

**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

No. P23 of 2012



10

BETWEEN:

[STANFORD]

Appellant

and

[STANFORD]

Respondent

**WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN
AUSTRALIA (INTERVENING)**

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

20 **PART II: BASIS OF INTERVENTION**

2. Section 78A of the *Judiciary Act 1903* (Cth).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

**PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND
LEGISLATION**

4. See the Annexure to these submissions and Exhibit 1 to the Appellant's Submissions.

PART V: SUBMISSIONS

- 30 5. The constitutional issue that most directly arises in this matter can be stated as follows; does the Commonwealth have power, pursuant to either or both of s.51(xxi) and s.51(xxii) of the *Constitution*, to confer jurisdiction on, and power to, a court to make an order requiring one party to a marriage to settle or transfer property to the other where the marriage has not broken down; or (alternatively)

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where the parties are not separated within the meaning of s.49 of the *Family Law Act 1975* (Cth).

6. It may be that a different constitutional issue arises; does the Commonwealth have power, pursuant to either or both of s.51(xxi) and s.51(xxii) of the *Constitution*, to confer jurisdiction on, and power to, a court to make an order requiring one party to a marriage to settle or transfer property to the other in proceedings between them.
7. Western Australia intervenes solely to address the scope of the Commonwealth's power under s.51(xxi) and s.51(xxii) of the *Constitution*.

Jurisdiction and power

- 10 8. A Magistrate of the Family Court of Western Australia exercised jurisdiction in this matter pursuant to s.39(2) of the *Family Law Act 1975*. Power was exercised, and relief sought and ordered, under s.79. It would appear that the order initially made, and the latter order of the Full Court, were in the nature of an order pursuant to s.79(1)(d), with the payment of the sum by the husband being an order to make a settlement for the benefit of the wife¹.
9. Section 39(2)² invokes and applies the definition of "matrimonial cause". In this matter, the Appellant denies and the Respondent contends that the proceeding is a matrimonial cause within (ca) of the definition of "matrimonial cause" in s.4(1).

A basic fact

- 20 10. Having regard to the manner in which the matter was dealt with, a finding was made that the parties to the marriage did not intend to separate and they lived apart only because [the wife] suffered a stroke and required hospital treatment followed by permanent residential care³. The Magistrate at first instance and the Full Court accepted that the husband and wife were not "separated" in the sense of there being a breakdown of the marital relationship and that neither the husband nor wife formed or acted on an intention to sever or not to resume the marital relationship⁴.
11. As will be postulated, a further finding may be open that is relevant; that there was marital breakdown.

Construction and validity

- 30 12. The first question which this matter presents is whether the order made is within the jurisdiction conferred by s.39(2) of the *Family Law Act 1975*, being whether the proceeding is a matrimonial cause. This question is determined by the limits of the

¹ Section 79 requires consideration of the definition of "property settlement proceeding". It can not be doubted that the proceeding brought was a "property settlement proceeding" so defined; orders were sought in respect of property of the husband, being the house, and property of both husband and wife, being the rest. The proceeding was "in relation to the parties to the marriage", in the sense of being *inter partes*, even if by their respective personal representatives. Courts below did not consider an exercise of power pursuant to s.72 of the *Family Law Act 1975*, having regard to s.77A.

² Along with s.39(1) and s.39(1A).

³ *Stanford & Stanford* [2011] FamCAFC 208; (2011) 46 Fam LR 240 at [37].

⁴ *Stanford & Stanford* [2011] FamCAFC 208; (2011) 46 Fam LR 240 at [38].

Commonwealth's legislative power pursuant to either or both of s.51(xxi) and s.51(xxii) of the *Constitution* to confer this jurisdiction.

The definition of matrimonial cause

13. Central is the definition of matrimonial cause within (ca) of the definition in s.4(1). A copy of the definition is annexed. In terms of (ca), the proceeding was between the parties to a marriage with respect to the property of the parties to the marriage or either of them.
14. The issue as to jurisdiction under s.39(2)⁵ is whether the proceeding was one arising out of the marital relationship in terms of (ca)(i) of the definition. The meaning of (i) is central. It is informed by an understanding of the legislative history of the definition of matrimonial cause in the *Family Law Act 1975* and its antecedents.

Legislative history

15. To construe the current form of the definition of matrimonial cause in the *Family Law Act 1975* requires consideration of earlier legislation and the constitutional context.
16. The Commonwealth legislative history, prior to the *Family Law Act 1975*, is brief⁶. The *Matrimonial Causes Act 1945* (Cth) (as amended by the *Matrimonial Causes Act 1955* (Cth)) dealt with the limited issue of the appropriate jurisdiction to institute proceedings in any matrimonial cause, where the parties to the marriage, or the party seeking to institute proceedings, was resident but not domiciled in a State or Territory. The definition of "matrimonial cause" in section 3(1) of the *Matrimonial Causes Act 1945* (Cth) is annexed.
17. Likewise, the *Marriage (Overseas) Act 1955* (as amended by the *Marriage (Overseas) Act 1958*) dealt only with the limited issue of the solemnization of foreign marriages where at least one party was an Australia citizen or a member of the Defence Force.
18. It was not until the *Matrimonial Causes Act 1959* (Cth) ("the 1959 Act")⁷ and the *Marriage Act 1961* (Cth)⁸ that the Commonwealth Parliament enacted comprehensive legislation.⁹ The 1959 Act was amended by the *Matrimonial Causes Act 1965* (Cth) and the *Matrimonial Causes Act 1966* (Cth) and then ultimately repealed and replaced by the *Family Law Act 1975*.¹⁰ The 1959 Act was

⁵ And s.39(1) and s.39(1A).

⁶ A note is annexed.

⁷ It came into operation in February 1961.

⁸ In which the *Marriage (Overseas) Act 1955* and *Marriage (Overseas) Act 1958* were repealed (see s. 4 of the *Marriage Act 1961* (Cth)).

⁹ This dearth of legislative activity is more surprising having regard to the fact that these Commonwealth legislative powers were included by the framers as a deliberate departure from the United States *Constitution* progenitor, where federal legislative power in respect of marriage and matrimonial causes is absent; see Ronald Sackville and Colin Howard, "The Constitutional Power of the Commonwealth to Regulate Family Relationships" (1970) 4 *Federal Law Review* 30, 33-35.

¹⁰ Section 3(1) of the *Family Law Act 1975*.

also amended by the *Matrimonial Causes Act 1971* (Cth), which was repealed in 1999.¹¹

19. Section 86 of the 1959 Act¹² was the broad equivalent of s.79 of the *Family Law Act 1975*. State Supreme Courts were invested with federal jurisdiction by s.23(2) to determine "matrimonial causes instituted under [the] Act". In this sense, s.23(2) of the 1959 Act was the broad equivalent of s.39 of the *Family Law Act 1975*. The definition of "matrimonial cause" in the 1959 Act is annexed.
20. This definition, and in particular (a) and (b), emerged from the historical and constitutional context. An understanding of this is enhanced by the seminal paper of Sackville and Howard¹³, where the learned authors outline the Conventions' consideration of what became ss.51(xxi) and (xxii)¹⁴.
21. As regards the scope of s.51(xxii) as understood at Federation, and the framer's "intentions", the explanation of Harrison Moore¹⁵ is brief and that of Quick and Garran¹⁶ illuminating:
- "The matters contemplated and covered by this grant of power are those subsidiary and consequential to marriage and divorce. They will naturally include judicial separation, restitution, of conjugal rights, nullity of marriage, jactitation, damages against an adulterer and probably maintenance of wives and children and marriage settlements."
22. Though this catalogue is not referenced, Sackville and Howard suggest that it emerged from the definition of "matrimonial cause" in Australian colonial and English legislation in force at Federation¹⁷. As can be seen, this catalogue was reflected in (a) of the definition of "matrimonial cause" in the 1959 Act.
23. In legislation, the term "matrimonial cause" can be traced to the *Matrimonial Causes Act* of 1857¹⁸, being an "Act to amend the law relating to Divorce and Matrimonial Causes in England"¹⁹. The Act conferred on the Court of Divorce and Matrimonial Causes jurisdiction over divorce, nullity of marriage, restitution of conjugal rights, judicial separation, and jactitation of marriage.²⁰

¹¹ See s. 3 and Schedule 1 of the *Statute Stocktake Act 1999* (Cth).

¹² A copy of the section is annexed.

¹³ Ronald Sackville and Colin Howard, "The Constitutional Power of the Commonwealth to Regulate Family Relationships" (1970) 4 *Federal Law Review* 30; H A Finlay, "Commonwealth Family Court: Some Legal and Constitutional Implications" (1971) 4 *Federal Law Review*, 287; H A Finlay, "Australian Family Law: The Twilight Zone" (1976) 8 *Federal Law Review*, 77.

¹⁴ At pp.33-35.

¹⁵ Harrison Moore, *Constitution of the Commonwealth of Australia* (1910, 2nd ed), 474-475.

¹⁶ J Quick and RR Garran, *Annotated Constitution of the Australian Commonwealth* (1901), 611.

¹⁷ Ronald Sackville and Colin Howard, "The Constitutional Power of the Commonwealth to Regulate Family Relationships" (1970) 4 *Federal Law Review* 30, 57.

¹⁸ Act 20, 21 Victoria c.85.

¹⁹ This Act accompanied 20, 21 Victoria c.77 and together extracted matrimonial and testamentary causes from the ecclesiastical courts to Common Law courts. See Holdsworth *A History of English Law* Vol XV p.205.

²⁰ *Matrimonial Causes Act 1857* (UK), ss 2, 3. See, Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003) 142. The *Matrimonial Causes Act 1857* did not affect the jurisdiction of ecclesiastical courts with respect to the granting of marriage licences. The 1853 Campbell Royal Commission recommended that the Divorce Court should be entrusted with discretion in prescribing any

24. This history and common understanding confirms the assertion of Windeyer J that, at Federation, the term was understood in the context of dispositions of property to one or other or both parties to a marriage, "because of the dissolution of the marriage"²¹.
25. Whether this understanding was reflected in the meaning of the term in the 1959 Act and the extent and scope of the term in s.51(xxii) of the *Constitution*, was considered in *Lansell v Lansell*²².

Lansell v Lansell

- 10 26. In *Lansell v Lansell*, (it would appear that) the husband contended that, to the extent that the 1959 Act authorised the Court to order a settlement of property, such power was not with respect to matrimonial causes, and beyond the legislative competence of the Commonwealth. Each of Kitto²³, Taylor (with whom Owen J agreed)²⁴ and Menzies²⁵ JJ decided the case on the basis that the power under s.86(1) of the 1959 Act, to order a property settlement, was valid as incidental to substantive orders that fell within (a) or (b) of the definition of matrimonial cause.
- 20 27. In respect of matters within (a) and (b) of the definition, there was little question that some fell within the power conferred by s.51(xxi) of the *Constitution* and others within (xxii). In this sense the legislation presented an oddity in that, in effect, the validity of a statutory provision conferring jurisdiction on a court in respect of matrimonial causes relied upon not only the conferral of power in s.51(xxii) in respect of matrimonial causes, but also s.51(xxi) in respect of marriage.
28. Taylor J considered the power under s.86(1), "as exercisable only incidentally to a substantive proceeding [dealing with a matter in (a) and (b) of the definition of matrimonial cause] either pending or completed"²⁶. Furthermore, his Honour noted that²⁷:

30 "It is, of course, reasonably clear that the expression matrimonial cause cannot be taken to comprehend every application by one spouse for the settlement of some part of the property of the other. Nor can it be taken to comprehend every such application made at any time simply because the parties have at some time been married and the marriage has been dissolved or a decree of nullity or for judicial separation has been pronounced in the past. But the jurisdiction conferred by s. 86 is not a jurisdiction to direct settlements at large or simply because the applicant was once married to the respondent. It is a jurisdiction which is exercisable only "in proceedings under this Act", that is to say, in applications for orders directing

provision to be made to the wife; in adjusting any rights she and the husband had in each other's property; and in providing for maintenance of children. This recommendation was ignored in the 1857 Act; see *First Report of the Royal Commissioners into the Law of Divorce* (1852-1853, C. 1604), 22. See Cretney, *Family Law in Twentieth Century: A History* (Oxford University Press, 2003) 395.

²¹ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 370 (Windeyer J). Restitution of conjugal rights and jactitation of marriage do not relate to property.

²² *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353.

²³ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 359-361.

²⁴ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 365.

²⁵ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 368-9.

²⁶ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 365.

²⁷ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 367.

settlements in relation to proceedings of the character specified in pars. (a) and (b) of the definition of "matrimonial cause". ...

It is a jurisdiction which is exercisable only where the application bears an appropriate relationship to substantive proceedings which admittedly constitute a matrimonial cause, that is to say, where the application can fairly be said to be incidental to the relief obtainable or already obtained in the substantive proceedings. As such it appears as a provision designed to deal with situations brought about by the granting to one or other of the parties to a marriage of substantive relief of the character referred to in pars. (a) and (b) and which the legislature may well have thought to call for some provision enabling appropriate financial readjustments to be made as occasion might require."

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29. Menzies J was more explicit in confining s.86(1) to orders that were, "part of divorce proceedings or proceedings in relation to some other matrimonial cause"²⁸. His Honour's observations confine the meaning and scope of the term "matrimonial cause" substantially²⁹:

"A proceeding by a wife against a husband for a settlement of his property upon herself and the children of the marriage might be regarded as a matrimonial cause in a wide sense but in s. 51 (xxii.) the words "matrimonial causes" are used in conjunction with the word "divorce" and can hardly cover all proceedings between spouses. Still less could proceedings by a child against a parent seeking a settlement be regarded as a matrimonial cause. Yet unless s.86 is to be limited in some way it would seem to authorize proceedings such as I have just mentioned. In my opinion, however, s. 86 is limited by the words "in proceedings under this Act" for, as I read them, they require the application under the section to be part of divorce proceedings or proceedings in relation to some other matrimonial cause. Section 86 is not a section authorizing the institution of a matrimonial cause; it is a section providing ancillary relief in a matrimonial cause in the constitutional sense. So understood, what appears to me as the substantial objection to its validity disappears."

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30. Windeyer J was even more prescriptive; limiting the ambit of the constitutional term matrimonial cause to a circumstance or proceeding arising "because of the dissolution of the marriage"³⁰.

30

Russell v Russell

31. *Russell v Russell*³¹ followed the enactment of the *Family Law Act 1975*. A copy of the original definition of matrimonial cause in the *Family Law Act 1975* is annexed. Relevantly it included:

"(c) proceedings with respect to-

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

(ii) the property of the parties to a marriage or of either of them; or

²⁸ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 368-9.

²⁹ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 368-369.

³⁰ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353 at 370.

³¹ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495.

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

32. This definition, and the validity of the jurisdiction and power conferred having regard to this definition, was considered in *Russell v Russell*.
33. The central issue in *Russell v Russell* was the answer to the question:
- "... whether a law creating a jurisdiction to make orders for maintenance, custody or settlement of property where the application ... is unrelated to any proceedings for divorce or nullity is a law with respect to marriage".³²
- 10 34. Barwick CJ concluded that proceedings seeking a settlement of property that were not ancillary to a proceeding for divorce or nullity of marriage were not, of themselves, matrimonial causes.³³ Gibbs J came to the same conclusion and reasoned that it emerged from the inclusion in s.51(xxii) of the words after "divorce and matrimonial causes", which his Honour construed as indicating:
- "...a clear intention that the power given by par. (xxii.) should not authorize legislation with respect to those questions unless they arise as an incident to proceedings for divorce or some other matrimonial cause."³⁴
- 20 35. Gibbs J observed that, in the absence of the confining words of s.51(xxii), the unconfined "matrimonial cause" would encompass "any controversy between the parties to a marriage as to a matter which pertained to the marriage relationship"³⁵. Gibbs J noted that the existence of s.51(xxii) limited the scope of s.51(xxi) and that, in the absence of this limitation, s.51(xxi) would authorize the making of laws (with respect to marriage) including the duty of one party to a marriage to support and maintain the other³⁶.
36. Mason J³⁷, came to the same conclusion as each of Barwick CJ and Gibbs J, that the conferral of jurisdiction in respect of matrimonial causes (as defined) by s. 39 of the *Family Law Act 1975* was not supported by s.51(xxii)³⁸. As with Gibbs J, this conclusion flowed from the confining words of s.51(xxii).
- 30 37. Mason J made a number of observations concerning the relationship between s.51(xxi) and (xxii)³⁹ and thereby brought into stark relief a number of matters. *First*, that the grants of power in respect of divorce and matrimonial causes is limited by the words following these in s.51(xxii). *Second*, accordingly, this limited power in respect of matrimonial causes did not authorise the conferral of jurisdiction in respect of matrimonial causes as defined in the Act, which went beyond "parental rights, and the custody and guardianship of infants". *Third*, certain matters that might ordinarily be thought of as matrimonial causes fall

³² *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 508 (Barwick CJ).

³³ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 511-512.

³⁴ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 525.

³⁵ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 525.

³⁶ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 524-527.

³⁷ With whom Stephen J in this respect agreed; *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 529.

³⁸ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 537-538.

³⁹ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 538-540.

outside of the grant of power in s.51(xxii). *Fourth*, from this emerged the odd proposition that matters that fell within the statutory definition of matrimonial causes and that would, as that term was customarily understood, be matters that were matrimonial causes, were not within the grant of power under s.51(xxii). *Fifth*, as such, courts could only be invested with jurisdiction in respect of such matters if they fell within the marriage power in s.51(xxi).

- 10 38. It is for these reasons, no doubt, that the Commonwealth in *Lansell v Lansell* relied on both s.51(xxi) and (xxii) and why in *Russell v Russell* it relied solely upon s.51(xxi) in respect of a law conferring jurisdiction to make orders for settlement of property unrelated to any proceedings for divorce or nullity.
39. Mason J and Gibbs J disagreed in *Russell v Russell* as to the extent to which, and the manner by which (if any), the marriage power was prescribed by s.51(xxii)⁴⁰. Gibbs J construed s.51(xxi), prescribed by s.51(xxii), naturally and obviously as one would if it appeared in a commercial instrument or any legislation.
40. Mason J eschewed this limitation on s.51(xxi)⁴¹. There is some difficulty in reconciling aspects of his Honour's reasoning in relation to the scope of the marriage power; in particular the passage at pp.539-540 and that at pp.540-541, having regard to his Honour's answers at p.542.
- 20 41. Commencing at p.540, Mason J considers the definition of matrimonial cause in s.4(1) of the *Family Law Act 1975*. Of central importance are paragraphs (c), (e) and (f) of the definition.
42. Of central importance is his Honour's decision at p.542.

30 "Here, as it seems to me, the Parliament by providing for the exercise of a jurisdiction in the matters referred to in pars (c), (d), (e) and (f) independently of proceedings for annulment or dissolution of marriage has sought to exercise primarily the marriage power. For this reason a reading down should be carried out in the first instance by reference to the marriage power with resort to s. 51(xxii.) only to the extent to which the former power is insufficient. Pursuing this approach, I would confine pars (c) (i), (c) (iii)⁴² and (e) to proceedings between the parties to a marriage thereby saving par. (c) (i), par. (c) (iii) to the extent to which it relates to the natural and adopted children of the parties to the marriage (cf. s. 5), and par. (e). Paragraph (c) (ii) by reason of its reference to the property of either of the parties to the marriage, presumably comprehending any property howsoever and whensoever acquired, is not susceptible of a reading down under s. 51(xxi.); I would therefore read it down by reference to s. 51(xxii.) and treat it, in conjunction with s.39, as conferring jurisdiction to grant ancillary relief in proceedings for annulment or dissolution of marriage."

43. His Honour saves (c)(i) and (iii), being "proceedings with respect to the maintenance of one of the parties to a marriage; or the custody, guardianship or

⁴⁰ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 525-527 (Gibbs J), 539-540 (Mason J).

⁴¹ *Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495 at 539-540.

⁴² The definition was: (c) proceedings with respect to: (i) the maintenance of one of the parties to a marriage; (ii) the property of the parties to a marriage or of either of them; or (iii) the custody, guardianship or maintenance of, or access to, a child of a marriage.

maintenance of, or access to, a child of a marriage", by confining such proceedings to those between the parties to a marriage in respect of maintenance, custody etc.

44. How or why (c)(ii) could not likewise be saved is unclear. That said, in light of the passage in his Honour's judgment at pp.540-541, his Honour's judgment is best understood as authority for the proposition that were (c)(ii) able to be construed as limited to proceedings "between the parties to a marriage", it would have been within the power conferred s.51(xxi).
45. On this understanding, his Honour's judgment is authority for the proposition that a conferral of jurisdiction as to proceedings between the parties to a marriage with respect to the property of the parties to a marriage or of either of them is within the power conferred by s.51(xxi) of the *Constitution*.
46. Consistent with this is the assertion of Mason and Deane JJ in *Fisher v Fisher*⁴³ that *Russell v Russell* does not determine that a conferral of jurisdiction as to proceedings between the parties to a marriage with respect to the property of the parties to a marriage or of either of them was beyond power.

After *Russell v Russell* - the *Family Law Amendment Act 1976* (Cth)

47. Following *Russell v Russell* the statutory definition of matrimonial cause was amended by s.3(e) of the *Family Law Amendment Act 1976* (Cth)⁴⁴ to first include (ca) of the definition. It provided:
- 20 "(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or of either of them, being proceedings in relation to concurrent, pending or completed proceedings for principal relief between those parties."
48. "Proceedings for principal relief" was (and is) defined as, "proceedings ... of a kind referred to in paragraph (a) or (b) of the definition of matrimonial cause"; that is for divorce or nullity. This definition reflected the consequence of the orders in *Russell v Russell*.
49. It can be seen that this definition, and conferral of jurisdiction, did not apply the reasoning of Mason J in *Russell v Russell*.

30 Following the *Family Law Amendment Act 1976* – the *Family Law Amendment Act 1983* and the purpose of including (ca)(i)

50. Clause (ca) was amended to its current form by the *Family Law Amendment Act 1983* (Cth)⁴⁵. Section 3(1)(h) of the *Family Law Amendment Act 1983* (Cth) amended clause (ca) by adding (i) and (iii) to the definition. The explanation for

⁴³ *Fisher v Fisher* [1986] HCA 61; (1986) 161 CLR 438 at 451-452.

⁴⁴ *Family Law Amendment Act 1976* No. 63, 1976.

⁴⁵ *Family Law Amendment Act 1983*, No. 72, 1983 s.3(1)(h). The history of the relevant amendments to the definition is explained in the judgment of Mason CJ, Wilson and Dawson JJ in *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278 at [7]; see also *Kapoor & Kapoor* [2010] FamCAFC 113 at [60]-[67] (per Finn J).

the inclusion of (i) was provided in the Second Reading Speech⁴⁶. A copy is annexed. The inclusion of (ca)(i) to the definition mirrored the term "arising out of the marital relationship" in clause (e) of the definition.

51. The purpose of the inclusion of (ca)(i) to the definition was to deal with one specific issue referred to in the Second Reading Speech; people faced with marital breakdown who wish to secure a settlement of property rights before the expiration of the 12 month period of separation.
52. Following *Russell v Russell* there was some doubt as to whether the Commonwealth had power to confer jurisdiction on a court to make orders for settlement of property of the parties to a marriage (or of either of them), even if *inter partes*, unless the relief sought was ancillary to proceedings already on foot for divorce or nullity. The amendment, to include (i), allowed such an application "after marital breakdown" but prior to the expiry of the required 12 month period of separation which necessarily preceded the commencement of divorce proceedings. In this sense, the term "arising out of the marital relationship" was not "intended" to have a broad or broadening meaning, to expand s.79 beyond "marital breakdown".
53. It can certainly be said that the purpose of the inclusion of (i) to (ca) was not to give legislative effect to the (seeming) view of Mason J in *Russell v Russell* that a conferral of jurisdiction as to proceedings between the parties to a marriage with respect to the property of the parties to a marriage or of either of them is within the power conferred by s.51(xxi) of the *Constitution*.
54. The Second Reading Speech refers to "marital breakdown" and "separation". Separation is to be understood having regard to Part VI of the *Family Law Act 1975*, and in particular s.49. It is not understood to be controversial that separation involves a breakdown of the marital relationship and an intention of at least one of the parties to end the marital relationship and some consequential act.⁴⁷
55. As will be discussed, the distinction between these notions of "marital breakdown" and "separation" may be significant in this matter.

The purpose behind confining (ca)(i) to "marital breakdown"/"separation"

56. Were the conferral of jurisdiction in s.39 of the *Family Law Act 1975*, and the grant of power in s.79, not confined in the manner contemplated in the Second Reading Speech, the breadth of jurisdiction and power would be considerable.
57. The breadth of this scope of operation can be illustrated. If not confined in the manner contemplated in the Second Reading Speech the conferral of jurisdiction in s.39 and the grant of power in s.79 would extend to confer jurisdiction to hear a suit brought by one party to a marriage who wished to (say) sell the family home where the other party did not, but where otherwise the parties were happily married. It would confer jurisdiction to hear a suit brought by one party to a marriage who wished the other to sell property owned by the second party who did not wish to sell it, but where otherwise the parties were happily married. Following *Dougherty*

⁴⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1983, 1704 (Duffy, Minister for Communications).

⁴⁷ See *Stanford & Stanford* [2011] FamCAFC 208; (2011) 46 Fam LR 240 at [38].

*v Dougherty*⁴⁸, it would confer jurisdiction to hear a claim by a child of a marriage who wished the parents to make provision for him/her out of the assets of the family in a proceeding brought by one party to a marriage who wished the other spouse to sell property, but where otherwise the parents were happily married.

58. The potential scope ought not to be over-stated. With the current definition of marital cause, a child could only intervene in existing proceedings between the parents, as in *Dougherty v Dougherty*. The marriage power could not sensibly be thought to extend to conferring jurisdiction on a court to hear a *Giumelli* type claim⁴⁹ simply because the property was registered in the name of a person who was married. Similarly (ca)(i) could not be construed to confer jurisdiction to enable (say) a third party with a cause of action against a spouse to intervene in proceedings between spouses with respect to the property of the parties to a marriage or of either of them, and seek to accrue jurisdiction to deal with the action unrelated to and not arising out of the marital relationship.

The scope of (ca)(i)

59. The breadth of the current definition in (ca) came to be considered, though the validity of provisions flowing from it was not questioned, in *Fisher v Fisher*⁵⁰ and *Dougherty v Dougherty*⁵¹. As Finn J observed in *Kapoor & Kapoor*⁵²:

"Since the passage of Act No 72 of 1983, there appears to have been no direct challenge to the constitutional validity of sub-paragraph (ca)(i), but the decisions of the High Court in *Fisher & Fisher (No 2)* [1986] HCA 61; (1986) 161 CLR 438; (1986) FLC 91-767; and *Dougherty & Dougherty* [1987] HCA 33; (1987) 163 CLR 278; (1987) FLC 91-823 can be read as assuming its validity."

Fisher & Fisher

60. The question of validity that arises in this matter was not considered in *Fisher v Fisher*, where it was conceded by all parties that the Family Court had jurisdiction in respect of proceedings between parties to a marriage, in respect of property, where the proceedings arose out of the marital relationship. No issue arose as to the meaning, effect or consequence of the inclusion of (ca)(i) to the definition.
61. Rather, *Fisher v Fisher* was a case in which an order was sought by one spouse in respect of property of the other after they had separated. The question considered was the validity of providing for the continuance of such proceedings by a personal representative of a spouse who, having commenced proceedings, died before their completion⁵³. In *Fisher v Fisher* the husband and wife had separated prior to the commencement of the property proceeding⁵⁴ and, in light of the concessions made,

⁴⁸ *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278 at [7]; see also *Kapoor & Kapoor* [2010] FamCAFC 113 at [60]-[67] (per Finn J).

⁴⁹ *Giumelli v Giumelli* [1999] HCA 10; 196 CLR 101.

⁵⁰ *Fisher v Fisher (No 2)* [1986] HCA 61; (1986) 161 CLR 438.

⁵¹ *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278.

⁵² *Kapoor & Kapoor* [2010] FamCAFC 113 at [67].

⁵³ *Fisher v Fisher (No 2)* [1986] HCA 61; (1986) 161 CLR 438 at 445 (per Gibbs CJ).

⁵⁴ *Fisher v Fisher (No 2)* [1986] HCA 61; (1986) 161 CLR 438 at 439.

the case concerned, what Dawson J described (with respect, correctly) as, a simple point of survival of the action⁵⁵.

Dougherty v Dougherty

62. In *Dougherty v Dougherty* the definition was considered more directly. In this case, the marriage was dissolved some years prior to the maintenance and property settlement application brought by the wife. A child of the marriage then sought to intervene in the later property proceedings.⁵⁶
- 10 63. It does not appear that the Court was referred to the Second Reading Speech⁵⁷ of the *Family Law Amendment Act 1983* which provided the explanation for the inclusion of (i) in (ca) when considering the statutory definition of matrimonial cause⁵⁸. It appears from the report of the submissions in the CLR that the Commonwealth submitted that the marriage power authorised the Family Court to make an order in favour of a child in respect of any family property; seemingly whatever the status of the marriage of the parents⁵⁹.
- 20 64. Mason CJ, Wilson and Dawson JJ quoted approvingly the *dicta* of Gibbs J in *Reg v Lambert; Ex parte Plummer*⁶⁰ and in *Reg v Dovey; Ex parte Ross*⁶¹ which viewed (i) of (ca) and its equivalents as words of limitation. (With respect) their Honours' assertion that the reasoning in *Russell v Russell* confined (or expanded) the power conferred by s.79 and jurisdiction conferred by s.39, "to a claim based on circumstances arising out of the marriage relationship"⁶² is doubtful. It is difficult to rely upon the reasoning in *Russell v Russell* to support any view as to the meaning of (i) in (ca) as *Russell v Russell* was decided well before the amendment to (ca) which inserted (i)⁶³.
65. Brennan J's judgment in *Dougherty v Dougherty* does not address the question which arises in this case, and does not specifically consider (ca)(i) and the effect that a "broad" understanding of (i), not limited to circumstances of marital breakdown, would have upon the jurisdiction and power of the Family Court. Likewise, Gaudron J does not address the limitation in (ca)(i). Her Honour accepted that the proceeding between the former wife and husband for a settlement

⁵⁵ *Fisher v Fisher (No 2)* [1986] HCA 61; (1986) 161 CLR 438 at 462.

⁵⁶ *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278 at 279.

⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 October 1983, 1704 (Duffy, Minister for Communications).

⁵⁸ There is no reference to it at (1987) 163 CLR 278 at 279-282.

⁵⁹ *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278 at 282 (in particular the penultimate sentence of the submission).

⁶⁰ *Reg v Lambert; Ex parte Plummer* [1980] HCA 52; (1980) 146 CLR 447.

⁶¹ *Reg v Dovey; Ex parte Ross* [1979] HCA 14; (1979) 141 CLR 526. See *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278 at 287-8.

⁶² *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278 at 288.

⁶³ As to footnote 22 on page 286, the following can be said. *First*, the reference to *Russell v Russell* at pp.525 and 528 seems misplaced. Gibbs J there did not extend the power of the Commonwealth to confer jurisdiction and power on a court to adjudicate "to claims based on circumstances arising out of the marriage relationship". His Honour's judgment is more limited than that. *Second*, the reference to *Russell v Russell* at pp.542-543 seems equally misplaced.

of property and maintenance was one arising out of the marital relationship⁶⁴. As the marriage had been dissolved, there was little issue as to this.

The issue here

66. It is uncertain whether the *ratio* of *Russell v Russell* is that s.51(xxi) empowers the Commonwealth to enact legislation conferring jurisdiction on a court to hear proceedings between the parties to a marriage with respect to the property of the parties to a marriage or of either of them. This question need not be determined in this matter.
67. This matter can be resolved by way of construction of (ca)(i).
- 10 68. As a matter of construction of (ca), (i) (like (ii) and (iii)) are words of limitation. Paragraph (i) confines the breadth of "proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them". Paragraph (i) confines (ca) differently to (ii), but the meaning of (i) emerges from the fact of its difference to (ii) (and (iii)). Although (i) does not relate to "divorce or validity of marriage proceedings", its purpose is to confer jurisdiction in a like circumstance; rather than strictly in divorce or validity proceedings, in a circumstance of "marital breakdown".
- 20 69. As a matter of the power of the Commonwealth under s.51(xxii) and/or (xxiii), it is not disputed that legislation conferring jurisdiction on a court to hear proceedings between the parties to a marriage with respect to the property of the parties to a marriage or of either of them, where the marriage has broken down, is within the marriage power. Because the *ratio* of *Russell v Russell* is difficult to identify, even if such a proposition may be thought difficult to reconcile with the decision in *Russell v Russell*, the proposition, is clearly consistent with *Fisher v Fisher* and *Dougherty v Dougherty*.
70. Marital breakdown is not logically confined to circumstances of separation in terms of s.49 of the *Family Law Act 1975*.
- 30 71. In a circumstance where a guardian or attorney of a spouse, who is incapable, brings proceedings (for the spouse) with respect to the property of the parties to the marriage or the other spouse, seeking a settlement of such property for the benefit of, and to ensure the welfare of the incapable spouse, *ipso facto*, there is a marital breakdown, even if not a separation.
72. Understood in this way, neither s.39(2) or s.79 of the *Family Law Act 1975* are invalid.
73. Whether the actual exercise of power, and the making of the order under s.79 after the death of the wife, disclosed error is not addressed in this submission.

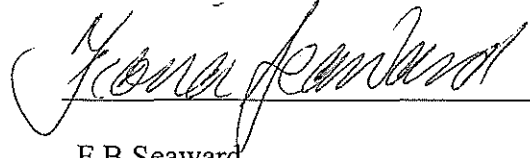
⁶⁴ *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278 at 299-300.

DATED the 24th day of August 2012.



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ANNEXURE

*Family Law Act 1975 (Cth)***Definition of "matrimonial cause" in s. 4(1) of the *Family Law Act 1975 (Cth)*:**

"matrimonial cause means:

- (a) proceedings between the parties to a marriage, or by the parties to a marriage, for:
 - (i) a divorce order in relation to the marriage; or
 - 10 (ii) a decree of nullity of marriage; or
- (b) proceedings for a declaration as to the validity of:
 - (i) a marriage; or
 - (ii) a divorce; or
 - (iii) the annulment of a marriage;
 by decree or otherwise; or
- (c) proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage; or
- (caa) proceedings between:
 - (i) a party to a marriage; and
 - 20 (ii) the bankruptcy trustee of a bankrupt party to the marriage;
 with respect to the maintenance of the first-mentioned party; or
- (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:
 - (i) arising out of the marital relationship;
 - (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
 - 30 (iii) in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104; or

(cb) proceedings between:

- (i) a party to a marriage; and
- (ii) the bankruptcy trustee of a bankrupt party to the marriage;

with respect to any vested bankruptcy property in relation to the bankrupt party, being proceedings:

- (iii) arising out of the marital relationship; or
- (iv) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between the parties to the marriage; or
- (v) in relation to the divorce of the parties to the marriage, the annulment of the marriage or the legal separation of the parties to the marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104; or

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(d) proceedings between the parties to a marriage for the approval by a court of a maintenance agreement or for the revocation of such an approval or for the registration of a maintenance agreement; or

(e) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship (other than proceedings under a law of a State or Territory prescribed for the purposes of section 114AB); or

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(ea) proceedings between:

- (i) the parties to a marriage; or
- (ii) if one of the parties to a marriage has died—the other party to the marriage and the legal personal representative of the deceased party to the marriage;

being proceedings:

(iii) for the enforcement of, or otherwise in relation to, a maintenance agreement that has been approved under section 87 and the approval of which has not been revoked;

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(iv) in relation to a maintenance agreement the approval of which under section 87 has been revoked; or

(v) with respect to the enforcement under this Act or the applicable Rules of Court of a maintenance agreement that is registered in a court under section 86 or an overseas maintenance agreement that is registered in a court under regulations made pursuant to section 89; or

(eaa) without limiting any of the preceding paragraphs, proceedings with respect to a financial agreement that are between any combination of:

- (i) the parties to that agreement; and
- (ii) the legal personal representatives of any of those parties who have died;

(including a combination consisting solely of parties or consisting solely of representatives); or

(eab) third party proceedings (as defined in section 4A) to set aside a financial agreement; or

10 (eb) proceedings with respect to the enforcement of a decree made under the law of an overseas jurisdiction in proceedings of a kind referred to in paragraph (c); or

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

Meaning of "separation" in s. 49 of the *Family Law Act 1975 (Cth)*:

"49 Meaning of separation

20 (1) The parties to a marriage may be held to have separated notwithstanding that the cohabitation was brought to an end by the action or conduct of one only of the parties.

(2) The parties to a marriage may be held to have separated and to have lived separately and apart notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other."

s3(1) "financial or custodial proceedings" means proceedings (being, unless the context otherwise requires, proceedings under this Act) of a kind referred to in paragraph (c), (d) or (e) of the definition of "matrimonial cause" in this sub-section;

"made", in relation to a decree, being a judgment, means given, and "make" has a corresponding meaning;

"maintenance agreement" means an agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage, being an agreement that makes provision with respect to financial matters, whether or not there are other parties to the agreement and whether or not it also makes provision with respect to other matters, and includes such an agreement that varies an earlier maintenance agreement;

"marriage counsellor" means—

- (a) a person appointed as a counsellor under section 37;
- (b) a person authorized by an approved marriage counselling organization to offer marriage counselling on behalf of the organization; or
- (c) a person authorized under the regulations to offer marriage counselling;

"matrimonial cause" means—

- (a) proceedings between the parties to a marriage for a decree of—
 - (i) dissolution of marriage; or
 - (ii) nullity of marriage;
- (b) proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise;
- (c) proceedings with respect to—
 - (i) the maintenance of one of the parties to a marriage;
 - (ii) the property of the parties to a marriage or of either of them; or
 - (iii) the custody, guardianship or maintenance of, or access to, a child of a marriage;
- (d) proceedings between the parties to a marriage for the approval by a court of a maintenance agreement or for the revocation of such an approval or for the registration of a maintenance agreement;
- (e) proceedings for an order or injunction in circumstances arising out of a marital relationship; or
- (f) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs

(a) to (e), including proceedings of such a kind pending at, or completed before, the commencement of this Act;

“ordinarily resident” includes habitually resident;

“overseas maintenance agreement” means a maintenance agreement that has force and effect in a prescribed overseas country by reason of the registration of the agreement, or the taking of any other action in relation to the agreement, under the law of that country and includes an agreement with respect to the maintenance of an ex-nuptial child that would be covered by the foregoing provisions of this definition if the child were a child of the marriage of the parties to the agreement;

“prescribed overseas country” means New Zealand or any other country outside Australia that is declared by the regulations to be a prescribed overseas country for the purposes of the provision in which the expression is used;

“proceedings” means a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connexion with a proceeding;

“proceedings for principal relief” means proceedings under this Act of a kind referred to in paragraph (a) or (b) of the definition of “matrimonial cause” in this sub-section;

“property”, in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion;

“Registrar”, in relation to a court, means the Registrar, Master or other proper officer of that court;

“repealed Act” means the *Matrimonial Causes Act* 1959 and includes that Act as amended at any time;

“separation order” means a decree, not being a decree of dissolution or nullity of marriage or for a judicial separation, having the effect of relieving a party to a marriage from any obligation to cohabit with the other party to the marriage;

“Territory” does not include an external Territory other than Norfolk Island;

“welfare officer” means—

- (a) a person appointed as a welfare officer under section 37;
- (b) a person who is permanently or temporarily employed as a welfare officer in the Australian Public Service or in the Public Service of a Territory;
- (c) a person who is permanently or temporarily employed as a welfare officer in the Public Service of a State and whose services have been made available for the purposes of this Act in pursuance of an arrangement between the Government of Australia and the Government of the State;

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Extract - Second Reading Speech - Family Law Amendment Bill 1983 (HL)

20.

Question Time

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given which should properly be given as statements to this House, that should be so done.

Mr SPEAKER—I respond to the matter raised by the Deputy Leader of the National Party. I indicated earlier that I hoped that questions would be succinct and that answers would be to the point. However, if honourable members turn to the relevant pages of *House of Representatives Practice*—I think page 500 is the most relevant—they will see that there are no Standing Orders which enable me to cut down on the length of an answer. It can be done only by persuasion. Similarly, one must remember that with regard to questions the habit has grown for a question to contain more than one question. I hope that the House will take note of the request and that questions will be succinct and answers similarly so.

Mr Scholes—Mr Speaker—

Mr SPEAKER—The Minister for Defence is seeking my indulgence to speak.

Mr SCHOLES (Corio—Minister for Defence)—On the matter of procedure, it should be drawn to the attention of the House that during the period of the previous Government this matter was raised on a number of occasions and the then Leader of the House opposed it on every occasion. I do not think he can have his cake and eat it, too.

Mr SPEAKER—We are now getting into a debate. I have indicated that the Chair is limited by the powers that the House itself gives the Chair.

Mr Dawkins—Mr Speaker, on this point—I do not want to prolong it—but it is all very well for the Opposition to make claims about the Government abusing Question Time. We had plenty of examples under a former regime, but in any event—

Mr SPEAKER—Order! The Minister will resume his seat.

Mr Dawkins—It would be useful if the Opposition asked some sensible questions.

Mr SPEAKER—Order! I am willing to hear matters of procedure. I am not willing to have a debate.

Mr ANTHONY (Richmond—Leader of the National Party)—With your indulgence, Mr Speaker, I would like to make a point.

Mr SPEAKER—The Leader of the National Party should be very relevant to the point. I will not allow a debate on this matter.

Mr ANTHONY—Yesterday a member of my Party was suspended from the House. I think all of us regret that a member of this Party was suspended and you, Mr Speaker, would regret very

much having to exercise your authority to keep order. But yesterday it was obvious that because of the prolonged and provocative answers that were given by Ministers and the Prime Minister the Opposition reacted. The Opposition will react, and there will be trouble in this Parliament unless there can be—

Mr SPEAKER—Order! The Leader of the National Party is defying what I have said. I have already asked the Minister for Finance to resume his seat and not debate the matter. The point has been made. I will give no further indulgence on this matter.

**FREEDOM OF INFORMATION
AMENDMENT BILL 1983**

Bill received from the Senate, and read a first time.

Ordered that the second reading be made an order of the day for the next day of sitting.

FAMILY LAW AMENDMENT BILL 1983

Consideration resumed from 11 October.

Second Reading

Mr DUFFY (Holt—Minister for Communications) (10.16)—I move:

That the Bill be now read a second time.

The law reform policy released before the election stated that a top priority for a Labor government would be the introduction of a Bill to propose overdue reforms of the Family Law Act. This Bill is the fulfilment of that promise.

Any government that cares for people and is concerned to minimise unhappiness and social conflict must give paramount consideration to family law matters. Family law affects more Australians—adults and children—than any other single area of law. When marriages break down, for whatever reason, every effort must be made to ensure speedy resolution of differences with the minimum of trauma and expense and the maximum possible benefit to all parties.

I believe it is overwhelmingly accepted that the Family Law Act was a landmark in social legislation. It was a great Labor achievement and is one of the enduring legacies of Senator Murphy's time as Attorney-General. Its removal of the concept of matrimonial fault from the law relating to this most complex of human relationships was a revolutionary advance. Its establishment of the single ground, no fault divorce, must on no account be jeopardised. The Family Law Amendment Bill 1983 will give effect to many recommendations of the parliamentary Joint Select Committee on the Family Law Act that reported

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in August 1980. I am sure the honourable member for Dundas (Mr Ruddock) who so ably chaired that Committee will, for one, join with me in hoping that the Bill will have a swift passage in this House.

The Bill before honourable members has been subjected to extensive and intensive examination by bodies like the Family Law Council, the Law Council of Australia, by judges and others. It was, of course, the subject of lengthy debate in the Senate. Because of its concern for people the Government would like to see the proposed reforms operative as soon as possible. The amendments contained in the Bill fall broadly into three classes: Those which expand the jurisdiction of the Family Court of Australia; those which relate to the structure and procedures of the Family Court; and those which affect the substantive law applied in courts exercising jurisdiction under the Act.

Expansion of Jurisdiction of the Family Court

By far the most important amendments in the Bill relate to the expansion of jurisdiction concerning children. At present, proceedings under the Family Law Act can be brought only in relation to natural or adopted children of both parties to a marriage. The Bill in clause 4 adopts the Joint Select Committee recommendation that the category be extended to cover step-children and even foster children. The Bill seeks therefore to increase the number of children in Australia who may be assisted by the enlightened conciliatory procedures of the Family Court. But there will unfortunately remain, for constitutional reasons, some children who in the event of domestic disruption cannot be dealt with by the Family Court. It is hoped that by means of an appropriate referral of powers by the States or by a constitutional amendment, the Commonwealth may one day be able to legislate for the guardianship, custody and maintenance of all children in Australia.

In addition, the Bill provides in sub-clause 3 (1) that a third party, say an uncle or grandparent, may bring proceedings under the Act against one or both parties to a marriage in relation to a child of the marriage. At present where a third party wishes to institute such proceedings he or she must do so in a State court under State law unless the child had previously been the subject of proceedings under the Family Law Act. It will be seen therefore that the Bill seeks to reduce the number of situations that require resort to two different courts and legal systems.

Further, the Bill will expand the jurisdiction of the Family Court concerning children to enable

proceedings to be brought relating to the welfare of a child. Courts exercising jurisdiction under the Family Law Act will be invested with power similar to the wardship power of the State supreme courts. This gives effect to another of the major recommendations of the Joint Select Committee. I would, however, stress that the Commonwealth does not intend to intrude into the area of State child welfare law. I trust that the relevant provisions of sub-clause 3 (1) of the Bill make this abundantly clear. To reinforce this policy, clause 5 of the Bill will repeal sub-section 10 (3) of the Act which provides for the Family Court to override State welfare orders.

Property proceedings at present can only be brought in relation to concurrent, pending or completed proceedings for dissolution or annulment of marriage between the parties. The Bill in sub-clause 3 (1) will enable proceedings to be brought by parties to a marriage in relation to property of the parties at any time where the proceedings arise out of the marital relationship. This is a further significant recommendation of the Joint Select Committee and will be of advantage to many persons faced with marital breakdown who wish to secure a settlement of property rights before the 12 month period of separation required for divorce proceedings has expired. This amendment would ensure that all married people are entitled to the benefit of the principles of the Family Law Act which are generally more just than under State law in that they permit a spouse, who has contributed to the acquisition of marital property in an indirect or non-financial but nevertheless significant way, to claim a share in the property without having to institute divorce proceedings.

Clause 16 of the Bill will enable the Family Court in the Australian Capital Territory to be invested with as broad a jurisdiction as possible in family law matters. This was a further recommendation of the Joint Select Committee and this Government hopes that the Family Court throughout Australia will one day exercise such a broad jurisdiction.

Procedures and Structure of the Family Court

There has for some time been a call for the Family Court to be opened to the public. The Bill in clause 52 gives effect to the majority report of the Joint Select Committee and the Family Law Council that proceedings in the Family Court may be held in open court although it empowers the Court to exclude persons from proceedings. While the Bill relaxes the present total prohibition on the publication of details of proceedings under

SUMMARY OF THE LEGISLATIVE HISTORY
COMMONWEALTH MATRIMONIAL CAUSES ACTS

Matrimonial Causes Act 1945 (Cth)

1. Definition of "matrimonial cause: in section 3(1):

"includes suits for the dissolution of marriage, nullity of marriage, restitution of conjugal rights and judicial separation, and also includes, as incidental to any such suite, matters in relation to damages, alimony, maintenance, the custody, maintenance and education of children, settlements, remarriage, cross or counter-proceedings and costs, together with all other matters incidental to any such suit"
- 10 2. Part II applies to marriages celebrated in Australia, on or after 3 September 1939 and before the appointed day (1 June 1950 – see Commonwealth Gazette 8/6/1950) where the husband was, at the time of the marriage, not domiciled in Australia and the wife was, immediately before the marriage, domiciled in a State or Territory (s. 4).
3. Where the parties to a marriage to which Part II applies are not domiciled in a State or Territory, either party may institute proceedings in any matrimonial cause in the Supreme Court of the State or Territory in which that party is resident notwithstanding the party is not domiciled in that State or Territory (s. 5(1)).
- 20 4. Under Part III, where any person domiciled in a State or Territory is resident in some other State or Territory, and has resided there for not less than 1 year, that person may institute proceedings in any matrimonial cause in the Supreme Court of that other State or Territory notwithstanding that person is not domiciled in that other State or Territory (s. 10).
5. Repealed by section 4(1) of the *Matrimonial Causes Act 1959 (Cth)*.

Matrimonial Causes Act 1955 (Cth)

Amends the *Matrimonial Causes Act 1945* by:

1. Repeals sections 7 and 12 (dealing with State and Territory laws) (ss. 3 and 4).
- 30 2. Inserts a new Part IIIA and section 12(a) and (b). These sections provide that where a woman is resident in a State or Territory and has resided there for not less than three years immediately prior to the institution of proceedings under Part IIIA, she may institute proceedings in any matrimonial cause in the Supreme Court of that State or Territory as though she were domiciled in that State or Territory (s. 5).
3. Amends section 13 dealing with the effect of judgments and specifies that they shall have effect through-out Australia (s. 6).
4. Inserts a new section 13A to deal with the situation where proceedings are instituted in different States at the same time (s.6).

5. Inserts a new section 13 B, which provides that the Act shall not affect the jurisdiction of any court of a State or Territory existing otherwise than under this Act (s. 6).
6. Repealed by section 4(1) of the *Matrimonial Causes Act 1959*.

Matrimonial Causes Act 1959 (Cth)

1. Repealed the *Matrimonial Causes Acts 1945 and 1955* (s. 4(1)).
2. Definition of "matrimonial cause" contained in section 3 (1):

"matrimonial cause" means-

- (a) proceedings for a decree of-
 - 10 (i) dissolution of marriage;
 - (ii) nullity of marriage;
 - (iii) judicial separation;
 - (iv) restitution of conjugal rights; or
 - (v) jactitation of marriage;
- (b) proceedings for a declaration of the validity of the dissolution or annulment of a marriage by decree or otherwise or of a decree of judicial separation, or for a declaration of the continued operation of a decree of judicial separation, or for an order discharging a decree of judicial separation;
- 20 (c) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in either of the last two preceding paragraphs, including proceedings of such a kind pending at, or completed before, the commencement of this Act;
- (d) any other proceedings (including proceedings with respect to the enforcement of a decree, the service of process or costs) in relation to
 - 30 concurrent, pending or completed proceedings of a kind referred to in any of the last three preceding paragraphs, including proceedings of such a kind pending at, or completed before, the commencement of this Act; or
- (e) proceedings seeking leave to institute proceedings for a decree of dissolution of marriage or of judicial separation, or proceedings in relation to proceedings seeking such leave."

3. Repealed by section 3(1) of the *Family Law Act 1975* (Cth).

***Matrimonial Causes Act 1965* (Cth)**

Amends the *Matrimonial Causes Act 1959* in a number of respects. Some of the key amendments were:

1. To deal with polygamous marriages outside of Australia (and their treatment under Part VI)(s. 3).
2. To amend section 8(4) (supersession of exiting laws) in relation to a decree of dissolution (s.5)
- 10 3. To insert a new section 8A clarifying that State child welfare laws are not affected by the *Matrimonial Causes Act 1959* (s. 6).
4. To amend paragraph 18(2) – dealing with marriages that are not void/voidable (s. 7).
5. Amendments to section 39 and inserts a new 41A - when a dissolution of marriage will not be made where the petitioner condoned or connived (ss. 9-10).
6. Amendments to section 55 regarding effects on the devolution of property whilst a decree of judicial separation is in operation (including the effect of State intestacy laws) (s. 11).
7. Amendments to sections 71 and 72 which require issues regarding children to be resolved prior to a decree nisi becoming absolute (ss. 12 and 13).
- 20 8. Minor amendment to section 89 – orders under this Part shall not be made with the petition for principal relief has been dismissed (s. 15).
9. Minor amendment to section 105 (enforcement of orders) (s. 17).
10. Repealed by section 3(1) of the *Family Law Act 1975* (Cth).

***Matrimonial Causes Act 1966* (Cth)**

Amends the *Matrimonial Causes Act 1959* by:

1. Amending section 123 (restrictions on publication of evidence) to increase the penalties (s. 3).
- 30 2. Repealing the Third Schedule (Enforcement of Orders for Maintenance) and inserting a new Third Schedule (ss. 4-5).
3. Repealed by section 3(1) of the *Family Law Act 1975* (Cth).

Matrimonial Causes Act 1971 (Cth)

1. This Act is incorporated, and shall be read as one, with the *Matrimonial Causes Act 1959* as amended.
2. Section 5 consists of a savings provision in relation to various types of decrees.
3. Repealed by s. 3 and Schedule 1 of the *Statute Stocktake Act 1999* (Cth).

1945

1945.

Special Annuity.

No. 21.

169

3.—(1.) There shall be payable out of the Consolidated Revenue Fund, which is hereby appropriated accordingly, to the widow of the late the Right Honourable John Curtin, an annuity at the rate of Five hundred pounds per annum.

Annuity to the widow of the late the Right Honourable John Curtin.

(2.) The annuity provided by this section shall cease to be payable in the event of the remarriage of the annuitant.

4. The annuity payable under this Act shall be paid in monthly instalments.

Annuity payable monthly.

MATRIMONIAL CAUSES.

No. 22 of 1945.

An Act relating to Matrimonial Causes.

[Assented to 16th August, 1945.]

[Date of commencement, 13th September, 1945.]

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

PART I.—PRELIMINARY.

1. This Act may be cited as the *Matrimonial Causes Act 1945*. Short title.

2. This Act is divided into Parts, as follows:— Parts.

Part I.—Preliminary.

Part II.—Institution of Matrimonial Causes against Members of Overseas Forces, and certain other Persons, not Domiciled in Australia.

Part III.—Institution of Matrimonial Causes by certain Persons Domiciled in Australia.

Part IV.—Miscellaneous.

3.—(1.) In this Act, unless the contrary intention appears— Definitions.

“Australia” includes the Territories of the Commonwealth;

“marriage” includes a purported marriage which was void *ab initio*;

the High attached any such existing judgment, my right of the deemed Territory be fixed than six the King Territory ng to law, and truly Acting or l do right ill-will. unuity irable 1945.] Senate, alth of ated in 5. on the e.

"matrimonial causes" includes suits for the dissolution of marriage, nullity of marriage, restitution of conjugal rights and judicial separation, and also includes, as incidental to any such suit, matters in relation to damages, alimony, maintenance, the custody, maintenance and education of children, settlements, re-marriage, cross or counter-proceedings and costs, together with all other matters incidental to any such suit;

"suit" includes any action or original proceeding between parties;

"Territory" means Territory of the Commonwealth.

(2.) In this Act, any reference to the Supreme Court of a Territory shall, in relation to the Territory of Norfolk Island, be read as a reference to the Court of Norfolk Island sitting in its Full Jurisdiction.

PART II.—INSTITUTION OF MATRIMONIAL CAUSES AGAINST MEMBERS OF OVERSEAS FORCES, AND CERTAIN OTHER PERSONS, NOT DOMICILED IN AUSTRALIA.

4. This Part shall apply in relation to marriages celebrated in Australia, on or after the third day of September, One thousand nine hundred and thirty-nine, and before the appointed day, where the husband (whether a member of an overseas Naval, Military or Air Force, or not) was, at the time of the marriage, not domiciled in Australia, and the wife was, immediately before the marriage, domiciled in a State or Territory.

5.—(1.) Where the parties to a marriage in relation to which this Part applies are not domiciled in a State or Territory, either party may institute proceedings in any matrimonial cause in the Supreme Court of the State or Territory in which that party is resident, notwithstanding that that party is not, or has not been for any period required by the law of that State or Territory, domiciled in that State or Territory.

(2.) The Supreme Court of each State is hereby invested with Federal jurisdiction, and jurisdiction is hereby conferred on the Supreme Court of each Territory, to hear and determine matrimonial causes instituted under the last preceding sub-section.

(3.) Nothing in this section shall entitle a person to institute proceedings in a matrimonial cause in any State or Territory if the parties to the marriage have, at any time since the marriage, resided together in a country outside Australia in which the husband was domiciled at the time of the residence.

(4.) For the purposes of the last preceding sub-section, where the husband was domiciled in a part of the United Kingdom, of a British possession or of the United States of America, residence in any other part of the United Kingdom, of that British possession, or of the United States of America, shall be deemed to be residence in the country in which the husband was domiciled.

Marriages to which Part II. applies.

*1 Jan 1950.
G. G. Smith 8/6/50*

Institution of matrimonial causes in relation to marriages to which Part II. applies.

(5.) This matrimonial cause shall not be instituted if the husband has been married for less than five years.

6. Subject to the provisions of this section, the Court of a Territory may exercise any jurisdiction conferred on it, by this Act, in relation to any matrimonial cause in which the husband is a party.

(a) in a matrimonial cause in which the husband is a party.

(b) if—

7. Nothing in this section shall prevent the Court of a Territory from exercising any jurisdiction conferred on it, by this Act, in relation to any matrimonial cause in which the husband is a party.

8.—(1.) The Court of a Territory may, in the exercise of its jurisdiction, make any order or decree which it may think fit, having regard to the interests of justice, in any matrimonial cause in which the husband is a party, notwithstanding that that party is not, or has not been for any period required by the law of that State or Territory, domiciled in that State or Territory.

(2.) A Proclamation may be made in respect of any order or decree made by the Court of a Territory in the exercise of its jurisdiction, and such Proclamation may provide for the recognition and enforcement of such order or decree in any other State or Territory, and for the recognition and enforcement of such order or decree in any other country.

9. In this section "Proclamation" means a Proclamation made by the Governor-General in Council.

PART III.—

10.—(1.) Where the husband is a party to a matrimonial cause in which the husband is a party, and the wife is a party, and the husband is resident in some other country for less than one year.

FIFTH SCHEDULE.

Section 64.

AMOUNT OF GRATUITY PAYABLE TO AN EXISTING CONTRIBUTOR, NOT BEING AN OFFICER, WITH LESS THAN TWELVE YEARS' SERVICE FOR PENSION.

Number of Years of Service for Pension completed before Commencing Date.	Number of Years of Service for Pension completed before Retirement.					
	6	7	8	9	10	11
0	120	170	220	270	380	490
1	120	170	220	270	370	470
2	120	170	220	270	360	450
3	120	170	220	270	350	430
4	120	170	220	270	340	410
5	120	170	220	270	330	390
6	120	170	220	270	320	370
7	..	150	200	250	300	350
8	..	..	180	230	280	330
9	..	..	..	210	260	310
10	..	..	..	..	240	290
11	..	..	..	..	..	270

MATRIMONIAL CAUSES.

No. 104 of 1959.

An Act relating to Marriage and to Divorce and Matrimonial Causes and, in relation thereto, Parental Rights and the Custody and Guardianship of Infants.

[Assented to 16th December, 1959.]

BE it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows :—

PART I.—PRELIMINARY.

1. This Act may be cited as the *Matrimonial Causes Act* Short title. 1959.
2. This Act shall come into operation on a date to be fixed by Proclamation. Commence-ment.

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“ marriage guidance counsellor ” means a person authorized by an approved marriage guidance organization to offer marriage guidance on behalf of the organization;

“ matrimonial cause ” means—

(a) proceedings for a decree of—

- (i) dissolution of marriage;
- (ii) nullity of marriage;
- (iii) judicial separation;
- (iv) restitution of conjugal rights; or
- (v) jactitation of marriage;

(b) proceedings for a declaration of the validity of the dissolution or annulment of a marriage by decree or otherwise or of a decree of judicial separation, or for a declaration of the continued operation of a decree of judicial separation, or for an order discharging a decree of judicial separation;

(c) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in either of the last two preceding paragraphs, including proceedings of such a kind pending at, or completed before, the commencement of this Act;

(d) any other proceedings (including proceedings with respect to the enforcement of a decree, the service of process or costs) in relation to concurrent, pending or completed proceedings of a kind referred to in any of the last three preceding paragraphs, including proceedings of such a kind pending at, or completed before, the commencement of this Act; or

(e) proceedings seeking leave to institute proceedings for a decree of dissolution of marriage or of judicial separation, or proceedings in relation to proceedings seeking such leave;

“ petition ” includes a cross-petition;

“ petitioner ” includes a cross-petitioner;

“ proceedings ” includes cross-proceedings;

“ respondent ” includes a petitioner against whom there is a cross-petition;

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disease or injury, requires oversight, care or control for his own protection or for the protection of others and is, by reason of that fact, unfitted for the responsibilities of marriage.

22.—(1) Except as expressly provided in this Part, nothing in this Part affects the validity or invalidity of a marriage that took place before the commencement of this Act.

Validity, &c., of certain marriages not affected.

(2.) A provision of this Act does not affect the validity or invalidity of a marriage where it would not be in accordance with the common law rules of private international law to apply that provision in relation to that marriage.

PART V.—JURISDICTION.

23.—(1) Subject to this Act, a person may institute a matrimonial cause under this Act in the Supreme Court of a State or of a Territory to which this Act applies.

Jurisdiction in matrimonial causes.

(2.) Subject to the succeeding provisions of this section, the Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Supreme Court of each Territory to which this Act applies, to hear and determine—

- (a) matrimonial causes instituted under this Act; and
- (b) matrimonial causes (not being matrimonial causes to which section one hundred and fifteen of this Act applies) continued in accordance with Part XIII. of this Act.

(3.) The jurisdiction with which the Supreme Court of a State is invested by this section is subject to the conditions and restrictions specified in sub-section (2.) of section thirty-nine of the *Judiciary Act* 1903–1959 so far as they are applicable.

(4.) Proceedings for a decree of dissolution of marriage or for a decree of nullity of a voidable marriage shall not be instituted under this Act except by a person domiciled in Australia.

(5.) Proceedings for a decree of nullity of a void marriage or for a decree of judicial separation, restitution of conjugal rights or jactitation of marriage shall not be instituted under this Act except by a person domiciled or resident in Australia.

(6.) Where, in proceedings for a decree of dissolution or nullity of marriage, the court finds that the parties to the marriage were, or one of those parties was, at the time when the proceedings were instituted, domiciled, according to the principles of the common law, in Australia, it shall include in the decree a statement to that effect.

(7.) Without prejudice to the application of sub-sections (4.) and (5.) of this section in relation to proceedings in the Supreme Court of a Territory to which this Act applies, jurisdiction under

this Act in a matrimonial cause instituted under this Act is not conferred on the Supreme Court of such a Territory unless at least one of the parties to the proceedings—

(a) is, at the date of the institution of the proceedings, ordinarily resident in the Territory; or

(b) has been resident in the Territory for a period of not less than six months immediately preceding that date.

(8.) Jurisdiction under this Act in a matrimonial cause of the kind referred to in paragraph (b) of sub-section (2.) of this section is not conferred on a court other than the court in which the cause was instituted.

Special provisions as to wife's domicile.

24.—(1.) For the purposes of this Act, a deserted wife who was domiciled in Australia either immediately before her marriage or immediately before the desertion shall be deemed to be domiciled in Australia.

(2.) For the purposes of this Act, a wife who is resident in Australia at the date of instituting proceedings under this Act and has been so resident for the period of three years immediately preceding that date shall be deemed to be domiciled in Australia at that date.

Law to be applied.

25.—(1.) The jurisdiction conferred on a court, or with which a court is invested, by this Act shall be exercised in accordance with this Act.

(2.) Subject to this Act, a court exercising jurisdiction under this Act in proceedings for a decree of nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage shall proceed and act and give relief as nearly as may be in conformity with the principles and rules applied in the ecclesiastical courts in England immediately before the commencement of the Imperial Act known as The Matrimonial Causes Act 1857.

(3.) Where it would be in accordance with the common law rules of private international law to apply the laws of any country or place (including a State or Territory of the Commonwealth), the court shall apply the laws of that country or place.

Staying and transferring of proceedings.

26.—(1.) Where it appears to a court in which a matrimonial cause has been instituted under this Act that a matrimonial cause between the parties to the marriage or purported marriage has been instituted in another court having jurisdiction under this Act, the court may, in its discretion, stay the cause for such time as it thinks fit.

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(2.) Subject to this section and to the rules, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(3.) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.

(4.) The power of the court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

85.—(1.) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage—

Powers of court in custody, &c., proceedings.

(a) the court shall regard the interests of the children as the paramount consideration; and

(b) subject to the last preceding paragraph, the court may make such order in respect of those matters as it thinks proper.

(2.) The court may adjourn any proceedings referred to in the last preceding sub-section until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and may receive the report in evidence.

(3.) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

(4.) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage, or by the parties or a party to the marriage, as the case may be.

86.—(1.) The court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

Powers of court in proceedings with respect to settlement of property.

(2.) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

(3.) The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.

General powers of court.

87.—(1.) The court, in exercising its powers under this Part, may do any or all of the following:—

- (a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;
- (b) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;
- (c) where a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs;
- (d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
- (e) appoint or remove trustees;
- (f) order that payments be made direct to a party to the marriage, or to a trustee to be appointed or to a public authority for the benefit of a party to the marriage;
- (g) order that payment of maintenance in respect of a child be made to such person or public authority as the court specifies;
- (h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;
- (i) impose terms and conditions;
- (j) in relation to an order made in respect of a matter referred to in any of the last three preceding sections, whether made by that court or by another court and whether made before or after the commencement of this Act—
 - (i) discharge the order if the party in whose favour it was made marries again or if there is any other just cause for so doing;

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