THE CHILD UNDER THE FAMILY LAW ACT: RECENT DEVELOPMENTS

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THE 'CHILD' UNDER THE *FAMILY LAW (AMENDMENT) ACT* 1983

From 1959 to 1975 the Commonwealth *Matrimonial Causes Act* (1959) applied to a class of children which was very much wider than the simple case of the children of both parties to the marriage. Section 6 of that Act extended its operation to a child of only one of the parties to the marriage providing that the child was, at the relevant time, ordinarily a member of the household of the husband and wife. This expanded notion of the child of a marriage was accepted without challenge for the fifteen years of the operation of the *Matrimonial Causes Act*. Judging by the paucity of case law on the subject, it was applied without apparent difficulty by the Supreme Courts which administered that Act.

In its original form the *Family Law Act* 1975 (Cth.) retained the notion of the child of the household. However, after the challenge in *Russell* v. *Russell; Farrelly* v. *Farrelly*[1] where the High Court indicated a view of the marriage power which confined its scope to legislation tied to both parties to the marriage, the *Family Law Act* was hastily amended. The new child of the *Family Law Act* belonged to a fairly restricted class; the child who was a natural or adopted child of both parties to the marriage. The range of litigants who could be involved in proceedings relating to such children was also confined in section 4(1) to the parties to the marriage. By a process of interpretation however, the matrimonial cause in section 4(1)(f)[2] became the basis for a comparatively wide jurisdiction for third parties to intervene in child proceedings or take part in proceedings for the variation of orders relating to children, providing that the original proceedings had been brought between the parties to the marriage.[3]

The Parliament undertook in 1983 to reinstate the child of the household of married parties as the *Family Law Act* child (section 5). Section 4 was also amended in 1983 to broaden the range of litigants who could initiate proceedings in child cases under the Act so that henceforth only one party to the marriage need be involved while the other party might be the child itself or a third party.

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[1] (1976) 134 C.L.R. 496.

[2] Section 4(1)(f) defines as a matrimonial cause and proceedings in relations to concurrent, pending or completed proceedings [being child proceedings which themselves are under s.4(1)].

[3] *E and E* (No. 2) (1979) F.L.C. 90-645 *Dowal* v. *Murray & Anor.* (1978) F.L.C. 90-156 *Fountain and Anor.* v. *Alexander and Anor* (1982) F.L.C. 91-218.

RETROSPECTIVE OPERATION OF THE *FAMILY LAW (AMENDMENT) ACT* 1983

While the Amendment Act effected important substantive changes of status, for the purpose of proceedings under the *Family Law Act*, to the new "children of the marriage", there was no indication in the new provisions as to whether they were intended to apply retrospectively. The well accepted rule determining the issue of retrospectivity is "a general primal presumption that a statute changing substantive rights ought not unless the intention to do so clearly appears, be understood as applying back to events pre-dating that law" (*Maxwell* v. *Murphy*[4], *Carr* v. *Finance Corporations of Australia Ltd.*[5]). The presumption is rebuttable on proof of a legislative intention sufficiently expressed that the law should apply retrospectively. The relevant fact or event within section 5(1) might be the adoption or birth of the child, or in relation to a child of the household, the separation of the parties, or the institution of proceedings.

Bollen J. of the Supreme Court of South Australia applied these well established principles in *Edmonds* v. *Edmonds*[6] and concluded that section 5 had only prospective operation so as not to apply to proceedings which had commenced more than six months prior to the proclamation of the Amendment Act. The action in *Edmonds* was brought by a husband and wife seeking custody of the husband's younger brother whom they alleged was a child of their household. Bollen J. found that the boy was not a child of the marriage of the parties insofar as at the time the proceedings were instituted (the "relevant time" section 5(2)) the parties were not yet married but were cohabiting in a de facto relationship. Bollen J.'s observations as to whether the Act applied to proceedings commenced before the proclamation date were therefore effectively dicta.

Strauss J. applied the rule of construction in *Maxwell* v. *Murphy* in *Delany and Delany*[7] but having agreed with Bollen J.'s formulation of the rule he disagreed with his conclusions. Strauss J. found that the presumption was rebutted by a legsilative intention to apply retrospectively, expressed in the general scheme of the *Family Law Act* as it affected children within a marriage. Moreover, his Honour felt that this conclusion was in keeping with the aims of the 1983 child provision amendments, which were to eliminate confusion with respect to categories of children and to bring as many children as possible within the ambit of the Act.

The conclusion in *Delany* is clearly preferable to that in *Edmonds*. Strauss J. determined the objectives of the law by reference to the second reading speech of the Minister on the 1983 Bill. It is submitted that the necessity to resort to extrinsic materials in order to resolve the question of retrospectivity is attributable to inadequate drafting. Problems of retrospectivity have also

[4] (1956-1957) 96 C.L.R. 261.
[5] (1982) 42 A.L.R. 29.
[6] (1984) F.L.C. 91-530.
[7] (1985) F.L.C. 91-633.

arisen in relation to other aspects of the amendments e.g. as to divorce, (*Kelada and Kelada*[8]) and as to variation of property orders (*Parker and Parker*[9] and *Rohde and Rohde*[10]). It is incumbent upon the legislature to resolve these problems and clarifying amendments are needed urgently.

An inadequate legislative program is also to blame for the position that some of the 1983 provisions have been rendered unworkable or uncertain in their operation by the failure to make regulations putting them into effect. The new provisions enabling a child to take its own proceedings in relation to maintenance and in relation to its welfare are not supported by regulations specifying how the child is to go about appointing a next friend where separate legal representation is not ordered. Similarly it was found in *J. and P.*[11] that the long awaited section 99A which provides for the court to have the power to order procedures for the proof of paternity is rendered quite useless by the absence of regulations specifying the tests which are to be accepted and the authorities which may administer them. Accordingly, while the Court theoretically has been equipped for some two and a half years with the power to order very reliable paternity tests, Treyvaud J. was obliged in *J. and P.* to make do with the presumption of legitimacy and with the difficult task of establishing evidence of intercourse at possible conception times years after the birth of the relevant children. While this can hardly be described as a satisfactory way to proceed, the decision that the husband was not the father of the children, in the face of the refusal of the mother and of her defacto (both medical practitioners) to undergo blood tests was upheld by the Full Court on the husband's appeal.[12] The High Court refused the husband further leave to appeal.[13] Indeed the *Amendment Act* also failed to acknowledge that we may be embarking upon an era of disputed maternity, as new medical technology has for the first time given us the opportunity to disguise genetic motherhood. In this regard section 5A and section 5(1)(d) should have extended when they were added in 1983 to include a child of a marriage born as a result of a medical procedure and who is not biologically the child of the wife.

THE CONSTITUTIONAL VALIDITY OF THE CHILD AMENDMENTS

Since the proclamation of the *Amendment Act* the High Court has ruled on three occasions on the constitutional validity of the new provisions. In two cases, *Re Cook and Maxwell JJ. Ex Parte C: & Anor*[14] (hereinafter referred to as *Ex Parte C*) and in *Cormick and Cormick* v. *Salmon*[15] aspects of section 5 were declared invalid with the consequence that the range of

[8] (1984) F.L.C. 91-503.
[9] (1983) F.L.C. 91-364.
[10] (1984) F.L.C. 91-592.
[11] (1985) F.L.C. 91-624.
[12] *J and P (No. 2)*, 1986 F.L.C. 91-707.
[13] Unreported decision.
[14] (1985) F.L.C. 91-619.
[15] (1984) F.L.C. 91-554.

children who are subject to the *Family Law Act* has again been narrowed. In the result the Family Court has a jurisdiction which fails to reach children who were for fifteen years the subject of the *Matrimonial Causes Act*. In the third case, *V and Anor* v. *V*[16] the High Court fortunately was prepared to take a step which had not previously been taken; it declared valid section 4(1)(ce) of the Act. That provision enables a third party to initiate proceedings in relation to a child of a marriage provided that the other party to the marriage is the other party to the proceedings. The child in *V* v. *V* had become a child of the marriage by adoption by the parties. The applicant third party was in fact the natural mother. She sought access to the child in the Family Court relying on the new matrimonial cause, section 4(1)(ce). The High Court held that section 4(1)(ce) was a valid exercise of the marriage power. It regulated the rights of the parties to the marriage which arose out of the marital relationship where the exercise of those rights was being challenged by the application for access by a third party. Effectively then *V* v. *V* extends the category of litigants under the *Family Law Act*, while *Cormick and Cormick* v. *Salmon*, and *Ex Parte C* restrict the class of relevant children. The result is that the jurisdiction where the welfare of the child is paramount neither the federal nor the State courts can deal in an integrated way with many "blended" families. Moreover the *Family Law Act* is rendered inapplicable not only in matters of guardianship, custody and access, but for other purposes as well. The revival of State jurisdiction under the *Maintenance Act* where a child has been a member of the household of married parties is extemely unfortunate.

Cormick and Cormick v. *Salmon* involved an ex-nuptial child, aged six, who had been raised since infancy by its grandmother and her husband (the Cormicks). The Cormicks applied for joint custody and joint guardianship of the child in the Family Court on the basis that, although the child was ex-nuptial, she was deemed by the *Family Law Act* to be a child of their marriage. The application was resisted by the child's natural mother, Mrs. Cormick's daughter. Gibbs C. J. delivered the majority judgment of the Full Bench; Murphy J. dissented. The Chief Justice accepted that the grandmother's proceedings would come within section 4(1)(ce) provided that the child could be said to be the child of the Cormick's marriage within section 5. The only applicable provision was section 5(1)(f). That subsection deemed a child who, although not the natural or adopted child of either party, was "treated by the husband and wife as a child of their family" to be a child of the marriage and "was ordinarily a member of the household of the husband and wife". As the child proceedings were not associated with any principal relief proceedings the validity of section 5(1)(f) in the circumstances depended on it being an appropriate exercise of the marriage power, section 51 (xxi) of the Constitution. The High Court held that it was not. Gibbs C.J. insisted that section 51(xxi) could not be satisfied by deeming a child to be of a marriage, where the necessary connection between the child and the mar-

[16] (1985) F.L.C. 91-616.

riage did not in truth exist. There was not a sufficient connection, in his Honour's view, between the institution of marriage and this law which purported to treat a child as being of the marriage.

Those statements whould seem to tend towards the situation established after *Russell* v. *Russell*,[17] that only children of both the parties to a marriage would appear to be *Family Law Act* children. However, it is submitted that the Chief Justice's dicta, indicating the proper limits of extensions to the *Russell* v. *Russell* child are of the utmost importance. These extensions while not going so far as to support section 5(1)(f) in the circumstances in *Cormick*, nevertheless, would appear to go some way further than the simple case of proceedings between the parties to the marriage in relation to a child of them both. Gibbs C. J. stated: "It 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 their child who is not a child of the marriage".[18] Effectively the Chief Justice was indicating that a law could validly define the rights and duties of a husband and wife *inter se* in relation to a child who is not of their marriage. It would appear to follow from this statement that section 5(1)(f) might validly operate in the situation where the proceedings were between the parties to the marriage though not, as in *Cormick*, where the proceedings were between a married party and third party. Therefore, it is urged that the High Court in *Cormick* did not intend the wholesale destruction of section 5(1)(f). It intended only to deny that there was a necessary connection with marriage in so far that the provision intended to apply to "the 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".[19] It would therefore seem most likely that had the dispute in *Cormick* arisen not between the grandparents and the child's natural mother but between the married grandparents *inter se* that the child in those proceedings might have been regarded as a child of the marriage and that section 5(1)(f) would to that extent have been held a valid law of the Commonwealth. In effect, it is urged, section 5(1)(f) is only partially and not totally invalid even as drafted.

The next new provision to fall at the hands of the High Court was section 5(1)(e)(i) which deems a child of the household who was the ex-nuptial child of one of the parties to the marriage to be a child of a marriage. Yet given its antecedent in section 6(1)(c) of the *Matrimonial Causes Act* it was something of a shock when section 5(1)(e)(i) was declared invalid by five of the six judges comprising the Full Bench that decided *Ex Parte C.*

Ex Parte C concerned a 12 year old girl who was born out of wedlock some years before her mother married Mr. C., who was not the girl's father. The child had run away to her grandparents, Mr. and Mrs. T., in January 1985. She was living with the grandparents at the time the proceedings were initiated in May 1985 and had been living there for some six months at that

[17] See footnote 1 above.
[18] At p. 79, 472, Emphasis added.
[19] At p. 79, 473.

time. It appears to have been conceded in argument, however, that she was ordinarily a member of the household of Mr. and Mrs. C., a concession which seems both unnecessary and unfortunate as it was arguable that at "the relevant time" (section 5(2)) she was no longer a member of that household. Be that as it may the grandparents initiated proceedings in the Family Court, relying on the matrimonial cause in section 4(1)(ce) which we have noted was upheld in *V* v. *V*. Mr. and Mrs. C. responded by impugning the jurisdiction of the Family Court in relation to the child. They obtained orders *nisi* for prohibition and certiorari against Cook and Maxwell JJ. of the Family Court who had been involved in preliminary hearings of the custody application by the grandparents. The orders for prohibition were made absolute by a majority of the Full Bench on the ground that section 5(1)(e)(i), was an invalid law, beyond the constitutional power of the Commonwealth.

As in *Cormick's* case the fact that no principal relief proceedings were to be undertaken in *Ex parte C* meant that the relevant source of constitutional power was the marriage power. The question for the Court was whether section 5(1)(e)(i) could properly be referred to section 51 (xxi). The Chief Justice delivered the leading judgment with which four of his learned brethren agreed that, at least in the circumstances in *Ex parte C*, section 5(1)(e)(i) was not a valid exercise of the marriage power. Deane J. dissented, holding that section 5(1)(e)(i) was valid.

In the Chief Justice's opinion, the dominant feature of the provision in question was that it contemplated an ex-nuptial child. His Honour said, "in truth without more, there is no connection between an ex-nuptial child and the marriage of one of its parents".[20] Gibbs C. J. was referred by counsel for the grandparents to his own remarks in *Cormick*. There his Honour had indicated that he felt that the only means by which a child could have the status of a child of a marriage was through birth, legitimation or adoption. He was prepared to extend the notion of adoption in *obiter* in *Cormick* to include the case of a de facto adoption. Counsel therefore invited his Honour to rule that "section 5(1)(e)(ii) in effect describes the situation which exists where there has been a de facto adoption". However Gibbs C. J. declined to rule in these terms because he felt that as a matter of statutory interpretation the express mention of adoption in section 5(1)(e)(ii) operated to exclude any notion of adoption in the relevant provision, section 5(1)(e)(i), and that section 5(1)(e)(ii) did not, as drafted, contemplate a de facto adoption. His Honour however "left open"[21] the possibility that a sufficient connection with marriage so as to come within the marriage power would exist if the law were redrafted in relation to an ex-nuptial child within a marriage to require that the parties had undertaken a de facto adoption of the child. It is not clear what the Chief Justice intended by his notion of de facto adoption. The concept is not one which is known to Australian family lawyers

[20] *Ex Parte C* at p. 80, 006.
[21] Ibid.

and it is not a feature of the jurisprudence relating to children.[22] Gibbs C. J. indicated that by it he meant that "both parties to the marriage should have treated and intend 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".[23] The Chief Justice appears to have adapted notions from the law of domicile to the law relating to children. With respect, this is somewhat strange, but the most difficult aspect of His Honour's definition is the weight His Honour gives to the views of the child itself. With respect, the child's intentions should not be a material consideration. Children are not, for reasons which are well understood, regarded as having a capacity to form binding intentions for other legal purposes. It is unfortunate to base a de facto adoption upon them.

At the end of the day the possibility remains after *Ex parte C* that while section 5(1)(e)(i) as presently drafted is not within the marriage power, it could be redrafted, in the views of three members (Mason and Dawson JJ. agreeing with the Chief Justice) of the High Court, to require a de facto adoption of an ex-nuptial child by the parties to a marriage. Unfortunately we have no *ratio decidendi* on the point as the Full Bench, in the absence of their brother Murphy J., broke with the convention that the Court sits with an uneven number and sat with six judges. However, it seems that some ex-nuptial children within a marriage can, with amendments to section 5(1)(e)(i), be included under the jurisdiction of the *Family Law Act*.

Moreover, it is submitted that *Ex parte C*, like *Cormick's* case, is not as restrictive as it may appear, since proceedings in that case were commenced under the *Family Law Act* not by the parties to the marriage who were not opposed, but by the grandparents, whom the child appeared to favour. *Cormick's* case and *Ex parte C* both in fact involved the application of two extensions to the *Family Law Act* in the 1983 amendments: those allowing third parties to initiate proceedings, and those bringing under the Act children who are not the natural children of both parties to the marriage. The High Court it appears, might have been prepared to uphold each of these individually, but would not tolerate those circumstances occurring together. Section 4(1)(ce), we have seen had already been approved in *V* v. *V*.[24] The High Court's objection to section 5(1)(e)(i), however, was expressed by the Chief Justice and also by Mason J. with a similar qualification to that in *Cormick* in relation to section 5(1)(f) i.e. that the ex-nuptial child could not be deemed a child of the marriage "at least *vis a vis strangers to the marriage*".[25] Given that Wilson and Dawson JJ. had endorsed the views of the Chief Justice, the result is that a four member majority of the Full Bench has actually limited the invalidity of section 5(1)(e)(i) to the situation where a third party seeks to initiate proceedings under section 4(1)(ce).

[22] Perhaps an order for guardianship and custody under the *Children (Guardianship and Custody Act)* Vic. (1984) which is "less than" and adoption might satisfy the notion of a quasi adoption but that facility is not available in other states.
[23] *Ex Parte C* at p. 80, 006.
[24] See p. 136 above.
[25] *Ex Parte C* at p. 80, 006.

Effectively then, the child is deprived of the status of the child of the marriage not merely by its ex-nuptial origins but by the circumstance that the proceedings go beyond the parties to the marriage. This view is repeated in the decision of G. N. Williams J. in the Queensland Supreme Court in relation to proceedings brought by the grandfather of an ex-nuptial child against its father and his new wife. In *Re W (an infant)*[26] a grandfather sought orders for access in the Supreme Court to his son's child. The son had fathered an ex-nuptial child and had subsequently married a woman who was not the child's mother. The child lived in the married household. It was held that the application was appropriately brought in the State Court.

The learned Supreme Court judge held that matrimonial cause in section 5(1)(e)(i) could not validly extend to the circumstances in *Re W (an infant)* because the attempt to apply the law to a married person (here the father) was not sufficiently connected with the marriage relationship to be a valid enactment pursuant to the marriage power. The result in *Re W* and, it is submitted, the reasoning, are entirely consistent with the view that is being urged here of the High Court's decision in *Ex parte C*, although that case was not decided at the time. G. N. Williams J. observed in significant dicta that while the parties to the marriage in *Re W* were in fact united both generally and in their opposition to the grandfather's application for access, had this not been the case the marriage power would enable the Commonwealth to legislate with respect to their rights and obligations *inter se* in relation to an ex-nuptial child of their household.

Re W is inkeeping with the decision of Strauss J. in the Family Court in *Delany and Delany*.[27] The child of the *Delany* marriage was the nuptial child of the wife's previous marriage. Mrs. Delany succeeded in obtaining an order for maintenance for the child against the husband, the child's stepfather. While *Delany* anticipates *Ex parte C*, Strauss J. was able to distinguish *Cormick* on grounds which, it is submitted, are equally in point in relation to section 5(1)(e)(i) namely that "the dispute is between two persons who were married"[28] and further that the wife's application for maintenance was in relation to the parties' divorce and thus referable to the matrimonial causes power.

It would follow then that if in *Cormick* and in *Ex parte C* the parties to the marriage had been litigating against each other in relation to a child of their household including an ex-nuptial child of one of them, that child would be a *Family Law Act* child. However, that same child would be a State child if the proceedings were initiated by a third party. This result is somewhat incongruous, as is the logic by which a section of an Act is valid in its own right but is invalid when read in combination with another valid section of that Act. Nevertheless family lawyers will be grateful that children of the household in a marriage will for many purposes at least come within the *Family Law Act*. It is suggested moreover that providing the initial proceed-

[26] (1985) F.L.C. 91-637.
[27] See footnote 7 above.
[28] At p. 80, 122. *Ex parte C* at p. 80, 122.

ings were between the parties to the marriage it is open now as it was prior to the 1983 amendments, on well established doctrine, for a third party to intervene in those proceedings (*Pearn and Appleby*[29]) or to take variation proceedings (*Fountain* v. *Alexander*[30]) or to take proceedings after the death of the custodian (*Dowal* v. *Murray*[31]). This result comes about, it is submitted, because despite its "ineligible" origins, the child would have "qualified" as a *Family Law Act* child by virtue of the original proceedings between the parties to the marriage.

We have seen that aspects of section 5(1) require that a child must be "ordinarily a member of the household of the husband and wife" (section 5(1)(e) and section 5(1)(f)) in order to be deemed a child of the marriage. That requirement was regarded under section 6 of the *Matrimonial Causes Act* as a simple test: the child only needed to be usually resident in a household which had a degree of permanency.[32] Applying that test, G. N. Williams J. in *Re W*[33] found that the child in that case was ordinarily a member of the household of its father and stepmother. His Honour felt constrained by authority so to find although he was troubled by the circumstance that the natural mother retained an active decision-making role in relation to the child. His Honour felt that the child had not "become part of the personal and private world of the relationship within his father's marriage",[34] but that he was, nevertheless a *Family Law Act* child.

"The child of the household" would thus appear a broad concept. There is however, in section 5(1)(f) an additional requirement. The child in section 5(1)(f) must not only be a child of the household but it must also be "treated by the husband and wife as a child of the family." Gibbs C. J. in *Ex parte C*[35] indicated that the "family" was a notion going beyond the parties to the marriage and their children and included other relatives. Accordingly, that notion could not anchor section 5(1)(f) to the marriage power. In the Supreme Court, Holland J. in *Playford* v. *Collier*[36] and G. N. Williams J. in *Re W*[37] have said that the "treating as a child of the family" requirement was a restrictive one importing that both parties to the marriage must assume the status of parenthood towards the child. Thus the continuing role of the natural mother in *Re W* while not preventing the child from being "of the household", nevertheless resulted in the Court finding that it was not "treated as of the family" of the husband and wife.[38]

This view, it is submitted, is unduly restrictive. It needlessly excludes from the ambit of the Act children who, this writer has urged, would otherwise qualify as section 5(1) children. It is difficult to know what additional con-

[29] (1977) F.L.C. 90-231.
[30] (1982) F.L.C. 91-218.
[31] (1978) F.L.C. 90-516.
[32] See *Cunnew* v. *Cunnew* (1974) 9 S.A.S.R. 587.
[33] See footnote 26 above.
[34] At p. 80, 152.
[35] See p. 138 above.
[36] (1984) F.L.C. 91-529.
[37] (1985) F.L.C. 91-637.
[38] At p. 80, 152.

tent should be ascribed to the requirement that the child be "treated as a child of the family". Perhaps guidance may be sought here from English decisions which interpret a similar requirement in their legislation, as one that the parties to the marriage do not differentiate between that child and other children of them both.[39] Those decisions acknowledge that the relevant child may have some involvement with its natural parents.

A further point is that in none of the High Court decisions that we have discussed were principal relief proceedings a feature of the litigation. This is significant, for despite our habit of referring child legislation to the marriage power since *Russell* v. *Russell*, the High Court has maintained since *Lansell* v. *Lansell*[40] in 1964 that the powers in the Constitution do not form water-tight compartments. Aspects of section 5 which may not conform with the marriage power may nevertheless, where there are principal relief proceedings, have sufficient nexus with those proceedings to come within the matrimonial causes power (section 51 (xxii)). Indeed in *Cormick's* case Gibbs C. J. expressly reserved this question and it may be that a "blue pencil" test should be applied to either or both section 5(1)(e)(i) and section 5(1)(f) so that they are valid as drafted where principal relief proceedings are a feature of the litigation.

Strauss J. in *Delany* disapproved of the notion that the matrimonial causes power could salvage legislation which failed to satisfy the marriage power. He said in the context of child maintenance that the "matrimonial causes power would not serve to extend the jurisdiction of the Court any further than the marriage power". It is suggested, however, that while it is clearly undesirable that the application of the Act to a given child should turn on whether principal relief proceedings have been commenced, the Court should be slow to give up jurisdiction wherever it can avoid doing so, and if resort must be had to the matrimonial causes power then that course should be followed.

Cormick and Cormick v. *Salmon and Ex parte C* are unfortunate decisions. The High Court has not, however, impugned the status of the remainder of section 5(1)(e) which deems a nuptial child of either spouse to be a child of the marriage. The same is true of section 5(1)(e)(ii), which deems an adopted child of one party to a marriage to be a child of the marriage in appropriate circumstances. It is hoped that with careful interpretation of the High Court decision by the Family Court, and with some redrafting by the Parliament much of sections 5(1)(e)(i) and 5(1)(f) can be salvaged. It is not too late to attempt to restore the much needed jurisdiction of the *Family Law Act* in relation to children within a marriage.

JURISDICTION WITH RESPECT TO THE WELFARE OF A CHILD

A major change implemented in the 1983 Amendments was to confer jurisdiction on the Family Court in relation to the welfare of a child of the

[39] These cases are discussed in S. M. Cretney, *Principles of Family Law*, at p. 339-344 (2nd ed. Sweet and Maxwell).
[40] (1964) 110 C.L.R. 353.

marriage. The intention was to overcome problems which had arisen due to the absence of a federal jurisdiction in wardship. The more modern term "welfare" was used in preference to "wardship" on the recommendation of the Watson Committee Report (Wardship, Guardianship, Custody, Access, Change of Name) November, 1982. This writer has always felt that it was unwise to jettison the wardship concept,[41] the meaning of which was both wide and well established, in favour of an untested term. That some confusion may have resulted from the change in terminology is attested to by a dearth of reported cases successfully invoking the "welfare" jurisdiction. An unsuccessful attempt was made in *Egan and Egan.*[42] The applicant in *Egan* was the adult sister of three young children of the elderly husband and wife. The sister and her husband were in *loco parentis* to the three young children and intended to take them to live in the United Kingdom. She sought a property settlement for herself and the children from their parents. The applicant conceded that the property provisions of the *Family Law Act* did not extend to settlement on children of property but she argued that her application should be looked upon as a proceeding in relation to the welfare of the children of the marriage. Strauss J. held that the jurisdiction in relation to welfare in section 4 and section 64 did not extend to property and financial matters but was confined to matters involving the physical and emotional well-being of the child, including the ability to order medial procedures upon the child. With respect to His Honour, the concept of "wardship" was never thus restricted. While it is not suggested that the Court should depart from its practice of declining property settlements for children, it would have been preferable, it is submitted, to exercise the discretion to decline to make the property orders sought in *Egan*, rather than to limit the notion of "welfare". For example, the Court should retain an ability to direct how property which belongs to a child should be applied or expended. It is submitted that such an order would certainly be within the "wardship" notion. Having acquired the power in 1983 it would be unfortunate if the Court were now to import restrictions into the notion of the welfare of the child.

It should be noted that in amending the Act in 1983 the account taken of the new "welfare" jurisdiction was somewhat haphazard. As a consequence, a Magistrates' Court is able to take jurisdiction in relation to the welfare of the child even where one party objects, for section 46 which obliges the Magistrates' Court to first obtain the consent of both parties in child matters does not extend to welfare proceedings. This is an unintentional omission as is, it is suggested, the omission of welfare proceedings in section 31(1)(c) (original jurisdiction), in section 61 (death of custodian), in sections 68 and 69 (overseas orders), section 70 (interference with children subject to orders) and sections 70A and 70B (provisions preventing the removal of children from Australia). These provisions should be reviewed so that the jurisdiction in relation to welfare may be systematically written into the Act. The guardianship notion is also absent from section 68, again it seems by oversight.

[41] See Dorothy Kovacs, "Family Law" in Annual Survey of Australian Law 1985" R. Baxt and G. Kewley (eds.) Law Book Co. at p. 122.
[42] (1985) F.L.C. 91-608.

MAINTENANCE OF CHILDREN

In *Mee and Ferguson*[43] the Full Court (Asche S. J. Fogarty and Cook JJ.) embarked upon the most comprehensive analysis yet attempted of the child maintenance provisions of the *Family Law Act*. For the first time, it seems, the Court spelt out the correct approach to the maintenance obligation. In particular, it explicated the relationship between section 75(2) which concentrates primarily on the conditions of the "parties", and section 76 which looks to the particular financial circumstances of the child. The Court observed that it had previously been common practice to look first at the respective financial circumstances of the parties and then only later to consider the financial needs of the particular child. In the past the child's needs have in effect been viewed as coinciding with what the parties can be made to pay towards its maintenance. The Full Court in *Mee* said that this approach was not correct. Indeed, the reverse was appropriate; the Court in the first instance should consider the financial needs of the particular child and actual evidence of those needs should be presented to the Court. The second stage, according to the Full Court, was to look at the extent to which the child has financial resources to meet those needs. This aspect did not feature largely in the circumstances in *Mee* as the young children there had no significant financial resources of their own. Their mother had, however, re-married to a Mr. Ferguson and the Court acknowledged that Mr. Ferguson was in effect a financial resource of the children. However, the Court preferred to consider his position at the third stage of the inquiry i.e. when considering the financial needs and resources of the parties. In the context of the second stage, however, i.e. the needs of the child, the Court pointed out that while the small financial earnings of most children were not significant, a child wealthy in its own right could have no claim against a parent. It is thus likely that income directed at a child for taxation or estate planning purposes may assume a new prominence in child maintenance decisions, particularly in a climate where the Court is antipathetic to schemes which deprive the public purse.[44] This focus on the financial resources of the child may also tend to place on adult student children a primary obligation to find employment.

The third stage according to the Full Court in *Mee* was an examination of the respective financial circumstances of the parties, both with respect to their resources and their financial needs and obligations. Mr. and Mrs. Mee had both re-married and the new spouse of each party was a financial resource of that party. The Court accepted the definition of financial resource proposed in *Kelly and Kelly* in the context of family companies and trusts i.e. as "a source of financial support which a party can reasonably expect would be available to him or her to supply a financial need or deficiency".[45]

Mee and Ferguson brings about a restructuring of the inquiry into child maintenance. The Full Court did not rest there however, but undertook to

[43] (1986) F.L.C. 91-716.
[44] See pp. 150 & 151 below.
[45] *Kelly* and *Kelly (No. 2)* (1981) F.L.C. 91-108 at p. 76, 803.

define, probably for the first time in Australian jurisprudence, a ranking of the priorities relating to child maintenance in which the child maintenance obligations could be placed among other responsibilities and expenditures of the parties. The Full Court first canvassed the possibilities.[46] At one extreme the maintenance obligation might be ranked first i.e. it might be regarded as a "pre-eminent obligation" to be assessed after deducting from the party's income only those expenses of the party which were legally unavoidable, e.g. expenses in the nature of income tax, compulsory superannuation contributions and Medicare levies. This position we may for convenience call the strict view. At the other extreme the child maintenance obligation might be ascertained only after deduction of all those living expenses which a party might reasonably incur. Were this position (the lenient view) adopted, then the maintenance obligations in respect of a child would be assessed only after the Court had made due allowance for the lifestyle of the respective parties.

The Court in fact preferred an "intermediate view" in which the maintenance obligation was assessed after the deduction from a party's income and financial resources of all legally unavoidable expenses together with those expenses which the Court would regard as *necessary* for the party to incur. In practical terms on the facts of *Mee* this rigorous test was to bring about an increase by the Full Court in the amount of maintenance that had been ordered against the husband by the trial judge, Walsh J. Walsh J. had in fact applied the "lenient view" and assessed the husband's liability only after taking into account numerous expenses including heavy mortgage repayments which the husband had undertaken in the purchase of a new home for himself and his second wife. Walsh J. had also deducted the husband's requirements for household replacements and furnishings and entertainment expenses. The Full Court held that it was incorrect to take these expenses into account in assessing the husband's child maintenace obligations. The Court found that the husband's new home was in all the circumstances an extravagant purchase; it was much more expensive than his previous house which had been adequate. The Court held that the husband was "perfectly free to enter into these additional liabilities if he chose to do so, it was not appropriate for him to . . . then treat that as a basis for reducing his maintenance payments for his own children."[47] The trial judge should have allowed for only the husband's reasonable transport, food and clothing expenses and other costs necessary to the continued reasonable existence of the husband and his second wife.

This statement of priorities by the Full Court is a novel and courageous development. It will offer hope to the majority of custodians who have until now found that court ordered maintenance is unhelpful and unrealistic in a judicial climate which has for so long now favoured the "lenient view" applied by Walsh J. It is hoped that it will bring about a realisation on the part of the Courts and of the profession, and especially on the part of non-

[46] *Mee and Ferguson* (1986) F.L.C. 91-716 at p. 75, 197.
[47] id. at p. 75, 206.

custodial parents that the obligation to maintain children is not one which is to be determined after the parties have provided for the lifestyle which they have chosen for themselves after the breakdown of a marriage. Indeed the matter of lifestyle is likely to undergo much closer scrutiny by the courts in future. Extravagant payments in the nature of Mr. Mee's mortgage obligation and other avoidable expenses including overpriced cars and expensive holidays are, it seems, to be matters which are to be disallowed, and parents who should maintain their children will take on such expenses at their peril in the future.

The Full Court did not make it clear whether these priorities were to be taken into account at the "jurisdiction" stage of the maintenance inquiry (i.e. in determining whether an order should be made), or only subsequently in arriving at the quantum of child maintenance orders. It is submitted that the "intermediate view" of priorities will be considered at both stages. It seems likely that some non-custodians who were previously exempt from liability to maintain children of the marriage will more easily incur such a liability in the future. Moreover, it is submitted that the decision in *Mee* will have important consequences in arriving at the quantum of maintenance awards which are likely in many cases to be significantly higher. That would seem to follow not only from the priorities spelt out by the Court but from statements of attitude in the joint judgment. Thus, the Court speculated that: "The recent publication by the Institute of Family Studies – 'The Cost of Children in Australia' – would provide a useful guide provided that it was admitted into evidence. It demonstrates what most custodians know, namely the very high cost of maintaining a child in our society, and that the courts may be lagging behind reality."[48] Similarly, in the course of criticising the tendency of Courts to adopt the "lenient view" the Court noted that: "The problem is ... that the amount of maintenance which is assessed is usually quite out of kilter with the actual needs of the child [and] ... a disproportionate financial burden is placed on the shoulders of the custodian."[49]

Indeed, it seems likely that this new assertiveness will extend not only to the ordering of maintenance but also to the recovery of arrears. In *Mee and Ferguson* the husband was in arrears of child maintenance in an amount of some $2,000. The Full Court found that this was attibutable in large part to the husband having taken on the excessive mortgage. The Court took the view that the husband was to be regarded as having had the capacity to continue paying the previous order but that he had unilaterally chosen not to do so by voluntarily assuming unnecessary responsibilities. The Full Court thus held him responsible for the full amount of the arrears, overruling Walsh J. who had assessed arrears only after taking into account the husband's other responsibilities. Family lawyers have been invited by the Full Court's decision in *Mee and Ferguson* to pursue the financial entitlements of children more aggressively. They should not be slow to take up the invitation.

[48] id. at p. 75, 196.
[49] id. at p. 75, 197.

THE FORM OF CHILD MAINTENANCE ORDERS

The Family Court has for some time not favoured the practice of capitalisation of maintenance obligations towards children either by lump sum order or by translating maintenance obligations into the transfer of an asset. It is not possible to make final orders in relation to child maintenance either under section 74 or by maintenance agreement (section 87(13)&(14)) as the parties are unable to give or bargain away the child's right to maintenance. The Court in general will insist that the order take the form of a periodic order (*V and G,*[50] *Spano and Spano*[51]).

While this principle has been reiterated in recent cases (*Brazel and Brazel,*[52] *James and James*[53]) it has been pointed out that it is not a rule of law, and it will be abandoned so as to capitalise child maintenance into a lump sum (*Vartikian and Vartikian (No. 2)*[54]) or to order the transfer of an asset or portion of an asset (*Williams and Williams*[55]) where this will be more beneficial than a periodic order. The Court has made capitalised orders where the obliged spouse has demonstrated a determination not to comply with a periodic order (*Vartikian (No. 2)*) or where it would cause hardship to the wife to finance a loan to pay out the husband for his share in the home, only to receive periodic payments in return (*Park and Park*[56]). In *Williams and Williams* where the husband was permanently hospitalised, the Full Court went so far as to allow the wife to acquire a home out of trust funds which had been held in the Supreme Court for the benefit of the husband. The Court partly attributed this purchase to maintenance. In *Marras and Marras*[57] the husband had proved his determination not to pay periodic maintenance. Purdy J. took a step which was probably unwise of the jurisprudence on section 79A, the power to vary property orders. His Honour varied a property order under section 79A to give the wife additional property saying that part of this was lump sum maintenance for the child. In *Vartikian (No. 2)* where the husband was similarly determined not to pay periodic maintenance, the wife was able to recover a lump sum amount for past and future maintenance of the children out of the husband's share of the proceeds of the sale of the home. This approach is clearly sensible. Had the Full Court been prepared to adopt it in earlier days the extreme hardship visited upon the wife and children in *Branchflower and Branchflower*[58] might have been averted.

[50] (1982) F.L.C. 91-207.
[51] (1979) F.L.C. 90-707.
[52] (1984) F.L.C. 91-568.
[53] (1984) F.L.C. 91-537.
[54] (1984) F.L.C. 91-587.
[55] (1984) F.L.C. 91-541.
[56] (1978) F.L.C. 90-509.
[57] (1985) F.L.C. 91-635.
[58] (1980) F.L.C. 90-857. IIn that case the wife and children of the marriage were unable to have the husband's share in the home transferred by way of maintenance even though the eldest child had suffered severe injuries in an accident and the wife's financial and personal position was such that it was imperative that she retain the home.

MAINTENANCE OBLIGATIONS OF STEP-PARENTS

The 1983 extensions to the notion of the child of the marriage apply "for the purposes of each application of this Act" (section 5(1)). While there is some debate as to the wider implications for the status of the child of section 5,[59] it seems clear that depending on the "relevant time" (section 5(2)) at which proceedings are brought, a given child may be a child of several marital relationships, and the rights and obligations of a given "parent" may arise and recede episodically. Given a high rate of re-marriage [60] in the community, the rights and obligations of step-parents will become a common problem where a second or subsequent marriage breaks down.

The step-parent has featured frequently in custody and guardianship matters[61] but there are surprisingly few reported decisions in Australia in which the maintenance obligations of step-parents have been in issue. The question arose in *Delany and Delany*[62] in the context of the wife's second marriage to a man who throughout their cohabitation had undertaken the support of her child by her previous marriage, including payment of the child's private school fees. On the breakdown of the second marriage Strauss J. ordered the husband to pay periodic maintenance for the child (but not school fees). The outcome in *Delany* is consistent with the requirement in English legislation that step-parents are liable for a child's maintenance only if they have assumed a responsibility of that nature.[63] It is not clear whether the assumption by the husband of responsibility was a requirement in *Delany*, nor whether that or any other special principles may apply to a step-parent's obligation. It may be that to require an assumption of responsibility could encourage irresponsible step-parenting and indeed the creation of new burdens for step-parents may encourage a withdrawal from marriage. In *Delany* Strauss J. was not called upon to allocate the obligation as between the wife's present and former husband but there seems no reason in principle why this should not occur, and we may soon witness tripartite maintenance proceedings to determine responsibility for the maintenance of a child. It would seem an appropriate time to contemplate a systematic exposition of the principles on which liability of a step-parent should be based. To that end reference should be made to legislation currently applicable in fourteen American states to the step-parent's obligation. The fourteen states take diverse approaches to various matters, e.g. does a non-custodial step-parent have a duty in relation to the child? Is the obligation apportioned between natural and step-parents? What is the effect of the termination of the relationship?[64]. A first

[59] See the discussion in C.C.H. "Australian Family Law and Practice". Broun and Fowlker eds.* 115-504.

[60] See Institute of Family Studies: *Children in Step Families*, P. Harper 1984, for statistical information.

[61] See the cases noted at footnote 3 above and *St. Clair* v. *Nicholson and ors.* (1981) F.L.C. 91-012.

[62] See footnote 7 above.

[63] *Matrimonial Causes Act* 1973 (U.K.) s. 25(4).

[64] See the discussion in S. H. Ramsey and J. M. Mason, "Stepparent Support of Stepchildren": A Comparative Analysis of Policies and Problems in the American and English Experience. (1985) 36 Syr. L. Rev. 660.

and very positive step has already been taken with the publication of the Issues Paper prepared by the Step-family Subcommittee of the Family Law Council. This valuable document examines some questions relating to the nature of the legal relationship created by step-parenting, and to the means which might be employed to establish rights and responsibilities as between the parties to the marriage and vis a vis natural parents outside the marriage in question. The Subcommittee tentatively concluded that custody and guardianship rights in a step-parent should arise only on application by the step-parent to a relevant authority (e.g. a Family Court Registrar) and if the natural parent consents.[65] Where the matter is contested the application by the step-parent would be to a Judge of the Family Court. The Committee's view was that a step-father should not in the future acquire an automatic liability[66] in relation to the wife's child so that the primary responsibility in a second marriage would be on the first husband (the child's natural father). The Subcommittee did contemplate, however, that the Court would in an appropriate case be able to make an order against a step-parent who had made no application in relation to the child. Thus it is entirely possible that when the child's father had "dropped out of the picture" (as in *Delany*), the step-father would acquire the primary responsibility.

In *Mee and Ferguson*[67] the Full Court made it clear that Mr. Ferguson, the wife's new husband, was not only a financial resource of the wife but also a financial resource of the children of the Mee's marriage. It did not follow however, that Mr. Ferguson acquired a legal liability to support his step-children. While it was conceded in *Mee* that section 73 imposed a liability on step-parents the Court said that "the decision is not as clear as that".[68] The Court referred to the unusual legal situation brought about by liability which arises only at the "relevant time" and described the rights and obligations of step-parents in relation to maintenance and guardianship as ones which "may arise and disappear in a manner which is difficult to rationalise".[69] These difficulties were compounded by the uncertainty surrounding the constitutional validity of section 5(1)(e).[70] Referring to the overlapping liabilities of Mr. Mee and Mr. Ferguson and to the absence of legal direction in ranking these liabilities, the Court found itself unable to do otherwise than to decide on the "circumstances of the individual case".[71] The Court did indicate in dicta that where the step-parent and children were no longer living together the step-parent's obligations might cease. However, in the situation in *Mee and Ferguson* where both the father and the step-father were in a position to maintain the children and where the step-father was of the same household the Court held that "the position is that one looks

[65] Family Law Council (Aus.) Step-Families subcommittee Canberra 1986. Cinderella revisted: Rights and responsibilities in step-Families para. 8.
[66] para. 8.4.
[67] See footnote 43 above.
[68] See p. 75, 199 of the judgment.
[69] Ibid.
[70] See discussion at pp. 137-142 above.
[71] At p. 75, 200.

primarily to the financial circumstances of the parents themselves ... and to the extent that their resources are sufficient to meet the reasonable financial means of the children, resort ought not to be had to the step-parent".[72] Mr. Ferguson assumed a financial responsibility for the children only "(a) to the extent that the father was financially unable to do so; and (b) in relation to ... the higher standard of living of the children as a consequence of being part of his household."[73]

Delany and Delany had been cited to the Court in *Mee and Ferguson*. The Court, did not comment in depth on *Delany* but gave it a diminished importance because it pre-dated the decision of the High Court in *Ex parte C*.[74] This writer has already suggested that *Delany* and *Ex parte C* are not at variance in relation to the constitutional issue[75] and one suspects that the Full Court would have preferred that the Court in *Delany* had at least made strenuous enquiries as to the position of the natural father.[76] While the parents' obligation is primary after *Mee and Ferguson*, it cannot be said that the Full Court has exempted all step-parents from a maintenance liability. The Court remarked upon the variety in financial expectations where children are involved in two families and declined to formulate rigid principles because of "the obvious difficulties about laying down the general rule which applies inflexibly to the various situations".[77]

CHILD MAINTENANCE: A PRIVATE OBLIGATION OR A COMMUNITY RESPONSIBILITY

A matter of recent controversy is the relationship between maintenance orders and social security entitlements. A dependant spouse and children often fare better by avoiding the maintenance system or accepting reduced maintenance rights, and resorting to the social security system which provides a reliable source of support. The Court has in recent times sought to reverse a trend whereby orders have been drawn so as to maximise the social security entitlements of the payee. In recent decisions (*P and P [tax evasion]*[78], *T and T*[79]) the Court has even declared that it has a public duty to report discovered tax evasion to the income tax authorities. While the Court's sense of public duty is clearly an appropriate consideration, the wisdom of this development is questionable. Parties who have agreed to conduct their financial affairs within the marriage so as to evade tax have thereby been afforded scope for blackmail. The Court will frequently be faced with a misleading picture of the property and resources of parties if both are unwilling to make

[72] At p. 75, 208.
[73] At p. 75, 200.
[74] See p. 75, 199.
[75] See p. 140 above.
[76] It is entirely possible that such enquiries were in fact made but this does not appear from the report.
[77] At p. 75, 200.
[78] (1985) F.L.C. 91-605.
[79] (1984) F.L.C. 91-585.

full disclosure. Moreover the effects of non-disclosure will work inequitably between the parties; a husband who is ordered to settle property on the wife on the basis of depressed business figures will clearly have gained an advantage because neither party wishes the true financial position to come to the attention of the tax authorities.

The Court's heightened sense of public duty has produced repercussions in the child maintenance cases. In *Kauiers and Kauiers*[80] the Full Court held that the trial judge had erred in tailoring an order so as to enable the wife to retain her supporting parent's benefit, given that the husband had means to support the children. While that may be entirely appropriate, this thinking may have been taken too far in *T and T*.[81] There an order that the husband pay private school fees would have left intact the wife's entitlement to the supporting parent's benefit, whereas an equivalent periodic order would have been considered income under the *Social Security Act* and cancelled that entitlement. Strauss J. delivered a strong dissent in *T and T* to the effect that the Court should order the husband to pay periodic maintenance because it had a public duty to shift the burden of the children's private education from the tax payer. The amount of the periodic order would then be fixed so as to cover school fees. The majority in the Full Court were however, prepared to tolerate the wife retaining the social security benefit as a "side effect" of an order that the husband pay the fees. With respect it is submitted that the majority view is to be preferred. There are good grounds quite unrelated to the social security advantages to the wife for ordering maintenance in the form of payment of school fees or other recurring fees, rather than a periodic order. A husband who lacks a sense of commitment to pay periodic maintenance to a spouse may be more inclined to make payment to a school or other third party. Moreover the order is automatically "indexed" and this relieves the wife of the onerous burden of making a fresh application in relation to each annual increase of school fees with the rising ages of the children and with inflation. While the Court should not collude with an applicant at the tax payer's expense, it is submitted, it must not in its eagerness to protect the public purse, sacrifice the genuine needs of its clients. A distinction should be observed between orders directed at maximising social security entitlements and orders which have that indirect consequence but which are arrived at in response to other valid considerations.

PRIVATE SCHOOL FEES

In *T and T*[82] and in *Delany and Delany*[83] the respondent resisted those aspects of the wife's application that sought maintenance on the basis that the children in those cases were to remain at private schools. The Full Court in the former case and Strauss J. in the latter concentrated in their discus-

[80] (1986) F.L.C. 91-708.
[81] See footnote 79 above.
[82] (1985) F.L.C. 91-626.
[83] See footnote 7 above.

sion on the educational expectations of the parties on the one hand, and on the other, the ability of the respondent to meet the amount of the order sought. The Full Court in *Mee and Ferguson*[84] looked carefully at the matter of private education and stated that where the parties are not in agreement, the focus in the debate should in the future be shifted. Whether a non-custodian parent should be made to pay private education fees is not merely a matter of the wealth of the party. The matter of style of education to be ordered is to be considered as "an aspect of the welfare and maintenance of the child"[85] and the choice will turn on whether "there are reasons relating to the child's welfare which direct attendance [at a private rather than at a State school]".[86] The parties in *Mee* were in fact agreed that the children should be schooled privately, so the dispute was confined to the matter of the husband's contributions to private fees. However, it is of interest that a wealthy custodian might not be ordered to pay fees where private schooling was not demonstrated to be required for the welfare of the child. The Court disapproved of the decision of Emery J. in *Skinner and Skinner*[87] to the extent that it suggested the contrary. When the situation does arise where a wealthy parent is unwilling to pay towards private school fees, the Court will be obliged to become "drawn into the issue of preference between [the two forms of schooling] as a generality"[88], a debate which the Court has thus far "always avoided".[89]

ADULT CHILD MAINTENANCE

A troublesome aspect of the law relating to child maintenance which the Full Court was not called upon to consider in *Mee and Ferguson* was the matter of adolescent maintenance in respect of a child over the age of 18 who requires assistance to complete an education (section 76(3)). In some cases it has been suggested that in that situation the quality of the relationship between the child and the respondent parents is of significance. That suggestion has plagued the case law since the inception of the Family Law Act when Watson J. said in *Mercer and Mercer*[90] that "an adult son cannot demand a slice of the paternal cake with one breath and spew out filial abnegation in the next".[91] Asche J. tried to soften this blow in *Oliver and Oliver*[92] but refused to eradicate the notion of adolescent fault. It was a factor in denying maintenance to an older child in *H and H*[93] Thus far, only Fogarty J. in *Gamble and Gamble*[94] has said that the quality of the relation-

[84] See pp. 144-146 above.
[85] At p. 75, 201.
[86] Ibid.
[87] (1977) F.L.C. 90-237.
[88] At p. 75, 200.
[89] Ibid.
[90] (1976) F.L.C. 90-033.
[91] At p. 75, 131.
[92] (1977) F.L.C. 90-227.
[93] (1981) F.L.C. 91-083.
[94] (1978) F.L.C. 90-452.

ship between the parent and the child, and the conduct of the child are irrelevant under section 76(3).

It is to be hoped that this very disturbing feature of the child maintenance jurisprudence under the *Family Law Act* will be put to rest when next a Full Court has the opportunity to consider the matter of maintenance of adult children. Unquestionably the view of Fogarty J. in *Gamble* is the one which should be adopted. It is ironic that the *Family Law Act* should have achieved the elimination of fault in the financial relationships of adults only to introduce it as between parents and children. The fact that there are proceedings involving the parent and child usually will entail that there has been a deterioration of the relationship between them. That deterioration may often be the fault of the parent, if fault can be meaningfully attributed at all. The marriage breakdown frequently polarises children as well as their parents and indeed even in the absence of such a crisis it is well known that parents and children are frequently estranged as children proceed into young adult life. This situation is often a transient one but whatever the ultimate outcome it should never fall to the Family Court to base its child jurisdiction on notions of the fault of the child.

DISCHARGE OF MAINTENANCE ORDERS

A decision which might have significant consequences where parties have chosen to resolve matters of maintenance, including child maintenance, by consent order or by maintenance agreement is *Dixon and Dixon.*[95] In that case Gee J. held that the circumstance that "there had never been in relation to the original order a real contest concerning it, nor a consideration of the means and earning capacity of the parties and the other matters involved in reaching a result in relation to that order"[96] constitituted "just cause" for discharging a maintenance order under section 83(1)(c). This was so although there had been no effective change in the circumstances of the parties since the order had been made. It is to be hoped that *Dixon* will be confined to the situation before the Court in that case as the Court had made the maintenance order with a view to making provision for the wife only until the parties effected an Order 24 Conference. The financial relationships (including maintenance) of the parties were yet to be finally resolved by the Court. The maintenance orders were in a sense interim relief. Indeed the orders should have been referred to section 80(h) of the Act and made as orders *pendente lite.* However, Gee J.'s reasoning does not appear to be restricted in this way, and the decision is threatening to the durability of all consent orders. A rule which effectively requires the parties to litigate if they wish to obtain a maintenance order which cannot be automatically discharged has little to commend it, and it is submitted that *Dixon* ought to be confined to the stop-gap situation of the original order in that case.

[95] (1985) F.L.C. 91-652.
[96] At p. 80, 253.

PROCEEDINGS BY OR ON BEHALF OF A CHILD

A child of a marriage is able, since the 1983 Amendments, to bring its own proceedings against parties to the marriage with respect to its own custody, guardianship, or maintenance and access, or in relation to its welfare. The new provisions have not thus far resulted in a tide of reported cases of hostile children taking their parents to court, or even of abuse by a party to the marriage representing that a proceeding is on behalf of a child. One instance of the latter does occur in *Thurgood* v. *Director of A.L.A.O.*.[97] In that case the wife had been awarded custody of the children. The husband sought to overcome that decision by initiating proceedings "on behalf of" the children. "The children" applied for legal aid for a new proceeding in which they sought the appointment of a new separate representative and joint custody for their father. When legal aid was refused they wrote to Sir Harry Gibbs "in a manner remarkably articulate for their years"[98] complaining about the provisions of the *Family Law Act*. The children also by their next friend (the father) applied to the Federal Court for judicial review of the decision by the A.L.A.O. refusing legal aid. The matter was dismissed in the Federal Court by Wilcox J. who made some significant observations concerning the application on behalf of the children. His Honour noted the difficulty that while children can apply for a variation of the custody order (section 4(1)(cc)) they are prohibited by Reg. 116(6) from putting in affidavit material without prior leave of the Court, although leave could be granted in a proper case. It is also to be noted that there appears to be no provision in the regulations as to how children are to take their own proceedings. In *Thurgood*, Wilcox J. noted without comment that the children had proceeded by application and by the statement in support. In *Egan and Egan*[99] a child of the marriage obtained maintenance orders in relation to her younger siblings as against the parties to the marriage. However, it was not critical in that case to clarify the procedures for applications by children as the applicant there was 27 years old. These matters need clarification in the regulations.

SOME OBSERVATIONS ON THE ABILITY OF THE FULL COURT OF THE FAMILY COURT TO MAKE LAW IN A DISCRETIONARY CONTEXT

The jurisdiction conferred by the *Family Law Act* in relation to children is characterised by the conferring of statutory judicial discretions which are more or less untrammelled. For example, it is the essence of the jurisdiction in relation to the welfare of a child that the jurisdiction is totally discretionary. The maintenance jurisdiction is likewise expressed in section 74 as enabling the court to make such orders as it thinks proper. The discretion thus expressed appears rather more generous than it actually is as the matters to which the court may refer are circumscribed by sections 75 and 76.

[97] (1984) F.L.C. 91-570.
[98] Per Wilcox J. at p. 79, 605.
[99] See footnote 42 above.

Nevertheless there is considerable freedom in the ordering of priorities as between those matters. In the guardianship and custody jurisdiction, by contrast, the matters to which the court must have regard are carefully itemised in section 64. The history of the jurisprudence in relation to guardianship and custody under the Act has by contrast been characterised by a tendency away from guidelines or presumptions that were more or less heavily entrenched under the *Matrimonial Causes Act*. Notions such as "the preferred role of the mother", the non separation of siblings and the retention of the status quo have been demoted from presumptions or principals into mere "considerations".[100] The retention of the maximum judicial discretion consistent with the requirements of the Act has, at least in this aspect, been a priority in decisions under the *Family Law Act*.

A question which remains unresolved in relation to the *Family Law Act* and indeed with respect to other statutes which confer judicial discretions, is the extent to which such discretions may effectively be limited by guidelines or presumptions emanating from appellate courts. The question has usually arisen under the Act when the Full Court has sought to overturn the exercise by the trial judge of his statutory discretion.

That issue presents nicely when, for example, we consider whether the careful guidelines expressed in *Mee* and *Ferguson* can obtain the status of binding precedent. Guidelines from the Full Court in the matter of maintenance have certainly been known in the past to control the exercise of judicial discretions.[101] The question of the binding weight of such decisions as *Mee and Ferguson* has now been given new importance with the recent decision of the Full Bench of the High Court in *Norbis* v. *Norbis*.[102] *Norbis* in fact concerned the judicial discretion under section 79 in relation to property orders. The five members of the Full Bench there considered how much weight should be given to guidelines which may emanate from appellate decisions. They also considered the circumstances in which an appellate court can require adherence to such guidelines so as to interfere with a decision of a trial judge who has failed to apply them. The most conservative view was taken by Wilson and Dawson JJ, who, building on the previous decision of the High Court in *Mallet* v. *Mallet*,[103] insisted that guidelines expressed in appellate decisions could not fetter a statutory discretion. They felt that "the genius of the common law is to be found in its case by case approach" ... and "not in the abstract formulation of principles or guidelines ... to constrain judicial discretion within a pre-determined frame work".[104] With respect, this minority view suffers somewhat from a "bootstraps problem" in that a given case in the "case by case" progression may

[100] See *Raby and Raby* (1976) F.L.C. 90-104 and *In the Marriage of Matthieson* (1977) F.L.C. 90-230.

[101] e.g See *Soblusky and Soblusky* (1976) F.L.C. 90-124 in relation to priorities between competing families under s. 75(2)(o) and *Spry* v. *Roet* (1977) F.L.C. 90-301 on the circumstances where arrears of maintenance will be enforced.

[102] (1986) F.L.C. 91-712.

[103] (1984) F.L.C. 91-507.

[104] at p. 75, 174

itself prescribe that in future, trial judges should approach a particular problem in accordance with the guideline laid down in that case. That indeed is the burden of the decision in *Mee and Ferguson* as this writer understands it. It is also difficult to agree with the conclusion of their Honours that "there is no reason to think 'this ... leads to arbitrary and capricious decision making or ... longer or more complex trials' ".[105]

By contrast with Wilson and Dawson JJ. the majority in *Norbis* Mason, Deane and Brennan JJ., held that the Full Court was indeed entitled to promote guidelines in the application of statutory discretions. The three majority judges agreed however that a guideline could not be elevated into a binding rule. Mason and Deane JJ. were of the view that guidelines from appellate courts could not readily be used to overturn a decision of a trial judge. Brennan J. was prepared to go further than his brethren in ascribing weight to appellate decision guidelines. His Honour felt that the trial judge was usually constrained to follow a guideline and indeed should only depart from it where it was demonstrated that to adhere worked inequity or injustice in the circumstances of the individual case before the court. In Brennan J.'s view the overriding need was for guidance from the Full Court. Without it the system would be vulnerable to judicial individualism and idiosyncrasy, and lawyers would be unable effectively to give legal advice.

It is submitted that the priority accorded to appellate guidelines by Brennan J. is particularly apt in the family jurisdiction where allegations of judicial idiosyncrasy are regularly made. Effectively then, Mason and Deane and Brennan JJ. have counteracted in some part the impression that has lingered after *Mallet* v. *Mallet* that the Full Court should rarely attempt to set guidelines for the exercise of judicial discretions, if indeed it can do so at all. While that development is to be welcomed, it nevertheless remains true after *Norbis* and *Norbis* that four judges of the Full Bench of the High Court have expressed reluctance to allow an appellate court to interfere with a decision of a trial judge, and indeed even Brennan J. felt that a trial judge's decision could only be reversed on appeal where he had so exercised his discretion that he had gone beyond "the generous ambit within which reasonable disagreement is possible".[106] Mason and Deane JJ., applying *House* v. *The King*[107] held that before a trial judge's decision could be reversed on appeal the appellate court had to find that as well as a failure to adhere to a guideline there was also an error of law or of fact.

In the final analysis *Norbis* v. *Norbis* appears to have undone some of the damage previously wrought by the High Court in *Mallet* v. *Mallet*. In *Mallet* the majority appeared anxious to inhibit the formulation of guidelines, particularly where guidelines could be termed presumptions. The majority in *Norbis* by contrast has encouraged the Full Court to formulate guidelines in the application of the statutary discretions. Perhaps it may not

[105] Ibid.
[106] at p. 75, 178.
[107] (1936) 35 C.L.R. 499.

be overstating the case to observe that the High Court in *Norbis* in 1986 may be in breach of the guidelines it expressed in *Mallet* in 1984.

The majority in *Norbis* v. *Norbis* has thus given its blessing to the attempt in *Mee* and *Ferguson* to promote uniformity of approach and certainty in the law in awarding child maintenance. Having said that, it nevertheless remains true even after *Norbis* v. *Norbis* that a trial judge who fails to adhere to such guidelines may not readily be overruled. It is unfortunate that *Mee and Ferguson* can be relied upon ultimately to settle the principles on which child maintenance is awarded only if future trial judges elect to adhere to the guidelines so carefully enunciated by the Full Court in that case. That sort of prognosis possibly underlies the impatience that has been expressed by the community with the judicial process in general, and with the Family Court in particular, and it may have led to recent suggestions that matters of maintenance might be better handled if they were removed from the judiciary altogether and entrusted to administrators.[108]

This writer regards this outcome as a failure of the operation of *stare decisis* under the *Family Law Act*. The Full Court of the Family Court must itself take a great deal of the responsibility for this failure, due to its lack of commitment to upholding its own previous decisions.[109] In addition, the High Court doctrine in *Mallet* did little to advance the aims of those Family Court judges who were minded to declare "principles" in circumstances where mere whim appeared to have the upper hand. The courage of the majority in *Norbis* is retreating somewhat from *Mallet* v. *Mallet* is indeed to be commended. There is however still some distance to go before we can look to appellate review of trial judges' decisions to ensure that the *Family Law Act* is not charged with being an instrument which confers unrestrained judicial choice.

STOP PRESS: THE HIGH COURT RE-EXAMINES THE SCOPE OF FEDERAL CHILD JURISDICTION

Since the time of writing the High Court has again had the opportunity to examine some of the questions left unanswered after *Cormick* and after *Ex parte C*[110] In *Re F; Ex parte F*[111] proceedings had taken place in the Family Court between the husband and wife in relation to a child born in 1982. The couple were married in 1977 and were divorced in 1985. The first proceedings in 1984 resulted in guardianship orders in favour of the husband. After these proceedings, and indeed after the divorce, the wife arranged for blood tests to be taken which showed conclusively that the husband could not be the father. The wife then re-opened custody and access and as neither the Family Court nor the Supreme Court of New South Wales would assert juris-

[108] See Dr. Meredith Edwards "Child Maintenance: Family Law Council Proposals for Reform", paper delivered at the Second National Family Law Conference. Sydney, June 1986.

[109] A recent example is the demotion of the guidelines for combined property and maintenance proceedings carefully spelt out by the Full Court in *Lee Steere and Lee Steere* (1985) F.L.C. 91-626 and *Bates and Bates* (1985) F.L.C. 91-627 to "optional" status by the Full Court in *Kauiers and Kauiers* (1986) F.L.C. 91-708.

[110] See p. 5 above.

[111] (1986) F.L.C. 91-739.

diction the matter went to the Full Bench of the High Court. It was conceded that at "the relevant time" (separation) the child was a child of the household of the married parties. At issue was the validity of section 5(1)(e)(i), the provision at the centre of the proceedings in *Ex parte C. Re F; Ex parte F* (hereinafter referred to as *Ex parte F*), differed from *Ex parte C* and indeed from *Cormick's* case in that the proceedings were between the parties to the marriage and did not involve any third party. Moreover, the parties in *Ex parte F* were divorced, thereby raising for the first time the possibility of supporting the 1983 child amendments by reference to the matrimonial causes power.

In the result four of the six members of the Full Bench held that section 5(1)(e)(i) was invalid and that the proceedings in relation to the child should take place in the Supreme Court. The majority judges were Gibbs, C. J. and Wilson, Dawson and Brennan JJ. The four member majority in fact supplied two different bases for striking down section 5(1)(e)(i). The Chief Justice assumed, without deciding, that the Commonwealth could legislate under the marriage power, in relation to ex nuptial children in a marriage providing that the legislation specified that the proceedings were between the parties to the marriage. Gibbs, C. J. found however that the structure of section 4(1) and section 5(1) was such that the blue pencil test could not be applied so as to read down section 5(1)(e)(i) in this manner. A much narrower view was taken on the extent of the marriage power by Dawson, Brennan and Wilson JJ. They insisted that a child could only become "of a marriage" by birth, legitimation or adoption. Accordingly a Commonwealth law with respect to this ex nuptial child could never be supported by the marriage power, and that remained true even where the litigation was between the parties to the marriage.

The dissenting judges, Mason and Deane JJ. held that section 5(1)(e)(i) as drafted was valid, provided that the proceedings involved, as they did in *Ex parte F* an ex nuptial child who was born after the marriage of the parties. This conclusion followed, it was held, because common law had long determined the status of a child born to a wife within a marriage by the presumption of legitimacy. From the long history of that presumption it followed that the Commonwealth legislation was not creating any new or controversial consequences of marriage, and as such the law could safely be termed a law *with respect to* marriage within the opening words of section 51 Constitution.

Given the majority view, it is apparent that it can no longer be argued that section 5(1)(e)(i) (and semble section 5(1)(f) a fortiori) can be *read down* as being valid providing that the proceedings are confined to the parties to the marriage. It is submitted however that it remains open, given Gibbs C.J.'s judgment, and inferentially from the dissenters' views, that section 5(1)(e)(i) could be redrafted expressly to require that the proceedings in relation to an ex nuptial child of the wife born after the marriage be between the parties. It would seem that three of the six members of the High Court as presently constituted might find such legislation acceptable. Again, it is difficult to

achieve progress while the Court persists in its present practice of sitting with a Full Bench of six instead of with an uneven number. In any event the matter of ex nuptial children may be resolved in the near future, at least in some States, where agreement has been arrived at to refer this power to the Commonwealth. A reference of power expressed in those terms would not however assist in the case of the "unrelated" child of the household contemplated in section 5(1)(f). That matter will continue to depend on the High Court's view of the marriage power and the matrimonial causes power. As to the latter, we get little assistance from the judgements in *Ex parte F.* The Chief Justice did not confront directly the question whether the matrimonial causes power could support legislation that was wider with respect to a class of children than under the marriage power. The dissenting judges, having upheld section 5(1)(e)(i) as an exercise of the marriage power, found it unnecessary to investigate the position with respect to the matrimonial causes power. Dawson, Wilson and Brennan JJ. specifically denied that the class of children could be enlarged under the matrimonial causes power beyond those that could be referred to the marriage power. Thus the matter remains for the moment unresolved.

As to the scope of the marriage power, Gibbs C. J. in his judgment in *Ex parte F* did not take matters substantially further than *Cormick* and *Ex parte C.* The insistence of Wilson, Dawson and Brennan JJ. that the child's connection with the marriage had to be by birth, legitimation or adoption, leaves no room at all for children to be deemed children of a marriage. The position which this writer found most interesting however was that in the dissenting joint judgment of Mason and Deane JJ.. Mason J. had already foreshadowed his own willingness to take a generous view of the marriage power in *Gazzo's*[112] case. At that time Mason J. was joined only by Murphy J. It seems that Deane J. has stepped into the breach in his brother Murphy's absence and joined in expressing the very broadest view of the scope of the marriage power. Mason and Deane JJ. avoided the conclusion that the law could not be a law with respect to marriage being one in relation to ex nuptial children. Their Honours adopted an approach that had been favoured by the majority of the Full Court of the Family Court in *Fisher and Fisher*[113], that a single law can be referred to more than one subject matter in the constitution. This law could accordingly be a law with respect to marriage even if it also was one in relation to ex nuptial children or some other subject matter.

The joint dissenting judgement delineated two aspects of the marriage power. The primary or central area (within which section 5(1)(e)(i) fell) supported laws creating rights and obligations arising directly from and by reference to marriage. There was however a secondary area, a "penumbra" which supported laws with a less direct connection with, but that were consequential upon or ancillary to marriage. In indicating this broader area, Mason and Deane JJ. resorted to a doctrine which although well established in High

[112] *Gazzo* v. *Comptroller of Stamps (Vic.)* (1981) F.L.C. 91-101.
[113] (1986) F.L.C. 91-701.

Court jurisprudence[114] is one which is unfamiliar in decisions of the High Court concerning family litigation since the inception of the *Family Law Act*. The dissenting judges did not however rely on the "penumbra" in upholding section 5(1)(e)(i) on the facts of *Ex parte F.* Rather section 51 of the Constitution in conferring power *with respect to* the various topics in that provision used a form of words which conferred the "widest power". Indeed Mason and Deane JJ. (very courageously it is submitted) went so far as to regret with "hindsight" "judgements including our own" in which "the more indirect connection with marriage"[115] would suffice to support legislation. This retreat from the conventional exposition of the marriage power by the High Court can only be described as dramatic. It was after all the judgement of Mason J. in *Russell* v. *Russell* which was the basis for the redrafting of the *Family Law Act* in such a truncated form so soon after being proclaimed.

The dissenting judgement invites the other members of a troubled High Court to reappraise their position on the proper limits of federal Family Law legislation. It is not too late for that invitation to be accepted.

CONCLUSION

The 1983 Amendments to the child provisions of the *Family Law Act* have brought about substantial improvements in the Federal jurisdiction relating to children. However, it remains true that despite the breadth of the review in 1983, important aspects of the jurisdiction continue to generate difficulty and uncertainty, and significant gaps remain. We have seen that some of these gaps and uncertainties are attributable to decisions of the High Court as to the scope of the Federal Constitutional power. It is difficult to overcome these aspects without a reference of power.

Yet others are the product of our failure to maintain an active programme of legislative review. That matter is easy to correct, and should be remedied promptly.

A relatively small proportion of the problems experienced by the Family Court in the child jurisdiction is perhaps self-inflicted. The occasional injury of this nature is perhaps inevitable given the pressure of work on the Court and the difficult constitutional environment in which it is obliged to function in the exercise of the child jurisdiction.

[114] eg. *Grannall* v. *Marrickville Margerine Pty. Ltd.* (1955) 93 C.L.R. 55.
[115] op. cit. at p. 75, 401.