

CROSS-VESTING OF JURISDICTION NEW SOLUTIONS OR NEW PROBLEMS?

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The division of powers between the Commonwealth and the states within our federal system frequently has the consequence that litigation which has both state and federal components must take place in more than one court.

The Commonwealth and the states have recently co-operated in a plan to vest jurisdiction upon each other. This is a bold and imaginative undertaking. The question is — will it work?

The aim of this work is to analyse the new cross-vesting laws in their application to proceedings in family property.¹ However the observations made here are equally applicable to other litigation in the Supreme Courts, the Family Court and the Federal Court.

The Jurisdiction of Courts Cross-Vesting Act 1987 (Cth) was passed by the Commonwealth Government on the 27th May 1987 and reciprocal legislation has since been passed in all States.² These Acts adopt a scheme promoted by the Advisory Committee to the Constitutional Commission on the Australian Judicial System whereby

the superior federal courts have, in addition to their own federal jurisdiction, the jurisdiction of the State and Territories Supreme Courts. Under the scheme each Supreme Court, the Federal Court and the Family Court would have in addition to their own ordinary jurisdiction conferred upon them the jurisdiction of the other. Transfer and removal provisions will ensure that cases are heard in the court in whose ordinary jurisdiction they belong. The aim of the cross-vesting provisions is not to effect a general shake up of the role of the Courts. Nor is it to give litigants a free choice of forum for initiating proceedings. Rather it is to 'ensure that almost always the court hearing a case would have ample jurisdiction to determine all the claims and defences involved in the case'.³

It is intended that all the components of a proceeding which has properly been brought in a particular court can be resolved in that court. It should be noted that the cross-vesting legislation operates only on the jurisdiction of the courts concerned. It does not affect legislative power.

The cross-vesting scheme does not create freedom of forum and indeed it is anchored in the notion of the proper forum.

The . . . Bill seeks to cross-vest jurisdiction in such a way that federal and State courts will, by and large, keep within their 'proper' jurisdictional fields. To achieve this end the Commonwealth Bill and the proposed State legislation make detailed and comprehensive provision for transfers between courts which should ensure that proceedings begun in an inappropriate court, or related proceedings begun in separate courts, will be transferred to an appropriate court. The provisions relating to cross-vesting will need to be applied only to those exceptional cases where there are jurisdictional uncertainties and where there is a real need to have matters tried together in the one court.⁴

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¹ See Kovacs, D., 'Property Disputes between Parties to a Marriage; Problems of Dual Jurisdiction' (1983) 13 *Federal Law Review* 201.

² *Jurisdiction of Courts Cross-Vesting Acts* 1987 of Victoria, New South Wales, South Australia, Tasmania, Western Australia, Queensland and the Northern Territory.

³ See para. 3.113 of the Report of the Advisory Committee.

⁴ See explanatory memorandum Commonwealth Attorney-General, General Outline, para. 6.

A court contemplating transferring proceedings to another court must apply a rigorous test⁵ before concluding that it is more appropriate that proceedings before it should be determined by the other court. This test includes a requirement that there is a relevant proceeding pending in the court to which a transfer is proposed.

There are significant benefits claimed for the new scheme. It is hoped to avoid those cases such as *Ireland and Ireland*⁶ where neither a federal court nor a state court has jurisdiction to deal with the whole controversy between the parties. The cross-vesting solution was regarded as superior to that of conferring more federal jurisdiction on federal courts as that would result in a 'decline in the role of the courts of the States⁷ . . . which [will] become more and more restricted in the scope of their jurisdiction . . . leading to a decline in the quality of appointees to State courts and a consequent, if gradual, loss of prestige'.⁸

However the cross-vesting legislation is not without its problems. The content of state jurisdiction in the Cross-Vesting Acts is defined by reference to the jurisdiction of the Supreme Court of a State or Territory and the only state courts which are involved in the scheme are Supreme Courts. From this it would seem to follow that jurisdiction in a state matter which would be heard in some other state court cannot be cross-vested. A civil component of a family property matter which falls within the County Court limits or within Magistrates Court limits could not therefore be heard by the Family Court. Nor could the family law components be transferred to such a state court so that no court is able to hear the entire case despite the cross-vesting scheme. Indeed one can foresee the growth of the use of fictions in the future to overcome problems of this nature. In addition there are constitutional difficulties with the legislation. While it is clear that original federal jurisdiction may be conferred on state Supreme Courts using s.77(iii) and s.122 of the Constitution, Professor Zines in an Opinion given to the Judicature Sub-committee⁹ expressed a doubt as to whether the Commonwealth can itself confer (or agree to the conferral by a State) of state jurisdiction upon a federal court where the jurisdiction in question is not within s. 75 or s. 76 of the Constitution. Zines was inclined to the view that state jurisdiction could be conferred on federal courts. However the Advisory Committee to the Constitutional Commission on the Australian Judicial System was concerned¹⁰ that

factors which would militate against the validity of such legislation would be the possibility that the State jurisdiction conferred would involve federal courts in the decision of matters which would offend against the present doctrine of separation of powers or which would involve federal courts in giving 'advisory opinions' outside the concept of a 'matter'. For these reasons the

⁵ See s. 5(1) regarding referral out by a state court and s. 5(4) regarding referral out by the Family Court.

⁶ (1986) F.L.C. 91-731.

⁷ See *Russell v. Russell* (1976) 134 C.L.R. 495 re conferral of federal jurisdiction on state courts.

⁸ Report of the Advisory Committee to the Constitutional Commission on the Australian Judicial System, para. 3.53.

⁹ Judicature Sub-committee, Report to Standing Committee on an Integrated System of Courts (October, 1984), Proceedings of the Australian Constitutional Commission 1985 Vol. II, 14.

¹⁰ Para. 3.144.

¹¹ The Committee drafted an appropriate constitutional amendment to empower the states to participate in the cross-vesting scheme in para. 3.115.

Committee felt that 'to enable cross-vesting proposals to proceed the conferral by the States of jurisdiction on federal courts needs to be accomplished (in order to put cross-vesting legislation beyond doubt as to the validity) either by reference of powers under s. 51 (xxxvii) of the Constitution or by constitutional amendment.

The Committee thus felt that it was premature to enact cross-vesting legislation. The current legislative scheme is clearly at risk of being struck down from the aspect of conferral upon the Family Court of state powers. Quite apart from concerns as to constitutional validity, the success of cross-vesting depends on the exercise by numerous courts of extensive statutory discretions. As the Committee observed 'the effectiveness of the cross-vesting legislation . . . will depend upon the manner in which the discretion to remit or hear proceedings outside the courts' primary jurisdiction is exercised'.¹² We cannot moreover even hope for a unified approach in this regard as the courts involved in the scheme will not be bound by decisions of other participating courts. A chaotic jurisprudence on cross-vesting thus seems inevitable.

A useful test of the effectiveness of the cross-vesting scheme is to consider whether cases which have previously proved intractable from the aspect of jurisdiction would benefit from the cross-vesting laws.

Some of these cases concern Family Court property proceedings in which a state component could not be determined by the Family Court. One such case was *Ireland and Ireland*¹³ which involved a claim by the husband on the one hand and the wife and her adult son by a previous marriage on the other. The husband alleged that a trucking business which was at the centre of the proceedings was owned by the parties to the marriage. The business was registered in the name of the husband and wife but the case for the wife and her son was that the business in reality belonged to the son. Lindenmayer J. held that the issue as between all three parties could be resolved in the Family Court provided that the Court could exercise accrued jurisdiction in the matter. His Honour in fact found that the Court had accrued jurisdiction. However the exercise of accrued jurisdiction is at the discretion of the Court and the learned judge declined to exercise the discretion. Instead he stayed the process in the Family Court pending a determination by the Supreme Court of Queensland of the son's application in that Court for a declaration that he was the sole beneficial owner of the business.¹⁴

It is entirely possible that a Family Court hearing *Ireland and Ireland* after it is armed with cross-vested state jurisdiction would not balk at the task, as Lindenmayer J. did, of determining the question of the son's title. However the son might resist a determination by the Family Court because of the risk that the Family Court would divide the business between all three parties.¹⁵ It would therefore be in the son's interest to insist on a separate determination in the state Court in which he could acquire sole title, and just as Lindenmayer J. declined to exercise the discretion to assume accrued jurisdiction the Family Court might decline to exercise the discretion to use cross-vested jurisdiction.

It should be noted that cross-vesting is to take place not only as between state

¹² Para. 3.127.

¹³ (1986) F.L.C. 91-731.

¹⁴ *Ibid.*

¹⁵ *C.f. Dougherty v. Dougherty and Dougherty* (1987) F.L.C. 91-823.

and federal courts but also as between federal courts as well as between state courts.¹⁶ This may be helpful where two federal courts currently maintain jurisdiction in a matter, particularly in such cases as *Milland and Milland*¹⁷ and *Re Stebhens*¹⁸ where bankruptcy proceedings and matrimonial proceedings coincide. Such cases, involving as they do both creditors and spouses, may be disposed of in consolidated proceedings. In many such cases it would probably be 'more appropriate'¹⁹ or 'otherwise in the interests of justice'²⁰ that the composite proceedings be heard in the federal court than in the Family Court as the greater number of interests would be served by referring the matrimonial matter into the bankruptcy jurisdiction. However a spouse in that situation would be concerned that their interests might be less strenuously protected in that forum than in the Family court. Inconsistencies in approach are inevitable. The Federal Court might for example express considerable hostility to an application which had been initiated in the Family Court under s. 85 of the Family Law Act to set aside a bankruptcy which had then been transferred to the Federal Court. The spouse initiating the Family Court proceeding would have expected a good outcome in that court²¹ but might end up by paying costs upon the proceedings being transferred, as a s. 85 order would be in the interests of the spouse but contrary to those of creditors of the party embarking upon the bankruptcy. In short the outcome may vary enormously depending which court ultimately hears a proceeding which would previously have taken place in two courts. It is therefore to be predicted that cross-vesting will increase rather than decrease forum shopping.

Indeed, duality of jurisdiction will continue notwithstanding cross-vesting. The resolution of the rights of third parties who deal at arm's length with parties to the marriage is a case in point.²² It is unlikely that a state Supreme Court will transfer proceedings from its commercial jurisdiction in cases such as *Rieck and Rieck*²³ and *Prince and Prince*²⁴ where a stranger asserts a commercial debt against a party to the marriage, or that the Federal Court will allow the Family Court to resolve the taxation aspects of cases like *T. and T.*²⁵ or *P. and P.* [*Tax Evasion*] where it transpires that as a result of the Family Court proceedings a party will incur a tax liability.²⁶ Equally the Family Court could not confidently say that the issue between the parties and a third party in these cases 'arises out of or is related to' proceedings in the Family Court.²⁷

Similarly it seems unlikely that a Supreme Court hearing a case like *Rafellini v. Raffellini*²⁸ would transfer those proceedings. There the wife applied to the

¹⁶ See s. 5(5) of the Cross-Vesting Acts.

¹⁷ (1981) F.L.C. 91-065.

¹⁸ *Re Stebhens: Ex parte Stebhens* (1982) F.L.C. 91-229.

¹⁹ Section 5(5B)(i).

²⁰ Section 5(5B)(ii).

²¹ See *Milland* (1981) F.L.C. 91-065.

²² See Kovacs, D., 'Re Ross-Jones; Ex parte Green. The High Court and the Third Party Jurisdiction of the Family Court' (1985) 8 *University of New South Wales Law Journal* 21.

²³ (1981) F.L.C. 91-067.

²⁴ (1984) F.L.C. 91-501.

²⁵ (1984) F.L.C. 91-588.

²⁶ (1985) F.L.C. 91-605.

²⁷ Section 5(1) of the Cross-Vesting Acts.

²⁸ (1985) F.L.C. 91-612.

Supreme Court to wind up a partnership, the members of which were the husband and wife as well as the husband's brother and his wife. Simultaneously the wife issued Family Court proceedings under s. 79 for division of property. The state court might take the view that the application for winding up, in so far as it involved strangers to the marriage, was not one related to or arising out of the Family Court proceedings between the parties. Equally the Family Court which heard *Raffellini* (No. 2)²⁹ might decline to transfer the division of property proceedings before it to the Supreme Court under s. 5(4), as it might properly find that the Family Court proceedings did not arise out of and were not related to the dissolution of partnership proceedings pending in the Supreme Court. Thus it is likely that even after cross-vesting, litigation like that in *Raffellini* would require separate hearings in two court systems.

Where a partnership dispute is entirely between the parties to the marriage the cross-vesting provisions may succeed in consolidating partnership and matrimonial proceedings. Page³⁰ points out that restrictions on Family Court jurisdiction in relation to partnership³¹ may be overcome by cross-vesting so that, for example, in an appropriate case the Family Court might appoint a receiver.³² The learned author suggests that both the Family Court and the Supreme Court could transfer proceedings in such a case. However, he considered that the Supreme Court would be reluctant to allow the Family Court to dissolve a partnership in accordance with the 'different considerations under s. 79' rather than on the Supreme Court's own strict accounting basis. Thus a Supreme Court would find that 'proceedings upon the partnership were not related to or arising out of proceedings for property settlement between the parties.'³³

Ultimately resolving the proper forum in the context of cross-vesting may be just as problematic as the current tests of 'matrimonial causes' which determine whether the Family Court has exclusive jurisdiction in a proceeding. It is not more difficult to decide whether a proceeding 'arises out of the marital relationship' within s. 4(1)(ca)(i) or whether it is 'a proceeding in relation to a principal relief proceeding' within s. 4(1)(ca)(ii) than to determine whether a proceeding in a court 'arises out of, or is related to', another proceeding pending in another court. It therefore seems inevitable that problems of jurisdiction in family property proceedings will continue, and while some cases will benefit from cross-vesting we will continue to experience conflicting interpretations of identical statutory criteria from courts which are not binding upon each other and which have an indifferent record when it comes to giving credence to each other's decisions. Each court can indeed issue injunctions in order to prevent parties from proceeding in another court and there may be a proliferation of appeals against decisions concerning the exercise of cross-vested jurisdiction. In this

²⁹ *Raffellini and Raffellini* (No. 2) (1986) F.L.C. 91-726.

³⁰ Page, G., *The Jurisdiction of Courts (Cross-Vesting) Bill 1986 and its Impact on Property, Custody and De Facto Issues*, Paper delivered at Leo Cussen Institute on 5th July, 1987.

³¹ *R. V. Ross-Jones; Ex parte Beaumont* (1979) 23 A.L.R. 179.

³² Page, *op.cit.* 24.

³³ *Ibid.* 25.

regard it should be noted that there is no cross-vesting of appellate jurisdiction.³⁴

There may also be problems in the application of different rules of evidence and procedure for different matters within a proceeding.³⁵ Section 13 prevents an appeal from a decision in relation to the transfer or removal of a proceeding or as to the application of rules of evidence. That will undoubtedly avoid a multiplicity of proceedings but it will also prevent the development of a cohesive jurisprudence regarding transfer or removal of proceedings or regarding the application of rules of evidence and procedure as there will be no central appellate review of the decisions of the various courts. In short cross-vesting may solve some of the problems produced by dual jurisdiction in family property proceedings. However it will create many more.

³⁴ See s. 7 of the Cross-vesting Acts. An exception is made for matter specified in the schedule *eg.* Bankruptcy and Electoral Act matters in which the Full Federal Court has exclusive appellate jurisdiction.

³⁵ See s. 11 of the Cross-Vesting Acts.