CASE NOTE

DOWAL v. MURRAY AND ANOTHER[1]

Constitutional validity of s. 61(4) of Family Law Act 1975 — Jurisdiction of Family Court to entertain s. 61(4) applications — Right of persons other than the surviving parent to make s. 61(4) application for custody

The proceedings in this case concerned the custody of a child aged five. The child was born in wedlock but following the divorce of its[2] parents in 1974, custody of the child was awarded to the mother. In 1977 the mother died. Thereafter the child lived with its maternal grandparents. The father made application for the custody of the child, and the maternal grandparents intervened in the proceedings and themselves sought custody.

The two important issues which came before the High Court in *Dowal* v. *Murray* were the constitutional validity of section 61(4) of the Family Law Act 1975 and the jurisdiction of the Family Court of Australia to entertain section 61(4) applications.[3] In dealing with these issues, the High Court provided significant discussion of the ambit of the Commonwealth's marriage power (section 51(xxi) of the Constitution) and the paragraph (f) definition of "matrimonial cause" in section 4(1) of the Family Law Act. The High Court's discussion of paragraph (f) forms the basis of the important decision of the Family Court in *E and E (No. 2)*.[4] As a result of limitations found by the High Court in *Dowal* v. *Murray* concerning eligible applicants under the existing section 61(4) provision and in apparent reliance on certain remarks made by Jacobs and Murphy JJ.[5] as to the extent of the Commonwealth's legislative power, a new section 61(4) provision was enacted by section 9 of the Family Law Amendment Act 1979.

In *Dowal* v. *Murray* Gibbs A-C.J., Stephen, Jacobs and Murphy JJ. (Aickin J. dissenting) held that section 61(4) was a valid exercise of the legislative power conferred on the Commonwealth by the Constitution. At the time of *Dowal* v. *Murray* section 61(4) was in the following terms:

> On the death of a party to a marriage in whose favour a custody order has been made in respect of a child of the marriage, the other party to the marriage is entitled to the custody of the child

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[1] (1979) 22 A.L.R. 577.

[2] The sex of the child in question remains undetermined. The facts of the case were stated by Gibbs A-C.J., Jacobs J. and Aickin J. The Acting Chief Justice refers to the child as female (*id.* 579); to Jacobs J. the child is male (*id.* 587) and Aickin J. avoids specification of the gender of the child by recourse to the definite article (*id.* 591).

[3] These issues had previously been considered by the Full Court of the Family Court in *Marriage of Robertson* (1977) 15 A.L.R. 145.

[4] (1979) FLC 90-645.

[5] See *infra* p. 422.

> only if the court so orders on application by that other party and, upon such an application, any other person who had the care and control of the child at the time of the application is entitled to be a party to the proceedings.

Although discussion of the constitutional validity of this provision centred on section 51(xxi) of the Constitution, Gibbs A-C.J. and Aickin J. also examined the validity of section 61(4) in relation to section 51(xxii).[6] In finding that section 61(4) was not supported by this head of constitutional power, their Honours cast almost no new light on the ambit of this provision. A more noteworthy suggestion as to the Commonwealth's legislative power in the family law field was, however, made by Murphy J. His Honour suggested that limitations on the jurisdiction of the Family Court in relation to children generally could possibly be removed by resort to the external affairs power (section 51(xxix) of the Constitution); in particular section 61(4) could be a valid exercise of that power.[7] Murphy J. based his view on the proposition that:

> The Parliament may have recourse to its power with respect to external affairs to carry out its international obligations in regard to children.[8]

In considering whether section 61(4) was supported by section 51(xxi) of the Constitution, all the judgments in *Dowal* v. *Murray* proceed on the basis that placitum (xxi) of section 51 is to be interpreted independently of section 51(xxii), as was decided by Mason J., giving what amounts to the majority judgment of the High Court in *Russell* v. *Russell; Farrelly* v. *Farrelly*.[9] *Russell* v. *Russell* was the first case in which the constitutional validity of provisions of the Family Law Act were challenged and it was aspects of the reasoning to be found in the judgment of Mason J. in *Russell* v. *Russell* which formed the basis of the challenge to section 61(4) in *Dowal* v. *Murray*.

One of the provisions challenged in *Russell* v. *Russell* was paragraph (c)(iii) of the definition of "matrimonial cause" in section 4(1) of the Act. As originally enacted paragraph (c)(iii) defined "matrimonial cause" to mean:

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[6] (1979) A.L.R. 577, 579 *per* Gibbs A-C.J. and 597 *per* Aickin J.

[7] *Id.* 590-591.

[8] *Id.* 591. Relevant international treaties are the International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976 and ratified by Australia) and the International Covenant on Civil and Political Rights (entered into force 23 March 1976 and ratified by Australia).

[9] (1976) 134 C.L.R. 495. "Majority" here refers to the judgment of Mason J. with which Stephen J. agreed in relation to the extent of legislative power conferred by para. (xxi) and (xxii) of s. 51 of the Constitution. Jacobs J. took a wider view of the Commonwealth's legislative power than did Mason J., while Barwick C.J. and Gibbs J. construed this power more narrowly than the rest of the Court. The order of the Court was, therefore, given in accordance with the judgment of Mason J. The "narrow" view of Barwick C.J. and Gibbs J., referred to above, was that the presence and terms of s. 51(xxii) limited the context and ambit of s. 51(xxi). Subsequently, however, Barwick C.J. in *Re Demack; ex parte Plummer* (1977) 137 C.L.R. 40, 43 and Gibbs A-C.J. in *Dowal* v. *Murray* (1979) 22 A.L.R. 577, 581-582 have applied the view of s. 51(xxi) taken by the majority in *Russell* v. *Russell*.

proceedings with respect to— . . .

(iii) the custody, guardianship or maintenance of, or access to, a child of the marriage.

In *Russell* v. *Russell* Mason J.[10] held that paragraph (c), by conferring a jurisdiction unlimited as to parties, travelled beyond the marriage power. Paragraph (c) was therefore read down by application of section 15A of the Acts Interpretation Act 1901 and confined to proceedings between the parties to the marriage.

Following *Russell* v. *Russell* the Family Law Act 1975 was amended to conform to the High Court's decision. Section 3 of the Family Law Amendment Act 1976 substituted the following paragraph for the original paragraph (c) of the definition of "matrimonial cause" in section 4:

(c) proceedings between the parties to a marriage with respect to—

(i) the maintenance of one of the parties to the marriage; or

(ii) the custody, guardianship or maintenance of or access to, a child of the marriage.

It was because section 61(4) proceedings, arising as they do only after the death of a party to the marriage, necessarily can never take place between the parties to a marriage, that the constitutional validity of the sub-section was challenged in *Dowal* v. *Murray*. Given that the former paragraph (c)(iii) of the definition of "matrimonial cause" had been confined in *Russell* v. *Russell* to proceedings between the parties to a marriage, the question of the constitutional validity of section 61(4) depended on whether the marriage power, in so far as it related to custody proceedings, was restricted to defining or providing for the enforcement of the right to custody of the parties to the marriage *inter se*. Only Aickin J. held that such a restriction existed. The remaining members of the Court held that the legislative power of the Commonwealth under section 51(xxi) of the Constitution was not so limited. This view had previously been asserted by Mason and Murphy JJ. in the High Court in *Re Demack*.[11]

The effect of the decision in *Dowal* v. *Murray* is that a law in relation to custody may be supported by the marriage power even though it is not limited to proceedings between the parties to a marriage. What new scope this gives the Commonwealth for further legislation remains, however, uncertain.

Broadly speaking, the judgments in *Dowal* v. *Murray* fall into two categories. Whereas Gibbs A-C.J., Stephen and Aickin JJ. in their judgments treated the majority judgment of Mason J. in *Russell* v. *Russell* as their point of departure, Jacobs and Murphy JJ. almost totally ignored *Russell* v. *Russell*, and persist in views which were rejected by the majority in that case.

In holding that section 61(4) was valid in spite of not being limited to proceedings between the parties to a marriage, Gibbs A-C.J. and

[10] (1976) 134 C.L.R. 495, 541.

[11] (1976) 137 C.L.R. 40, 52-53 *per* Mason J. and 57 *per* Murphy J.

Stephen J. emphasised the fact that section 61(4) was still concerned with the rights of a party to the marriage. Gibbs A-C.J. said:

> If the law is one which defines the right of *a party to the marriage* with respect to the custody of a child of the marriage, and provides for the enforcement of those rights, it provides for one of the legal consequences of the marriage relationship, and is a law with respect to marriage.[12]

and Stephen J. held that:

> What ensures that s 61(4) is within the scope of the marriage power is its concern with a child of the marriage and with the redefining and regulation of that child's custody, *at the instant of the surviving parent* following the disruption caused to the pre-existing custodial situation by the death of the other parent.[13]

Stephen J., who had concurred in the reading down of paragraph (c)(iii) in *Russell* v. *Russell*, reconciled this approach with the upholding of section 61(4) in *Dowal* v. *Murray* by recourse to the view that the test of reading down is not necessarily coterminal with the scope of the power exercised.[14] It was at this point that the reasoning of Aickin J. departed from that of Gibbs A-C.J. and Stephen J., resulting in Aickin J.'s dissenting judgment. Aickin J. held that:

> the effect of the decision of the majority in *Russell* v. *Russell* is that s 39, in so far as it confers jurisdiction by reference to paras (a) to (e) of the definition of matrimonial cause, is valid only to the extent that it refers to proceedings between the parties to a marriage, and by reference to para (f) only in so far as the proceedings are in relation to the proceedings between the parties to a marriage.[15]

By way of contrast Jacobs J.[16] reaffirmed the very wide view of the section 51(xxi) marriage power which he had taken in *Russell* v. *Russell* where he had upheld the definition of matrimonial cause in paragraph (c)(iii) of section 4(1) as originally enacted, holding thereby that the Commonwealth had legislative power in relation to proceedings with respect to the custody of a child of a marriage, such proceedings not being limited to proceedings between the parties to a marriage. Murphy J. also took the view that:

> a law which deals with the custody of a child of the marriage (either directly, or indirectly as by providing for it through judicial order) is a law with respect to marriage. The marriage power in relation to custody is not restricted to defining or providing for the enforcement of the custodial rights of the parties to the marriage between themselves.[17]

These views are clearly to be considered as minority opinions, rejected by the majority in *Russell* v. *Russell*, and inferentially by Gibbs A-C.J., Stephen and Aickin JJ. in *Dowal* v. *Murray*.

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[12] (1979) 22 A.L.R. 577, 582 (italics added).
[13] *Id.* 583 (italics added).
[14] *Id.* 586-587.
[15] *Id.* 595.
[16] *Id.* 589.
[17] *Id.* 590.

Yet in amending section 61(4) by section 9 of the Family Law Amendment Act 1979[18] the Commonwealth Government chose to act on the minority view of Jacobs and Murphy JJ. The new section 61(4) is:

> (4) On the death of a party to a marriage in whose favour a custody order has been made in respect of a child of the marriage—
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> (a) the other party to the marriage is entitled to the custody of the child only if the court so orders;
>
> (b) the other party to the marriage or any other person may make an application to the court for an order placing the child in the custody of the applicant; and
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> (c) in an application under paragraph (b) by a person who does not, at the time of the application, have the care and control of the child, any person who, at that time, has the care and control of the child is entitled to be a party to the proceedings.

In giving any person the right to make section 61(4) custody applications, the new section 61(4)(b) provision rests directly on the dicta of Jacobs and Murphy JJ. in *Dowal* v. *Murray*. Thus, Jacobs J. stated that it would be within power for the Commonwealth to pass legislation entitling persons (other than the parties to the marriage) who have the care and control of a child of the marriage to apply for legal custody of the child.[19] Murphy J. held that:

> If it wishes to use judicial procedures for custody purposes, the Parliament may vest jurisdiction in a court to make appropriate orders, and allow the parties to a marriage or other persons to initiate, defend or intervene in proceedings in relation to such orders.[20]

The general right to bring a section 61(4) action, conferred by section 61(4)(b), clearly allows for proceedings in which neither party is a party to the marriage and therefore appears to be irreconcilable with the majority view of Mason J. in *Russell* v. *Russell* that:

> by conferring a jurisdiction unlimited as to parties, par. (c) in my opinion travels beyond the marriage power.[21]

On this basis the constitutional validity of the new section 61(4)(b) would appear to be questionable. The situation may have been otherwise if the right of non-parents to apply for custody of the child had been restricted to non-parents who had care and control of the child, thereby at least, not conferring a jurisdiction unlimited as to parties.

The amendment to section 61(4), if constitutionally valid, overcomes the limitation inherent in the former section 61(4) that persons who had in fact the care and control of the child had no right to apply to the Family Court for an order for custody. The existence of this limitation had led Gibbs A-C.J. to state:

> It is indeed inconvenient that an application by the surviving spouse for the custody of a child can be entertained only by one court, and an application by the person who has in fact the care

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[18] In effect from 5 April 1979.
[19] (1979) 22 A.L.R. 577, 589.
[20] *Id.* 590.
[21] (1976) 134 C.L.R. 495, 541.

> and control of the child can be entertained only by another, as Helsham C.J. in Eq. has pointed out in *Clarke* v. *McInnes* (1978; unreported).[22]

However, regardless of whether section 61(4) confers any power upon a person with care and control of the child to initiate an application for an order granting custody of the child, it may be that an application by such a third party is possible:

> by virtue of para (f) of the definition of "matrimonial cause" and by virtue of s 39. The proceedings would be proceedings in relation to the previously completed proceedings for custody of the child and would be a "matrimonial cause" in respect of which s 39 confers jurisdiction.[23]

This suggests that an action may be instituted under the Family Law Act simply by relying on section 39 and one of the section 4(1) definitions of matrimonial cause, even though the action does not relate to the enforcement of the specific rights conferred by the Act in such sections as section 61.

Although section 61(4) does not expressly confer jurisdiction on any court to entertain an application for the custody of the child, the High Court held (Aickin J. dissenting) in *Dowal* v. *Murray* that this did not prevent the Family Court from exercising jurisdiction in section 61(4) proceedings. The basis of the Family Court's jurisdiction lies in the definition of "matrimonial cause" in section 4(1) read in conjunction with sections 31 and 39.

Because the paragraph (c) definition of "matrimonial cause" referring to proceedings with respect to the custody of a child of a marriage is limited to proceedings between the parties to a marriage, the paragraph (c) definition does not embrace section 61(4) proceedings. Paragraph (f) of the definition of "matrimonial cause" however, confers jurisdiction in proceedings (regardless of the identity of the parties thereto) which are "in relation to . . . completed proceedings of a kind referred to in", *inter alia*, paragraph (c) of the definition. Section 61(4) proceedings answer that description because, as stated by Stephen J.:

> they are intimately concerned with the original custody proceedings, involving, in effect, such modification of the custodial regimen created by the earlier proceedings as is necessitated by the changed circumstances bought about by the death of the original custodial parent.[24]

The significance of this approach taken by the High Court in *Dowal* v. *Murray* has become apparent in the decision of the Family Court in *E and E (No. 2)*. In *E and E (No. 2)*[25] Mr and Mrs P. had been interveners in the original custody contest between the mother and the father when sole custody was granted to the father with care and

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[22] (1979) 22 A.L.R. 577, 580. *Clarke* v. *McInnes* has now been reported at (1978) FLC 90-517.

[23] (1979) 22 A.L.R. 577, 588-589.

[24] *Id.* 587.

[25] (1979) FLC 90-645; 26 A.L.R. 376.

control to his parents and undefined access to Mr and Mrs P. The P.'s subsequently applied for custody of the child.

Strauss J. (with whom Asche S.J. agreed) relying on *Dowal* v. *Murray* held that once there have been proceedings between the parties to a marriage relating to the custody of a child of the marriage (that is, completed proceedings within the present paragraph (c)(ii) definition of "matrimonial cause") then any third party may make an application to the Family Court of Australia as to the custody of or access to the child without prior leave or without having intervened, because the third party's application will come within the paragraph (f) definition of "matrimonial cause".[26]

However, this conclusion of Strauss J. is open to question because it appears to lay insufficient emphasis on the requirement that paragraph (f) proceedings must arise "in relation" to the paragraph (c)(ii) proceedings. In *Dowal* v. *Murray*, for example in the passage quoted above from the judgment of Stephen J., his Honour stressed the intimate connection between section 61(4) proceedings and the original custody order, and Jacobs J. said:

> The close relation between the original order for custody and the provisions of s 61(4) is obvious.[27]

Because this necessary relation may not exist between any custody application made by a third party, and the original custody order arising from proceedings between the parties to the marriage, it seems impossible to assert that all custody applications by third parties made subsequent to completed custody proceedings between the parties to the marriage will fall within paragraph (f) of section 4(1).[28]

The majority judgment of Strauss J. must also be weighed against the strong dissenting judgment of Pawley S.J. Pawley S.J. held that in the definition of "matrimonial cause", the field of custody is covered by the paragraph (c) definition which is

> limited to proceedings *between the parties to a marriage* about *a child of the marriage* . . . and para. (f) has no application because it refers to *other proceedings*, that is proceedings other than custody proceedings which have already been dealt with specifically in para. (c).[29]

This approach is, however, not unexceptionable. The contrary view can instead be taken that paragraph (c)(ii) does not delimit all custody applications which may be made under the Family Law Act but merely requires that initial custody proceedings taken under the Act be between parties to a marriage. Subsequent custody proceedings which are not between the parties to a marriage and which therefore do not come within paragraph (c) will then be "other proceedings" within paragraph (f).

Apart from doubts as to the constitutional validity of the new section 61(4)(b) provision and difficulties with the extent of the Family

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[26] *Id.* (78,396-398).
[27] (1979) 22 A.L.R. 577, 588.
[28] See Pawley S.J. in *E & E (No. 2)* (1979) FLC 90-645 (78,378-379).
[29] *Id.* (78,377).

Court's jurisdiction to entertain custody applications under paragraph (f) of the definition of "matrimonial cause" once there have been completed custody proceedings between the parties to a marriage, further problems remain inherent in section 61(4). As stated by Stephen J. in *Dowal* v. *Murray*:

> The effect of s 61(4) is to alter what would otherwise be the consequence, both for the survivor and for the child, of the death of the other parent, to whom custody of a child of the marriage had been awarded. But for it, the surviving parent, having been denied during their joint lives the entitlement to joint custody which, but for a court order, s 61(1) would have conferred, would acquire that entitlement once the other parent's death brought the effect of the disentitling order to an end.[30]

By denying the surviving parent custody of the child, a lacuna occurs in relation to the custody of the child. On the death of the custodial parent no one has any legal right to custody of the child.

Further, there is doubt as to the ambit of section 61(4). In *Dowal* v. *Murray* Gibbs A-C.J. expressed the view that section 61(4) would operate where the order for custody had been made during the lifetime of the parents in favour of the husband and wife jointly, so as to deprive the surviving parent of custody.[31] Stephen J. dissented from this proposition, asserting that section 61(4) had no operation in the case of an order for joint custody, and that the phrase "the death of a party to a marriage in whose favour a custody order has been made . . ." means an order for sole custody, not joint custody.[32] When section 61(4) was amended in the 1979 Act the legislature did not clarify this issue.

It is submitted that the opinion of Stephen J. is to be preferred to that of the Acting Chief Justice. A joint custody order made in favour of the parties to a marriage does not alter the general right of custody specified in section 61(1) of the Act that:

> subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child.

Where no custody order has been made by the court and a party to the marriage dies, the surviving party to the marriage continues as custodian of the children of the marriage. Logically the same result should flow when a joint custody order is made in favour of both parties to the marriage. This will only be the case if section 61(4) does not apply to orders of joint custody as suggested by Stephen J.

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[30] (1979) 22 A.L.R. 577, 582-583.
[31] *Id.* 580.
[32] *Id.* 583.
* B.A.