where a natural parent marries and the spouse wishes to share legal responsibility for the child. In most Australian States this is achieved by an adoption order jointly in favour of both spouses,[76] whereby the child would become a "child of the marriage" under the first limb of section 5(1)(a). In States such as Western Australia and South Australia, in contrast, it is possible, with the consent of the natural parent spouse, for an adoption order to be made simply in favour of the other spouse, who then becomes a legal parent of the child together with the natural parent spouse.[77] The overall effect of such an adoption appears to be identical to that of a joint adoption order, and the second limb of section

72 Notes 20 and 41 *supra.*

73 Note 20 *supra,* 79,473 *per* Gibbs C.J., and 79,476 *per* Brennan J; note 41 *supra,* 80,006 *per* Gibbs C.J., 80,007 *per* Wilson J., and 80,008 *per* Brennan J.

74 This section was held to be valid by the High Court in *Attorney-General for Victoria* v. *Commonwealth* (1962) 107 CLR 529.

75 Note 31 *supra,* 79,982 *per* Gibbs C.J., Mason, Wilson, Brennan and Deane JJ.

76 *E.g.* Adoption of Children Act 1965 (N.S.W.) ss 18, 19, 27.

77 See Adoption of Children Act 1896-1981 (W.A.) ss 4, 7; Adoption of Children Act 1966-1967 (S.A.) s.11.

5(1)(a) may then be as valid, in its application to this type of procedure, as it is to joint adoption orders.

On the other hand, the wording of the second limb of section 5(1)(a) might also extend to a quite different, if rare, situation of an adoption by one spouse of a child unrelated to the other spouse.[78] Here the effect of the adoption order is to make the adopting spouse the *sole* legal guardian.[79] Would the fact of the other spouse's consent to the adoption provide a sufficient nexus between the child and the marriage for the child to become a "child of the marriage"? The majority judgments in *Ex parte C.* suggest not.[80]

Similar reservations may be expressed about the wording of section 5(1)(e)(ii), which is presumably directed to adoptions by one party *prior* to the marriage, or, where such an arrangement is possible, to an adoption by one spouse *after* the marriage but without the consent of the other party.[81] Here the "household" requirement is intended to supply the necessary nexus, but on the authority of *Ex parte C.* this would clearly not be sufficient.[82] A child adopted by one spouse and living in the household can hardly be more closely connected with the marriage than the spouse's ex-nuptial child living in the household in *Ex parte C.*, or for that matter, to a *nuptial* child living in the household of a remarried parent.[83] In each instance, we suggest, a majority of the High Court would not regard the child as a child of the marriage upon which the household is based, because the child's major link is to only one, rather than both, of the spouses.[84]

(b) Artificial Conception

In relation to artificial conception, the relevant paragraphs are sections 5(1)(c) and (d), read with section 5A. Section 5(1)(c) refers to "a child born to the wife, being a child who, under section 5A, is deemed to be a child of the marriage". Section 5(1)(d) covers a different situation, that of

> a child born to a former wife of the husband, being a child who, under section 5A, is deemed to be the child of the husband, if, at the relevant time, the child was ordinarily a member of the household of the husband and wife . . .

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78 As would be possible in New South Wales, for example, under ss 19(2) and (3) of the Adoption of Children Act 1965 (N.S.W.).

79 See *e.g.* Adoption of Children Act (1965) (N.S.W.) s. 35(1).

80 *Cf.* note 41 *supra*, 80,005-80,006 *per* Gibbs C.J., 80,006 *per* Mason J., and 80,013 *per* Dawson J.

81 This would only be possible in New South Wales, for example, if the spouses were separated – s.19(3) Adoption of Children Act 1965 (N.S.W.). But *cf.* Adoption of Children Act 1964-1983 (Qld.) s.12, where consent is apparently not required even where the spouses are living together.

82 *E.g.* note 41 *supra*, 80,005 *per* Gibbs C.J.

83 The opening words of s. 5(1)(e) ("a child of either the husband or the wife, including . . . ") would extend to cover a child born of one spouse's previous marriage. It is not clear whether even Deane J., who dissented in *Ex parte C.*, would regard this application of s. 5(1) as valid – see note 41 *supra*, 80,011-80,012.

84 See the citations at note 73 *supra*. For Wilson and Brennan JJ., in the case of a child adopted by one spouse there would at least be no danger of extinction of another person's rights under State law, but in the earlier case of *Cormick* both judges approved the reasoning of Gibbs C.J: see note 20 *supra*, 79,476.

Under section 5A a husband who is not the biological father of a child born to the wife as a result of a "medical procedure" (i.e. "artificial insemination or the implantation of an embryo"), is nevertheless deemed to be the father if he consented to the procedure, or if he is deemed to be the father under State or Territory law.[85]

Is section 5(1)(c) valid? In the case of a child born as a result of artificial insemination of the wife, to which the husband has consented, the child can be said to be connected to the marriage by the couple's decision to have the child by this means, analogously perhaps to a decision that they should jointly adopt a child. (The analogy with adoption is closest in those States (for example New South Wales) whose laws provide for the exclusion of any parental rights in the semen donor, and for the consent of the spouse to the procedure.) On this basis it is possible to argue for the validity of section 5(1)(c).

One complicating factor would arise if the child was instead born as a result of an embryo transplant, the fertilised egg not being that of the wife. In this instance, it is not clear whether the egg donor would under State law be regarded as the "mother" or as having any rights relating to the child. For Wilson and Brennan JJ. in *Ex parte C.*, at least, the potential overriding of another person's rights under State law was an important consideration in limiting the operation of the federal marriage power.[86] The likely balance of High Court opinion on the relevance of State laws is discussed further below.

Whatever view is taken of the proper application of section 5(1)(c), it is difficult to see how section 5(1)(d) could be held valid. Here the husband who is deemed to be the father has remarried and the child has become part of the second household. As with the ex-nuptial, nuptial and adopted children of one spouse included in section 5(1)(e), the "household" requirement is insufficient, according to the majority reasoning in *Cormick* and *Ex parte C.*, to provide the necessary nexus to the relevant marriage.

3. Summary: Validity of Definition of "Child of the Marriage"

We suggest that the second limb of section 5(1)(a), and section 5(1)(c) may be valid, although in each case a particular set of facts may be held to fall outside the permissible reach of the paragraphs. Sections 5(1)(d) and the remaining segments of section 5(1)(e), however, appear likely to be declared invalid.

V. FURTHER AMENDMENTS TO THE FAMILY LAW ACT?

The failure of the 1983 amendments to clarify and consolidate the extent of federal power concerning the care and support of children can only serve

85 "Medical procedure" is defined in s.5A(3). So far as we are aware, the relevant State laws also require the husband's consent – see *e.g.* Artificial Conception Act 1984 (N.S.W.) s. 5.

86 Note 41 *supra*, 80,007 *per* Wilson J. and 80,008 *per* Brennan J.

to reinforce concern over the problems of fragmentation of jurisdiction over children as between the Commonwealth and the States. To what extent can the confusion be reduced by further amendments to the Family Law Act? This arises especially in relation to the definition of "child of the marriage". Could the Commonwealth introduce a redrafted definition to cover at least some step-children associated with a marriage, in a form which would be acceptable to a majority of the High Court? We look at this firstly in regard to the federal marriage power (paragraph xxi), and secondly in regard to the divorce and matrimonial causes power (paragraph xxii).

*1. Gibbs J. in **Lambert** on the Scope of Paragraph (xxi)*

In spite of the series of cases decided since 1976, the criteria for determining whether or not a law is one with respect to "marriage" remain elusive. The composition of the High Court has changed since *Russell*, but marked differences of opinion persist within the Court as to the legitimate scope of paragraph (xxi). For Gibbs C.J., whose views have been decisive in forming a majority in several of the leading cases, the rights and duties defined in the legislation must "arise out of, or have a close connexion with, the marriage relationship".[87] Why a "close" connection is required between the law and the relevant marital relationship, rather than, as some other members of the High Court have suggested, a "sufficient" or "reasonable" or "rational" connection, has never been explained.[88] Murphy J. has been especially critical of the requirements of a "close" connection, arguing that there can be no justification for a more restrictive approach to the interpretation of paragraph (xxi) than that given to other legislative powers.[89]

What is also difficult to gauge is when the required connection will be found to exist. In *Lambert*, Gibbs J. sought to elaborate on this point:

> an enactment is not a law with respect to marriage simply because it has some operation with respect to the custody of a child of the marriage, or . . . with respect to married persons . . . The question whether a law is one with respect to marriage is one of degree. The answer to it depends on the closeness of the connexion between the law and the marriage relationship. Sometimes . . . it is helpful to consider what sort of rights and duties flow from the relationship of marriage in the ordinary understanding of reasonable men [*sic*] . . . [T]here comes a time when it is inaccurate to describe rights and duties, although created in respect of a child of a marriage, as rights and duties arising out of the marriage relationship. However, if a law is, in truth, a law with respect to marriage, it is not necessarily invalid because it affects the exercise of the powers of an authority of a State.[90]

In that case, the Court had to rule upon the validity of section 10(3) of the Family Law Act, which purported to allow the Family Court, "in special circumstances", to make a custody order concerning a child of a marriage which would override the powers of a State official under State child welfare

87 *Lambert*, note 12 *supra*, 75,692 *per* Gibbs J.

88 See *Gazzo* v. *Comptroller of Stamps* (*Vic.*) (1981) FLC 91-101, 76,724 *per* Stephen J. ("reasonable"); 76,726 *per* Mason J. ("sufficient"); and 76,734 *per* Murphy J. ("rational").

89 *Lambert*, note 12 *supra*, 75,700.

90 *Id.*, 75,692.

legislation. By a four to three majority, the Court held it to be invalid.

Gibbs J., who formed part of the majority, stated that while there was no objection in principle to rights and duties arising from the marital relationship being enforceable against third parties, the connection between the proceedings and orders contemplated by section 10(3) and the marital relationship was too "slight and incidental" to make it properly a law with respect to marriage.[91] Whether this conclusion was reached by having regard to the "ordinary understanding of reasonable [people]", or some alternative criteria, does not appear from the judgment. Indeed, given the last sentence of the above quoted passage, it remains a matter for speculation as to why the necessary connection was not found to be present. In the result, Gibbs J. reached a similar conclusion to that of Barwick C.J., Aickin and Wilson JJ. In the minority, Stephen, Mason and Murphy JJ. had no difficulty in finding section 10(3) to be valid, as they were unable to see why, if federal custody orders could in general prevail as against strangers to the marriage, they could not also prevail as against a State child welfare official.[92] The majority decision, Murphy J. said, could only be seen as a "triumph for the doctrine of the reserved powers of the States."[93]

2. "De Facto Adoption" – Rights of Third Parties

Turning now to the recent cases, significant differences of approach among the present members of the High Court can again be identified. One example of this difference of opinion, on which in the absence of Murphy J. a 3:3 division within the Court is a possibility, is the extent to which the marriage power may operate so as to override the rights of third parties (for example a natural parent) in respect of children associated with a marriage.

In ruling against the validity of sections 5(1)(f) and 5(1)(e)(i), in *Cormick* and *Ex parte C.*, Gibbs C.J. asked whether a "de facto adoption" might be relied on to bring a child within the category of "child of the marriage". He perhaps had in mind a situation in which the spouses were raising a child as their own, an arrangement intended by them (and possibly also the child) to be permanent.[94] If the analogy to nurture by the spouses of their natural children, or legally adopted children, is sufficiently strong to bring the fostering situation within the concept of marriage, Gibbs C.J. may, consistently with his concluding comments in the passage quoted from *Lambert*, consider it irrelevant that the federal law (for example sections 61(1), 73) has the effect of displacing or extinguishing the rights and duties of the child's biological parent(s) under State law. Mason J. in *Ex parte C.* was prepared to contemplate a similar result, consistently with his views in earlier cases.[95] Deane J., from his dissenting judgment in *Ex parte C.*, would

91 *Ibid.*
92 *Id.*, 75,694-75,695 *per* Stephen J; 75,697-75,698 *per* Mason J; and 75,701-75,702 *per* Murphy J.
93 *Id.*, 75,701.
94 Note 20 *supra*, 79,473 and note 41 *supra*, 80,006.
95 Note 41 *supra*, 80,006; *cf. Lambert*, note 12 *supra*, 75,697, and *In re Demack; ex parte Plummer* (1977) FLC 90-244, 76,314. Mason J. was however in the minority in *Lambert's* case.

certainly endorse the proposition that the federal law may have a valid operation notwithstanding that the rights of third parties under State law are affected.[96]

For Wilson J., on the other hand, paragraph (xxi) would not extend to allow the Commonwealth to

> extinguish the legal rights and obligations of the natural parents and invest new rights and obligations with respect to the child in the parties of the marriage.[97]

Brennan J. expressed a similar view in that case, and we assume, from the reasoning of Dawson J. in his dissenting judgment in *V.* v. *V.*, that he would also agree.[98] It may be debated whether this result is a resurrected version of the doctrine of the reserved powers of the States, as Murphy J. would say, or simply the result of a narrow conceptualising of "marriage" as primarily a private and personal relationship between the spouses. Whatever the basis, it is clear that a redrafted paragraph seeking to include children living with spouses in an enduring fostering arrangement as "children of the marriage", and thereby terminating or limiting rights of a parent or other persons under State law, would have little chance of achieving an outright majority in the High Court.

3. *Validity as Between Spouses?*

One other suggestion made by Gibbs C.J. in *Cormick* and in *Ex parte C.*, and hinted at by Mason J. in the latter case, is that the marriage power might permit the definition of rights and duties of the spouses *as between themselves* with respect to a child who was not a child of the marriage.[99] The fullest statement is that of Gibbs C.J. in *Cormick*:

> [i]t may in appropriate circumstances be within power for the Parliament to define the rights and duties of the parties to a marriage, as between themselves, with respect to a child who is not a child of the marriage. Where, however, the law provides that one or both of the parties to a marriage shall be entitled to the custody and guardianship of a child who is not a child of the marriage, and purports to make that entitlement effective against other persons, including the child and strangers to the marriage, the necessary connection with the marriage does not exist to support the law under sec.51(xxi) of the Constitution.[100]

It is difficult to reconcile this passage with the consistent trend of recent decisions on third party participation in custody disputes concerning children of a marriage, let alone the passage quoted from His Honour's judgment in *Lambert*. If the child was not properly to be regarded as a child of the marriage, then a law of the sort envisaged by Gibbs C.J. would seem to be simply a law with respect to married persons rather than a law with

96 Note 41 *supra*, 80,011-80,012.
97 *Id.*, 80,007.
98 *Id.*, 80,008 *per* Brennan J; *cf. V.* v. *V.*, note 31 *supra*, 79,984-79,992 *per* Dawson J.
99 Note 20 *supra* 79,472 *per* Gibbs C.J; note 41 *supra*, 80,006 *per* Gibbs C.J., and 80,006 (last sentence) *per* Mason J.
100 Note 20 *supra*, 79,472.

respect to "marriage".[101] Can paragraph (xxi) be used to regulate the position of spouses in relation to matters outside and unassociated with the marriage? Some nexus is surely required between the object and substance of the law and the relevant marital relationship.[102] On the other hand, if there is a sufficient connection between the particular category of children and the marriage then the rights and duties of the spouses concerning the child should, as was held most recently in *V.* v. *V.*,[103] at least be enforceable against strangers to the marriage, and, if the suggestions of Gibbs C.J. in *Lambert* (and *Ex parte C.* in relation to a "de facto adoption") are to be followed, even override the rights of third parties under State law.[104]

These apparently ambiguous statements by Gibbs C.J. may provide a tenuous justification for a legislative amendment giving the Family Court jurisdiction over a wider class of children, if limited to matters "as between the spouses". Even so, we cannot see that any real purpose would be served by attempting such an amendment. The notion of a definition of rights in relation to the care and custody of a child, for instance, which is not binding on anyone except the spouses, is scarcely sensible.[105]

4. The "Divorce and Matrimonial Causes" Power

The remaining possibility for a wider federal jurisdiction over children is by use of the divorce and matrimonial causes power (paragraph xxii). The Matrimonial Causes Act 1959, it will be recalled, had allowed the Court to make orders for custody and maintenance of children of a marriage, defined in section 6 to include children of only one spouse who were part of the marital household, but only where the proceedings were in relation to a claim for "principal relief" (that is, divorce or nullity). That Act did not contain provisions similar to sections 61(1) and 73 of the Family Law Act, with the result that during the marriage the spouses' rights and obligations towards the children were determined under the general (State) law.[106] Only at the time of the divorce proceedings did the federal law override the State

101 A point made on several occasions by Gibbs C.J. – *e.g. Lambert*, note 12 *supra*, 75,692, and *Gazzo*, note 88 *supra*, 76,718.

102 In *Gazzo*, note 88 *supra*, 76,719, Gibbs C.J. observed: "[i]t is not enough that the law incidentally touches upon marriage or that the Parliament has seized on the fact of marriage as a justification for the enactment of a law which really deals with some other topic."

103 Note 31 *supra*, 79,983 *per* Gibbs C.J, Mason, Wilson, Brennan and Deane JJ.

104 *Lambert*, note 12 *supra*, 75,692 *per* Gibbs C.J; *cf. Ex parte C.*, note 41 *supra*, 80,006 where the question was left open.

105 In this respect we adopt the view of Mason J. in his dissenting judgment in *Lambert*, note 12 *supra*, 75,697 that "[i]t is of the essence of an award of custody . . . that it may be enforced against strangers to the marriage." According to the decision of the majority in *Lambert*, nevertheless, there may be cases in which a federal custody order, made in favour of one spouse in relation to a child of the marriage, is suspended and made subject to the operation of State child welfare laws. This is a quite different situation from that mentioned by Gibbs C.J. in *Cormick*.

106 See *e.g.* Maintenance Act 1964 (N.S.W.), Infants' Custody and Settlements Act 1899 (as amended) (N.S.W.).

law.[107] On the basis of this precedent, it would today be open to the federal government to introduce a similarly worded paragraph into the definition of "child of the marriage" in the Family Law Act, but to limit its operation to the time when divorce (or nullity) proceedings are brought. In this way the Family Court would, in those instances where the parties have been separated for twelve months and proceedings are instituted for divorce, be in a position to resolve the issuė of future care and support of the spouses' children and step-children at the same time.

That no constitutional challenge was ever brought against section 6 of the former Act is of course no guarantee of its constitutional validity. Gibbs C.J. in *Cormick* expressly left open the question whether section 5(1)(f) could be saved by a reading-down under paragraph (xxii) (that is, "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants").[108] Nevertheless several High Court judges have hinted that the paragraph is capable of being used to affect a wider class of children than would be possible under paragraph (xxi). In *D.M.W.* v. *C.G.W.* (1982), Gibbs C.J. noted that paragraph (xxii) was not in its terms limited to children of a marriage.[109] In *Cormick* (1984) and *Ex parte C.* (1985), Brennan J. held that sections 5(1)(f) and 5(1)(e)(i) could not be supported as laws "for which the marriage power *alone* provides support" [emphasis added].[110] In *V.* v. *V.* (1985), Dawson J. appeared also to draw significance from the reference to custody and guardianship of infants in paragraph (xxii) and its absence from paragraph (xxi).[111]

Despite these scattered, if rather limited, dicta, it is not clear why, either as a matter of interpretation or of principle, the divorce power should be able to affect a wider category of children than the marriage power. Leaving aside the idiosyncratic view of Dawson J. in *V.* v. *V.*,[112] it has been established since *Russell* (1976) that the scope of paragraph (xxi) is not to be read down or limited by reference to paragraph (xxii).[113] While it is true that the reference in (xxii) to "infants" is more general than "children of the marriage", the paragraph nevertheless requires that their treatment be "in relation to" the divorce or other matrimonial cause. Thus it is only children who are properly connected to the particular proceedings between the spouses who can be dealt with under (xxii). It is perfectly sensible to say that as part of the tying up of loose ends following the dissolution of a marriage, provision must also be made for the care and support of the various classes of children formerly part of the marital household. But it is equally sensible to say that the need to provide for the welfare of those children associated with the marital household arises from the breakdown of the marriage

107 For examples of the application of s. 6 of the 1959 Act, see *Cunningham* (1966) 11 FLR 399, and *Viney* (1964) 6 FLR 417; *cf. Cunnew* (1974) 9 SASR 587.
108 Note 20 *supra*, 79,472.
109 (1982) FLC 91-274, 77,558.
110 Note 20 *supra*, 79,476 and note 41 *supra*, 80,008.
111 Note 31 *supra*, 79,991-79,992.
112 *Ibid.*
113 Note 4 *supra*, 75,168-75,169 *per* Mason J.

relationship, whether or not the parties are or ever will be proceeding to a divorce, and on this reasoning paragraph (xxi) could validly extend to cover this situation. Since the latter argument has been decisively rejected by the High Court in *Cormick*[114] and *Ex parte C.*,[115] however, we cannot see why the former argument should be more successful. In short, in light of the recent High Court cases and the current composition of the High Court, it is doubtful that paragraph (xxii) could be resorted to as a means of expanding federal jurisdiction over children associated with a marriage.

5. Alternative Proposals

Discussion of the difficulties caused by the fragmentation of jurisdiction over children between federal and State Courts, and suggestions of possible remedies, have continued since the Family Law Act first came into effect in early 1976. At the most recent Australian Constitution Convention in July 1985, delegates again turned their attention to several of the long-debated alternatives aimed at extending the scope of federal power or reducing the incidence of jurisdictional conflict: a Commonwealth constitutional amendment, a reference of power from the States to the Commonwealth, or the establishment of State Family Courts. In addition, a new proposal was considered which would see cross-vesting of jurisdiction between State Supreme Courts and the Family Court.[116]

It is not possible here to canvass again the respective merits of the various proposals for reducing the jurisdictional tangles, and to produce a coherent body of law applicable to all children. As is made clear in the recent Constitutional Convention debates, the practical resolution of these difficulties is as likely to depend upon considerations of financial and political advantage, and compromise between the States and the Commonwealth, as on matters of legal and social principle. It appears unlikely that the federal government will any longer contemplate a referendum for constitutional amendment, or allow the Family Court of Australia to be dismantled in favour of State Family Courts, such as that currently operating in Western Australia.[117] The details of cross-vesting of jurisdiction between the Family Court and the State Supreme Courts remain to be worked out, and are not without their own constitutional complications.[118] A reference of power from the States to the Commonwealth may still be the most straightforward solution for some States, such as New South Wales, but years of negotiations as to the terms of the reference, and as to which States would be included, have so far failed to come to fruition. In the meantime the existing unhappy state of affairs may

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114 Note 20 *supra*.

115 Note 41 *supra*.

116 We have briefly discussed some of these issues in Jessep and Chisholm, note 11 *supra*, 304-305. See also *Australian Constitutional Convention Debates*, 30 and 31 July 1985.

117 *Australian Constitutional Convention Debates*, 30 and 31 July 1985 (Mr L. Bowen).

118 See *e.g.* the Opinion of L. Zines, which appears as an appendix to *Report of Judicature Sub-Committee to Australian Constitutional Convention* (October 1984) 27-36.

persist, as children's custody cases continue to founder in the jurisdictional complexities of the court system, the judges blame the legislators, and the legislators blame each other.[119]

VI. THE 1983 AMENDMENTS AND CHILDREN IN STEP-FAMILIES: SOME POLICY ISSUES

We have seen that some parts of the extended definition of "child of a marriage" have been held invalid by the High Court, and some other parts are also vulnerable to challenge. It is possible that further efforts will be made, whether by new amendments to the Family Law Act, by reference of power, or a combination of these, to extend the scope of the Family Law Act. Such efforts, as well as shifting the boundary between the jurisdiction of State and Commonwealth courts, are likely to affect the substantive law governing the legal relationships between children and their step-parents, and perhaps other members of their new and former families. This is a matter of considerable significance, since it seems that up to 35,000 children become step-children each year.[120] In this section we consider the impact of the 1983 amendments on the substantive law, and some of the issues that will need to be addressed in any further attempts to mould a coherent and satisfactory set of provisions relating to children in step-families. These matters cannot be fully explored here, but a preliminary discussion seems warranted, lest the questions be approached and determined merely as a by-product of constitutional reform, without a considered analysis of the very complex issues they entail.

1. The Position of Step-parents Before the 1983 Amendments

Before the 1983 amendments to the Family Law Act, the law gave some recognition to the relation between children and step-parents.

Both State and federal legislation provided for the enforcement of child maintenance by step-parents. Maintenance orders for children could be made against step-parents under the State Maintenance Acts when the child "had been accepted as one of the family" by the step-parent.[121] State child welfare laws also provided for maintenance to be recovered from step-parents when children had been received into the care of the child welfare authorities.[122]

Step-parents could also be ordered to pay child maintenance under the Matrimonial Causes Act 1959 (Cth), by virtue of the extended definition of

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119 *E.g. Fountain* note 10 *supra*, 77,193 *per* Mason J; *Robinson* v. *Field* (1981) 7 Fam L R 866, 868 *per* Holland J; *Australian Constitutional Convention Debates*, 30 and 31 July 1985 (Mr L. Bowen, Mr Harper, Sir Adrian Solomons, Mr Hassell).

120 See P. Harper, *Children in Stepfamilies: Their Legal and Family Status*, Institute of Family Studies (Melbourne 1984) 4-5.

121 See *e.g.* Maintenance Act 1964 (N.S.W.) ss 7 (definition of "child of the family"), 12, 13.

122 *E.g.* Child Welfare Act 1939 (N.S.W.), ss 58-64, which were in force between 1939 and 1977, when they were repealed by Act No.43 of 1977. For similar legislation in other states, see *Ex parte C.*, note 41 *supra*, 80,010 *per* Deane J.

"child of the marriage" in section 6. As indicated, this legislation, being based on the constitutional power relating to "divorce and matrimonial causes" rather than "marriage", did not attempt to define the legal relationship between parents and children *during* the marriage, as the Family Law Act was later to do.

Various other State and federal laws recognised the position of step-parents for purposes other than maintenance. State child welfare legislation included step-parents under the definition of "parent".[123] Thus a step-parent who contributed to the commission of an offence by a child might become liable to pay a penalty,[124] and a step-parent might be required to attend a children's court in proceedings involving a step-child.[125] The step-parent's right to administer corporal punishment was also preserved in this legislation.[126] Finally, step-parents were recognised under legislation relating to workers' compensation, compensation to relatives, and taxation, and for purposes of such sexual offences as incest and carnal knowledge.[127] For all these purposes, step-parents included the spouses of parents whose children were born outside marriage, as well as spouses of parents whose children were born during a former marriage.

Despite all this, the legal status of step-parents was much more limited than that of parents. In the absence of a court order, step-parents were not the guardians of their step-children, nor entitled to their custody. There were no rights of inheritance on intestacy between step-parents and step-children.

For many step-parents, anxious to create a close relationship between themselves and the other members of their new families, the law did not go far enough. Adoption became and remains a popular device for overcoming the limited recognition of the step-parent's position.[128] The effect of adoption is to substitute the step-parent for the other natural parent for legal purposes: the step-parent acquires the full package of parental rights and duties, and the other natural parent loses them. In recent years, although the total number of adoptions has declined sharply, the proportion of step-parent adoptions to other forms of adoption has considerably increased.[129] Despite its popularity, step-parent adoption has been the subject of sharp criticism.[130] Adoption necessarily results in the extinguishing of the legal relationship with one half of the child's biological family, and this may not be in the long-term interests of the child. Commentators have therefore argued that the law's recognition of step-parents was either too little or (if the child was adopted) too much, and what was instead required was a more sensitive and flexible means of adjusting the various facets of the relationships between the

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123 *E.g.* Child Welfare Act 1939 (N.S.W.) s. 4.
124 *Id.*, s. 85.
125 *Id.*, s. 81(2).
126 *Id.*, s. 156.
127 See generally the citations in *Ex parte C.*, note 41 *supra*, 80,010-80,011 *per* Deane J.
128 See generally Harper, note 120 *supra*.
129 Step-parent adoptions comprised about 12% of all New South Wales adoptions in 1969-70, but nearly 48% of all adoptions in Australia during 1981-82: Harper, note 120 *supra*, 6-7.
130 *Id.*, 8-20; Adoption Legislation Review Committee-Victoria, *Report* (Melbourne 1983) 53-55.

children, their biological relatives, and members of their families, past and present.[131]

Against this background, the opinion of Deane J. in *Ex parte C.* is of particular interest. As mentioned earlier, the extension of the provisions of the Act to those ex-nuptial children described in section 5(1)(e)(i) was said by Deane J. to represent

> a considered legislative adjustment of rights and obligations of guardianship, custody and access to meet the change in circumstances and relationships of an under-age ex-nuptial child consequent on the marriage of a parent in circumstances where the child becomes ordinarily a member of the household of the parent and step-parent.[132]

His Honour nevertheless acknowledged that there was room for differences of opinion about the desirability of the overall result of the amendment. Again, he confined the scope of section 5(1)(e)(i) to ex-nuptial children born before the marriage, and did not give his views on the desirability of similar provisions affecting ex-nuptial children born *during* the marriage, or a *nuptial* child whose parent remarries. While a provision such as section 5(1)(e) might well appear to be a first step in the right direction, it raises several problems that will require attention if further developments in this area are to lead to a satisfactory legal framework for step-children and their families.

2. The Effect of the 1983 Amendments

The 1983 amendments to the Family Law Act, had they been valid, would have brought many step-children into the definition of "child of a marriage", with the consequence, as we have seen, that the step-parent would be a guardian, jointly entitled to custody, and obliged to maintain the child. Several points deserve comment here.

(a) Is the Other Parent Excluded?

We have noted a variety of State laws, such as the Maintenance Acts, which contain provisions relating to rights and duties associated with step-children. It is a difficult question how far an amendment such as that attempted in section 5(1)(e)(i) would operate, by virtue of section 109 of the Constitution, to suspend the effect of these State laws. For example, if the federal law stated that a step-parent is a guardian of an ex-nuptial child, would this be inconsistent with a State law making the child's natural father a guardian? Is a federal provision that the step-parent is liable to maintain the child inconsistent with an obligation of maintenance arising under State law? For that matter, what of the existing situation where a divorced father remains liable for maintenance under the Family Law Act, and a step-father becomes liable under the Maintenance Act of a State?[133]

It might be argued that at least for some of these laws there is no necessary inconsistency. Just as it might have been possible for several

131 Harper, note 120 *supra*, 21-27.
132 *Ex parte C.*, note 41 *supra*, 80,012.
133 See *e.g.* the facts in *Baber* (1980) FLC 90-901, 75,675, where however this issue was not discussed.

people to be guardians under the Family Law Act itself,[134] it is possible that a child will have guardians under both federal and State laws. Similarly, multiple obligations of maintenance could co-exist, although the relation between them might cause difficulties. The alternative argument, however, is that the relevant provisions of the Family Law Act were intended to "cover the field", therefore overriding the corresponding provisions of State law.

The problem may be illustrated by reference to *Ex parte C.*, in which the High Court considered the position of some step-children. In his dissenting judgment Deane J. argued that the recognition of the position of step-parents by law and custom provided the link with marriage that brought the amendment to section 5 within the constitutional power relating to "marriage". Considering the common case where it is the mother who remarries and brings her ex-nuptial child into her new family, Deane J. said:

> [i]n such a case, the child does not have a primary and possibly competing connexion with any previous marriage between his or her natural parents . . . [O]rdinary standards of morality and social behaviour in this country most clearly require that, having received the child as a member of the matrimonial household, the step-parent accept and discharge the quasi-parental obligations which are implicit in the special relationship of affinity between step-parent and stepchild . . . [135]

In this passage Deane J. appears to assume that the Family Law Act provides a second guardian for a child who would otherwise have only one – the mother. This assumption unfortunately overlooks the effect of State legislation relating to the status of children born outside marriage.[136] Such legislation has been held, at least for most purposes, to make the father a guardian of his ex-nuptial child.[137] If the Family Law Act had the effect stated by Deane J., it would do so at the expense of State law relating to guardianship. It is therefore difficult to accept fully Deane J.'s view[138] that the amendment to the Family Law Act reflects recent developments in law and policy, for the effect of a provision such as section 5(1)(e)(i) on guardianship seems opposed to, rather than supportive of, the trend of recent State legislation on the status of ex-nuptial children.

Whether it is desirable as a matter of policy that the law should remove a natural parent's rights of guardianship and custody, and obligations of maintenance, and impose those rights and duties on a step-parent, is also a difficult question. In considering one example of this issue, where the parents of a *nuptial* child divorce, and one or both remarry, Rebecca Bailey has pointed out that such an automatic severing of the natural parent's rights could be seen as "virtual adoption" (a phrase that should not however be allowed to obscure the different consequences of legal adoption on such

134 See above, text to notes 20, 21.
135 Note 41 *supra*, 80,011.
136 *E.g.* Children (Equality of Status) Act 1976 (N.S.W.).
137 *Youngman* v. *Lawson* [1981] NSWLR 439. It has however been held that the terms of the State Adoption Acts indicate that the father of an ex-nuptial child is not a "guardian" whose consent is required for the child's adoption: *W.* v. *H.* (1978) VR 1; *Re H. (an infant)* (1982) Qd R 364; *C.* v. *Director-General of Department of Youth and Community Services* (1982) 7 Fam L R 816.
138 Note 41 *supra*, 80,012.

matters as inheritance, name, and the birth certificate).[139] This might be objectionable on several grounds. First, the exclusion of the natural parent is effected without any court hearing in which objections might be raised – this is presumably the force of Bailey's point that the severance is *automatic.*[140] Second, the severance might in some circumstances deprive the child of a potentially valuable relationship, recognised in judicial decisions[141] and in the "status of children" legislation. Third, the result sits awkwardly with some other provisions of law, such as the continuing rights of inheritance between the child and the natural parent.

On the other hand, multiple guardianship and multiple obligations of maintenance might also create problems. This will be especially so where both federal and State laws are involved, and there may then be no single court which can determine all aspects of the matter, for example the allocation of financial responsibility between the step-parent and natural parent of an ex-nuptial child. In summary, it can be said that the 1983 amendments left unresolved a number of complex issues about the relationship between various rights and responsibilities arising under State and federal laws concerning children in step-families.

(b) The Basis for Step-parental Rights

A second difficulty with the terms of the extended definition of "child of the marriage" is that in sections 5(1)(d), (e), and (f) the child's inclusion as a "child of the marriage" depended upon the child's membership of the marital household at a particular time. The step-parent or foster parent would then cease to be a guardian, and to be liable for maintenance, if the child ceased to live in the household. On the one hand, as Deane J. suggests, it is sensible to link legal guardianship with actual responsibility for the child. A similar attention to factual arrangements would presumably be required if the notion of Gibbs C.J. of a "de facto adoption" was incorporated by way of further amendment to the Act. On the other hand, definitions of this kind may introduce an element of uncertainty and instability which could create practical problems. Obligations to maintain the child, for example, will change as the child moves households, and it is not difficult to imagine cases in which there would be bitter arguments about the precise dates on which one person's obligation to maintain was displaced by that of another. In some cases, the changing or uncertain location of guardianship may cause inconvenience to the child, the adults, and third parties, as for example where it is necessary to obtain the consent of a "guardian" for the adoption of a child,[142] or for the issue of a passport.[143]

139 Bailey, note 18 *supra*, 372.
140 *Ibid.*
141 *E.g.* in *Re C.N. and M.G.* (1976) 9 ALR 666 an unmarried father successfully argued that the child's interests would be advanced if the court preserved his links with the child by declining to make an adoption order in favour of the child's mother and step-parent.
142 See *e.g.* Adoption of Children Act 1965 (N.S.W.) s.26.
143 *Passports Act* 1938 (Cth) s. 7A(2)(a).

A degree of certainty therefore appears to be sacrificed if guardianship is made to depend on details of current family arrangements, which can easily become the subject of different interpretations and conflicting evidence. Whether it is possible to obtain greater legal certainty by basing guardianship on more permanent and easily-proven facts without losing the advantages of linking it with the actual responsibility for the child is not an easy question.

(c) Other Aspects of the Step-relationship

A third and obvious difficulty with the approach of the Family Law Act is that it did not (and constitutionally could not) address other important aspects of the relationship between step-child and step-parent, such as inheritance. The effects of the parent's marriage fall short of those attaching to adoption in that the mutual rights of inheritance remain between the child and the other natural parent. The natural parent also remains linked to the child under other provisions of State law, except to the extent that those provisions cease to have effect on account of inconsistency with the provisions of the federal Act. Does it make sense that the absent natural parent should have neither guardianship nor custody but should still retain rights and liabilities under laws relating to child welfare, compensation to relatives, and the like? It may well be appropriate to keep some of these links, but it seems clearly desirable that a review of the relevant State laws should accompany any proposals for this kind of change to the Family Law Act. The matter assumes even greater significance in the situation envisaged in section 5(1)(f), that is, a fostering arrangement, where the ties to *both* natural parents are being affected.

3. Issues and Options

In recognition of the range of difficulties indicated above, the Family Law Council has appointed a sub-committee to examine the position of step-children. The sub-committee will have some interesting models from which to draw ideas for reform. In the United Kingdom, the Children Act 1975 provides for the making of "custodianship" orders in favour of step-parents (among others) who have had the care of children.[144] These orders are intended to provide a more flexible alternative to adoption, but yet to create a more secure parent-child relationship than a mere custody order.

A less familiar alternative is suggested by an English study,[145] namely an administrative procedure whereby a step-parent could by a process of registration elect to acquire some or all parental rights. There would be no need for a court hearing unless the other parent or someone else objected. Variations on this theme can be readily imagined: the rule could be that step-parents acquire parental rights unless they "opt out" of them. Or the system could provide different rules for different aspects of parental

144 Children Act 1975 (U.K.) ss 33-39.

145 Judith Masson, Daphne Norbury and Sandie G. Chatterton, *Mine, Yours or Ours?*, HMSO (London 1983).

responsibilities, such as guardianship compared to mutual inheritance rights.

The issues relating to step-families, then, are by no means straightforward, and a variety of approaches could be taken to them. Unfortunately, in Australia the task of working out a coherent legal approach is bedevilled by the awkward division of legislative responsibility between the Commonwealth and the States, the present boundaries of which were considered in the earlier part of this article. It will be an ironic testimony to the constitutional difficulties facing family law reform in Australia, if, as seems likely, many of the recommendations of the Family Law Council's sub-committee will require action not by the federal authorities but by the Attorneys-General of the States.