

# JURISDICTION UNDER THE 'FAMILY LAW ACT' TO MAKE ORDERS AFFECTING PROPERTY IN THE ABSENCE OF PROCEEDINGS FOR PRINCIPAL RELIEF

by  
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## *Introduction*

The aim of this paper is to discuss how far courts with jurisdiction under the *Family Law Act* 1975 (Com.) have jurisdiction to make orders which affect property even though no proceedings for principal relief have been commenced under that Act. Although this question is relevant to the four different kinds of courts which presently have some jurisdiction under the *Family Law Act*,<sup>1a</sup> for convenience this paper will refer only to the Family Court of Australia<sup>1b</sup> though the question is equally relevant at present to all four kinds of court.<sup>1c</sup>

Federal Parliament has no specific head of constitutional power over property owned by married couples. Therefore any federal legislation which deals with property owned by married persons must arise only incidentally to one of the enumerated federal powers. The federal powers most clearly related to married persons are found in Section 51 (xxi) and (xxii) of the Constitution.<sup>1d</sup>

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1a Namely, the Family Court of Australia, (s. 39); the state Family Courts (s. 41 and the *Family Court Act* 1975, W.A.); courts of summary jurisdiction (ss. 39 (2) subject to ss. 39 (7) and 46); the Supreme Courts of a State or a Territory (s. 39 subject to s. 40 (3)). A proclamation dated 27th May, 1976, (published in the Australian Government Gazette No. G 22, 1st June, 1976), fixed 1st June, 1976 as the date on which the jurisdiction under the *Family Law Act* of the Supreme Courts of the States of N.S.W., Victoria, Queensland, South Australia and Tasmania and of the Australian Capital Territory and Norfolk Island was terminated.

1b Referred to hereafter as the 'federal Family Court' in contrast to the state Family Courts established under the *Family Law Act* 1975 (Com.) s. 41.

1c The theory embodied in s. 39 (7), 40 (3) and s. 41 is that eventually only the federal Family Court and the state Family Courts will have any jurisdiction under the *Family Law Act*.

1d *Commonwealth of Australia Constitution Act* 1900 (63 and 64 Vic. Ch. 12) s. 51 provides that, 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:—

(xxi) Marriage:

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'.

It was held in 1964 by the High Court that an order made under the provisions of *Matrimonial Causes Act 1959* (Com.)<sup>1e</sup> which altered the rights to property owned of the federal Parliament so long as the order was made as an ancillary order to a divorce decree or other proceedings for principal relief.<sup>1f</sup>

Then the *Family Law Act 1975* (Com.) came into effect in Australia on 5th January, 1976. It tried to go further than the *Matrimonial Causes Act* had done in the area of jurisdiction to make orders affecting property. No doubt under its original provisions, such property orders could still be made when ancillary to 'proceedings for principal relief'.<sup>1g</sup> However, additionally, the *Family Law Act*, in its original form, envisaged that orders declaring or adjusting the rights to property owned by married persons could be made by the Family Court of Australia even in the absence of an application for principal relief.<sup>2</sup> Thus a married applicant could obtain an immediate property order in the federal Family Court without waiting until principal relief was available or where no principal relief was being sought at all. This partly realized the ideal of all aspects of a matrimonial dispute being heard before a single court thereby decreasing delay, expense and uncertainty.<sup>3</sup>

However, the ideal was short-lived. Unlimited<sup>4</sup> property jurisdiction not ancillary to principal relief was held to be beyond federal constitutional power by a majority of the High Court in the case of *Russell v. Russell*; *Farrelly v. Farrelly*.<sup>5</sup>

Parliament was quick to amend certain parts of the Act to reflect the conclusions of the High Court.<sup>6</sup> However, the High Court decision in *Russell's* case has led *inter alia* to the following two inconvenient results.

1e S. 86. The *Matrimonial Causes Act* has since been repealed by the *Family Law Act 1975* (Com.), s. 3.

1f *Lansell v. Lansell* (1964) 110 C.L.R. 353 (H.C.).

1g *Family Law Act*, s. 4 defines 'proceedings for principal relief' as '(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'.

2 The original definition of 'matrimonial cause' in s. 4 (1) (c) (ii), now repealed by Act. No. 63 of 1976, included 'proceedings with respect to the property of the parties to a marriage or of either of them'. See also ss. 78 and 79 of the *Family Law Act*, which sets out what kinds of orders the court can make once it has jurisdiction.

3 H. A. Finlay, 'Commonwealth Family Courts: Some Legal and Constitutional Implications' (1970-71) 4 *Fed. L.R.* 287; H. A. Finlay, 'Family Courts — Gimmick or Panacea?' (1969) 43 *A.L.J.* 602.

4 See later discussion at footnotes 82-90 concerning potential federal jurisdiction over a narrowly defined concept of 'matrimonial property'.

5 (1976) 50 *A.L.J.R.* 594; 9 *A.L.R.* 103; (1976) *F.L.C.* 90-039, 11th May 1976 — Barwick C.J. Gibbs, Stephen and Mason J.J.; Jacobs J. dissenting on the property question. For contrary view see 'The Marriage Act case', *A.-G. for State of Victoria v. Commonwealth* (1962) 107 C.L.R. 529 at 602 (Owen J.) and 560-561 (Taylor J.); R. Sackville and C. Howard, 'The Constitutional Power of the Commonwealth to Regulate Family Relationships' (1970) 4 *Fed. L.R.* 30.

6 *Family Law Amendment Act 1976* (No. 63 of 1976). This Act was assented to on 8th June 1976 less than a month after the High Court decision in

*The Resulting Dilemma*

Prior to the commencement of or in the absence of proceedings for principal relief:

- (1) A married person cannot obtain an express declaration concerning property interests in the federal Family Court.

This limitation is, theoretically at least, a major problem because many married women seek maintenance orders during the twelve months prior to filing a divorce application. Such married persons who seek a maintenance order in the absence of an application for principal relief, theoretically, (even if not in practice) require mutual agreement or a court determination concerning their respective property interests before the maintenance order is made. Such a determination is specifically required by s. 75 (2) (b) of the *Family Law Act* 1975 (Com.) Section 75 (2) (b) provides that '...the court shall take into account...the... property and financial resources of each of the parties...' These words set out in s. 75 (2) (b) raise at least the four following questions.

Should s. 75 (2) (b) be interpreted as containing an implied power to make determinations concerning the property rights of married persons? If so, is this subsection *intra vires* as necessarily incidental to the federal power concerning maintenance between married persons? Further, if this subsection is *intra vires* will the incidental property decision under the federal legislation be *res judicata* and take precedence in subsequent hearings under state legislation?<sup>7</sup> Or should maintenance proceedings under the *Family Law Act* prior to an application for principal relief be adjourned until all property ownership issues are first decided by declaration under state married women's property legislation,<sup>8</sup> such declarations being then *res judicata* and binding upon courts administering the federal *Family Law Act*?

From the attitudes expressed in *Russell's* case<sup>9</sup> one could tentatively predict that the present majority in the High Court would answer the first question negatively and the fourth positively. In

*Russell*. Part of the original definition of 'matrimonial cause' in s. 4 (1) (c) (ii), set out in footnote 2, was repealed and replaced with subparagraph (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'.

<sup>7</sup> By analogy where there is federal jurisdiction over property owned by a married couple, this stays any pending proceedings concerning that same property under state jurisdiction. *Horne v. Horne* [1963] N.S.W.R. 499; (1962) 3 F.L.R. 381; *Re Gilmore and the Conveyancing Act* [1968] 1 N.S.W.R. 247; affirmed in [1968] 3 N.S.W.R. 675.

<sup>8</sup> e.g. *Married Women's Property Act* 1890 (Qld) s. 21; 1892 (W.A.) s. 17; *Law of Property Act*, 1936 (S.A.) s. 105; 1901 (N.S.W.) s. 22; *Marriage Act*, 1958 Pt VIII (Vic.); 1935 (Tas.) s. 8.

<sup>9</sup> Ante footnote 5. See also concluding comments *In the Marriage of McCarney* (1977) F.L.C. 90-200 (Full Court of Family Court).

other words, arguably *all* property ownership issues must be decided separately under state legislation where there is no application for principal relief underway. Thus doubt at least must presently remain whether there is power under the *Family Law Act* in the absence of an application for principal relief to make a determination of property ownership as a necessary incident of the power to award maintenance.<sup>9a</sup>

- (2) A married person cannot obtain an order adjusting property rights. Victoria is the exception here as s. 161 of the *Marriage Act* 1958 (Vic) gives state courts a discretion to determine proprietary rights other than by legal rules.

The question then arises what potential avenues are still available to avoid these consequences and thus allow orders which affect property despite the absence of an application for principal relief?

### *Thirteen Possibilities*

#### (1) *State Family Courts*

Federal Parliament is specifically empowered by s. 77 (iii) of the Constitution to grant jurisdiction to a state court over a matter arising under federal law.<sup>10</sup>

Pursuant to the constitutional power of s. 77 (iii), section 41 of the *Family Law Act* 1975 (Com.) specifically enables an approved state Family Court to exercise federal jurisdiction.

Thus if each state established an approved state Family Court under s. 41 of the *Family Law Act*, such a court could exercise both federal and state jurisdiction. Such a court at a pre-principal relief stage could be given jurisdiction to make both declaratory orders concerning property under state *Married Women's Property* legislation and to make maintenance orders under the federal *Family Law Act* provisions.

So far, only Western Australia has established an approved state Family Court.<sup>11</sup>

9a The contrary argument is that the court does have power to make orders affecting property where such power is a necessary incident or an 'essential element' of the exercise of the maintenance power. Compare the cases referred to post at footnotes 75-76.

10 Section 77 (iii) of the Commonwealth Constitution (1901) says as follows:—  
'With respect to any of the matters mentioned in the last two sections the Parliament may make laws — investing any court of a State with Federal jurisdiction.'

It appears that the reverse proposition is not possible. That is, a state law cannot confer jurisdiction on a Federal Court to administer a state law. Presumably this is because a Federal Court by definition can only administer federal matters. See P. H. Lane, *The Australian Federal System* (1972), at pp. 385-6.

11 *Family Court Act* 1975, (W.A.). The Family Court Act 1975 (W.A.) ss. 15 & 16 apparently confers upon the Chairman of that court the equivalent status of a Supreme Court judge and upon other judges of that court the equivalent status of a District Court judge. Thus as the ordinary judge of the Western Australian Family Court is neither a magistrate or Supreme Court judge it seems doubtful whether s. 17 of the *Married Women's Property Act* 1892-1962 (W.A.) 55 Vict. No. 20 in its present form confers jurisdiction on that state court to make declaratory property orders. See also footnote 26.

(2) *State Legislation on Variation of Property Rights*

In addition to (1) above, state legislation could empower a state Family Court not only to make declaratory property orders, but also to adjust proprietary rights.

An example of this kind of state legislation already exists in Victoria, where s. 161 of the *Marriage Act* 1958 (Vic.) was amended by the *Marriage (Property) Act* 1962 (Vic.) to give a court a discretion to determine proprietary rights other than by common law or equitable rules.<sup>12</sup> Additionally, s. 161 (4) (b) imposes at the time of marriage breakdown a rebuttable presumption of joint tenancy in the matrimonial home.<sup>13</sup>

In Victoria at present, there is no approved state Family Court established pursuant to s. 41 of the *Family Law Act* so that where maintenance proceedings are commenced in Victoria in the federal Family Court, independent proceedings must still be commenced in another court in order to obtain any property orders under s. 161 of the *Marriage Act* 1958 (Vic.).<sup>14</sup>

(3) *Judicial Discretion to Alter Property Rights*

In the 1950's and 1960's it was judicially suggested, especially by Lord Denning in the English Court of Appeal, that the Married Women's Property legislation<sup>15</sup> gave the courts power not only to declare existing property interests but also to alter such interests.<sup>16</sup>

Such a conclusion is unlikely to be resurrected by judicial efforts as both the High Court and the House of Lords have expressly disclaimed the existence of such a discretionary judicial power to vary matrimonial property interests.<sup>17</sup>

However, it seems clear that a degree of judicial discretion still exists even when merely ascertaining existing proprietary interests. This is because the legal and equitable principles of ownership require the judiciary to interpret such vague phrases as 'substantial', 'direct', 'financial', 'contributions' to the 'acquisition' or 'improvement' of property together with the 'objective intention' of the parties.<sup>18</sup>

Of course, the state married women's property legislation does not and cannot confer jurisdiction on a federal Family Court. Therefore, to restate part of the problem, in the absence of an application for principal

12 *Hogben v. Hogben* [1964] V.R. 468 at 471.

13 For a full discussion of the unique Victorian position see R. Sackville, 'The Emerging Australian Law of Matrimonial Property', (1970) 7 *M.U.L.R.* 353 at 358-373.

14 As amended by the *Marriage (Property) Act* 1962 (Vic.).

15 e.g. *Married Women's Property Act* 1882 (U.K.). For equivalent sections in Australia, see ante footnote 8.

16 e.g. *Hine v. Hine* [1962] 1 W.L.R. 1124; 3 All E.R. 345; D. Davies: 'Section 17 of the Married Women's Property Act: Law or Palm Tree Justice (1967) 8 *U.W.A.L.R.* 48.

17 *Wirth v. Wirth* (1956) 98 C.L.R. 229; *Pettitt v. Pettitt* [1969] 2 All E.R. 385 (H. of L.).

18 e.g. K. F. Lindgren, 'Death Duty and Matrimonial Home in Australia' (1974) 8 *U.Qld. L.J.* 103 at 107-127.

relief, a separate action must be commenced in a state court in order to obtain a declaration as to existing property rights.

Such an action in the state court will be stayed if subsequently an ancillary order relating to the same property is sought under section 78 or 79 of the *Family Law Act*.<sup>19</sup>

(4) *High Court Reversal of Russell's Case?*

It is theoretically possible for the High Court at some later date to overrule its own decision in *Russell's case*.<sup>20</sup> Although possible,<sup>21</sup> this is very unlikely. However, a means of distinguishing the case has been specifically hinted at in relation to the federal jurisdiction concerning 'family assets'.<sup>22</sup>

(5) *Constitutional Amendment*

It is also conceptually possible for the Commonwealth Constitution<sup>23</sup> to be amended in such a way so to confer jurisdiction over property in matrimonial disputes upon the federal Parliament. The dismal record of attempted constitutional amendments makes this very unlikely.<sup>24</sup>

(6) *Reference of Power*

One or more state governments could by reference under s. 51 (xxxvii) of the Constitution confer power on the federal Parliament to pass laws dealing with property owned by married persons.<sup>25</sup>

One cannot be optimistic that all or any of the states will make such a reference of power to the Commonwealth or that the Commonwealth would accept the reference without unanimity among the states.<sup>26</sup>

19 Ante footnote 7; also *In the Marriage of Cattarossi* (1976) F.L.C. 90-106 (S.C. of N.S.W.).

20 See footnote 5.

21 See Barwick 'Precedent in the Southern Hemisphere (1970) 5 *Israel L.R.* 1; F. K. H. Maher, P. L. Waller and D. P. Derham, *Cases and Materials on the Legal Process* (2nd Ed. 1971) p. 60-62.

22 *Russell v. Russell*; *Farrelly v. Farrelly* (1976) 50 A.L.J.R. 594 at 600-601. See later discussion at footnotes 82-90.

23 *Commonwealth of Australia Constitution Act 1900*, 63 & 64 Victoria, Ch. 12, s. 128.

24 Between 1900 and May 1977, there have been only five successful amendments to the Constitution, namely the *Constitution Alteration (Senate Elections) Act 1906* (No. 1 of 1907); the *Constitution Alteration (State Debts) Act 1909* (No. 3 of 1910); the *Constitution Alteration (State Debts) Act 1928* (No. 1 of 1929); the *Constitution Alteration (Social Services) Act 1946* (No. 81 of 1946); the *Constitution Alteration (Aboriginals) Act 1967* (No. 55 of 1967). These 5 successful amendments come from a total of 32 proposals submitted to referendum. (*Year Book Australia*, 1974, p. 89-91).

25 Section 51 of the Commonwealth Constitution:— 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:— (xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred or which afterwards adopt the law.'

26 Reference of power by State Governments was discussed in relation to ex-nuptial children at the Australia Constitutional Convention in Hobart in October, 1976. The N.S.W. Attorney General has apparently taken unsuccessful initiatives in an attempt to generally refer family law powers to the Commonwealth — see *Sydney Morning Herald*, 4th February, 1977. On 25th March, 1977, a joint Federal-State Committee was appointed by a

(7) *Counselling Notice*

The original *Family Law Act 1975* (Com.) included s. 79 (3) which provided:

The court shall not make an order under this section [i.e. to alter the property interests of the parties] unless a decree nisi for dissolution of the marriage, or a decree of nullity of the marriage has been made or proceedings for a decree of dissolution or nullity of the marriage have been instituted in that court or in another court having jurisdiction under this Act or a party has filed in the court a notice under section 15.

This section enabled a party to file a notice under s. 15 seeking the assistance of counselling facilities at the Family Court, whether bona fide or not, and thereby confer jurisdiction upon the court to make orders altering property interests. It provided a simple procedural device even though it was rather frustrating for the marriage counsellors.

However, s. 79 (3) was repealed by the *Family Law Amendment Act 1976*.<sup>27</sup> This subsection was not specifically held to be unconstitutional by the High Court in *Russell v. Russell*; *Farrelly v. Farrelly*<sup>28</sup> as this was not an issue before the court. However apparently the federal Attorney-General drew the implication from the judgments of the majority was that the subsection was a constitutionally suspect method of trying to make a connection between the federal marriage power<sup>29</sup> and property orders.

(8) *Revive Judicial Separation*

S. 86 (1) of the repealed *Matrimonial Causes Act 1959* (Com.) provided that, 'the court may in *proceedings* under this Act . . . order . . . such settlement of property . . . as the Court considers just . . .'. 'Proceedings' under the definition of 'matrimonial cause' in that Act included 'Proceedings for a decree of judicial separation'.<sup>30</sup> Thus, orders varying property interests could theoretically be made at the same time as an order for judicial separation.

Under the present provisions of the *Family Law Act*, proceedings for a decree of judicial separation have been abolished.<sup>31</sup> Such a decree seems to have no useful purpose in modern society. However, such decrees of judicial separation could be re-instated based on a simple ground such as 'estrangement' or 'marriage breakdown' proved by the

meeting of the Federal and State Attorneys-General to report inter alia on  
 — 'referral of the constitutional power by the States to the Commonwealth to deal with family law matters which at present can now be dealt with only by State Courts;  
 — establishing State Family Courts to deal with all family law matters including those matters now dealt with by the Family Court of Australia.

27 Act No. 63 of 1976.

28 Footnote 5.

29 Section 51 (xxi) of the Constitution.

30 Section 5 (1) (a) (iii) of the *Matrimonial Causes Act 1959* (Com).

31 Section 8 (2) of the *Family Law Act, 1975* (Com).

subjective testimony of the applicant<sup>32</sup> or upon a very liberal objective ground such as separation for one week.<sup>33</sup>

This would be (a) within the Constitutional powers of the Commonwealth (certainly a decree of judicial separation is historically a 'matrimonial cause' as required by s. 51 (xxii) of the Constitution) and (b) would provide a convenient procedural device in the absence of proceedings for principal relief, to give the Family Court jurisdiction to make orders declaring or varying property interests between married persons.

It is arguable that such a decree of judicial separation, if made available on a subjective standard, really amounts to an administrative rubber stamp rather than a judicial finding and, therefore, amounts to a non-judicial function. Moreover a federal court established under s. 71 of the Constitution can only exercise judicial functions.<sup>34</sup> In rebuttal, however, even such a resurrected form of judicial separation would probably still require a 'judicial' finding as that concept is rather broadly interpreted.<sup>35</sup>

#### (9) *Readily Available Principal Relief*

An application for the most popular form of principal relief, namely divorce, can only be filed upon the *completion* of twelve months of living separate and apart.<sup>36</sup>

However, a number of people have been able to file an application for divorce immediately upon marriage breakdown because of the uncertainty surrounding exactly when their period of separation commenced. The traditional view was that separation under the one roof only exists where two strictly separate households were created.<sup>37</sup> A more recent and liberal view suggests that separation under the one roof commences

32 'Subjective' grounds for matrimonial relief can be illustrated by the Californian *Family Law Act* 1969 (C.C. 4500). Under that act, the recommended method of proving marriage breakdown is by the following two questions from attorney to client.

'Q. You have stated that there are irreconcilable differences between you and your spouse. Is it your belief that your marriage has completely broken down?

A. Yes.

Q. Do you believe that conciliation counselling, the assistance of this Court or a waiting period can restore the marriage?

A. No.'

(from California Continuing Education of the Bar, *Attorney's Guide to Family Law Act Practice*, (1970) Termination of Marriage, Para. 2.26).

33 Suggested in R. Sackville and C. Howard, 'The Constitutional Power of the Commonwealth to Regulate Family Relationships', (1970) 4 *Fed. L.R.* 30 at 58.

34 See P. H. Lane, *Australian Constitutional Law* (1964) at pp. 112-121.

35 e.g. *R. v. Joske; Ex parte Shop Distributive and Allied Employees Association* (1976) 10 A.L.R. 385 (H.C.) (The exercise of the wide discretionary power conferred by the words 'as it thinks fit' introduces a concept with which courts are familiar and which does nothing to suggest a non-judicial function.); *Talga Ltd. v. M.B.C. International Ltd.* (1976) 50 A.L.J.R. 619 (H.C.). (It is a judicial function to declare that a contract is 'just and equitable')

36 Section 48 (2) of the *Family Law Act*.

37 *Hopes v. Hopes* [1949] P. 227; *Crabtree v. Crabtree* (1963) 5 F.L.R. 307; *Hastings v. Hastings* (1970) 1 S.A.S.R. 592; *Shindler v. Shindler* (1956) 31 A.L.J.R. 73.



when the nature of the marriage changes substantially or when substantial estrangement occurs.<sup>38</sup> This latter view, taken to its logical conclusion (which is unlikely!) would mean that the ground for divorce is more accurately described as twelve months' irretrievable marriage breakdown<sup>39</sup> rather than twelve months' living separate and apart.<sup>40</sup> Thus, by some judicial interpretations, s. 49 (2) may come to qualify s. 48 (2) to such an extent that living separate and apart would only be one way of proving irretrievable marriage breakdown.

Despite recently reported cases calling for corroborative evidence to show when the separation period under the same roof commenced<sup>41</sup> the judicial practice in the Family Court varies. It is not difficult to obtain the desired divorce decree before certain judges with a few rehearsed questions to and coached answers from the applicant regarding marital life under the one roof.

The continued development of this judicial practice and interpretation could effectively remove the problem of obtaining pre-principal relief property orders for a limited number of applicants. Principal relief is thereby made more readily available and with it, ancillary property orders.

#### (10) *Sham Application for Principal Relief*

It may be suggested that a Family Court has jurisdiction over property matters whenever a petition for principal relief is filed, regardless of the merits of the petition. If this is true, it would undoubtedly encourage the practice of filing sham application for principal relief in order to give the court property jurisdiction.

Proceedings for principal relief include proceedings between the parties to a marriage for

- (i) dissolution of marriage;
- (ii) nullity of marriage;
- (iii) a declaration as to the validity of marriage;
- (iv) a declaration as to the validity of the dissolution or annulment of a marriage.<sup>42</sup>

Arguably a literal reading of the definition of 'matrimonial cause'<sup>43</sup> would allow such sham applications for principal relief. The court has jurisdiction with 'respect to the property of the parties to the marriage' where proceedings for principal relief are 'pending'.

38 *In the Marriage of Pavey* (1976) 10 A.L.R. 259; F.L.C. 90-051 (Full court of Family Court). 'The evidence should examine and contrast the state of the marital relationship before and after the alleged separation' (at p. 265-266).

39 Section 48 (1).

40 Section 48 (2).

41 *In the Marriage of Wiggins* (1976) F.L.C. 90-004 (Watson J); *In the Marriage of Pavey* (1976) 10 A.L.R. 259; F.L.C. 90-051 (Full Court of Family Court); *In the Marriage of Lane* (1976) 10 A.L.R. 204 (Murray J.); *In the Marriage of Potter* (1976) F.L.C. 90-146 (Pawley J.).

42 See definition of 'matrimonial cause' in s. 4 (1) (a) and (b) of *Family Law Act*.

43 *Ibid* at s. 4 (1) (ca).

However, by analogy with the practice under the *Matrimonial Causes Act 1959* (Com.) it is unlikely that the present judiciary would make pre-principal relief property orders where they suspected that the principal application is not bona fide. The 1959 Act provided in rather anomalous fashion that where a bona fide petition was dismissed on its merits the court still had jurisdiction to make maintenance and custody orders (but for some reason not property orders) in favour of the unsuccessful petitioner. Yet it was also suggested that a bona fide petition dismissed on its merits gave the court jurisdiction to make an ancillary order regarding maintenance, custody *and* property in favour of the respondent.<sup>44</sup>

A further procedural hurdle to this practice of filing sham applications (not to mention possible prosecution for perjury — all applications are required to be verified by affidavit)<sup>45</sup> is that it would be difficult even in cases of urgency to convince a judge that final property orders should be made before the merits of the requested principal relief were considered. Rarely would the property question be heard before the question of principal relief except where necessary to preserve the status quo with an injunction.

Although a sham application for a decree of dissolution or nullity will eventually be dismissed, a sham application for a declaration for the validity of a marriage or dissolution or annulment of a marriage is technically not dismissed — some judicial decision is made.<sup>46</sup> Thus, *In the Marriage of Read*, Watson J. held that an application for a declaration of validity of marriage provides a successful device to which property orders can be attached even though the applicant has no bona fide question about the validity of the marriage.<sup>47</sup>

The learned authors of a well-known practitioner's guidebook<sup>48</sup> suggest, presumably from an abundance of caution until an appellate decision rules on this device, that practitioners include in their application for a declaration of validity of marriage the following clause —

'By reason of a consistent pattern of deceit by the respondent as to his personal life and affairs the applicant has doubts as to the validity of her marriage. Particulars of this allegation are contained in an Affidavit of the applicant filed herewith.'

The comment is later made, 'It is probably not necessary [if the judicial views expressed *In the Marriage of Read* are correct] to include such [a clause], indicating any doubt as to the validity of the marriage.'<sup>49</sup>

44 Section 89 (2) (b) of 1959 Act as amended by *Matrimonial Causes Act 1965*, (Com.) s. 15; see P. Toose, R. S. Watson, & D. G. Benjafield, *Australian Divorce Law and Practice* (1968) Paras. 774-776; *Meyer v. Meyer* (1964) 5 F.L.R. 285; contra *Brown v. Brown* (1965) 7 F.L.R. 255.

45 e.g. Regulation 33 of *Family Law Act Regulations*.

46 Section 113 of the *Family Law Act*.

47 Discussed in C.C.H., *Australian Family Law and Practice* by M. D. Broun and S. G. Fowler at Para 37-047; *In the marriage of Read* (1977) F.L.C. 90-201 (Watson, J.).

48 *Ibid.*

49 C.C.H. *Australian Family Law and Practice* at Para 63-305.

It is submitted that if such an allegation is accepted in a sworn document without any reasonable basis for suspecting the validity of the marriage, a judge must close his eyes to questions of perjury and frivolous accusation<sup>50</sup> and mud-slinging. However, the legal profession has traditionally used fictions to obtain expedient results<sup>51</sup> despite the resulting mystification for the layman.

The question then arises to what degree should the fiction be played out? Should the applicant immediately admit his/her real motives?<sup>52</sup> Or should he play along and present evidence, which he probably does not have, of doubts, which he really does not have, in order to prove, when he definitely hopes he will not prove, the invalidity of his marriage? Perhaps the desire for a comprehensive family court jurisdiction will justify this fiction even without the sworn allegation of doubts concerning the validity of the marriage being included in the application.<sup>53</sup> The fate of this convenient device must await some appellate decision.

As an alternative device to seeking a declaration as to the validity of a marriage, an applicant can seek a 'declaration as to the validity of the dissolution or annulment of a marriage by decree or otherwise'.<sup>54</sup>

Thus an applicant could quickly go through an unrecognised form of divorce or annulment. This need not involve an expensive trip to a divorce haven.<sup>55</sup> A variety of local divorce procedures, customary or otherwise, can be created such as tearing up a marriage certificate, divorce by local sect leader or jumping backwards over a broom.<sup>56</sup> Having completed the appropriate procedure, the applicant could approach the Family Court for a declaration concerning the validity of such a divorce. No doubt the layman will gaze in wonder (mixed with other feelings) at the mystery and magic of the law.

In passing it is also interesting to note the argument that a number of *de facto* marriage relationships could allege a bona fide exchange of

50 Section 118 of the *Family Law Act*.

51 H. H. Foster, 'Common Law Divorce', (1961) 46 *Minnesota L.R.* 43; Fictions is even a subject category in the Index to Legal Periodicals of the American Association of Law Libraries.

52 As was the situation *In the Marriage of Read* (1977) F.L.C. 90-201.

53 Family law judges have historically not been reticent to adopt fictions—see Watson J's comments in *Read* case at footnote 47; also Foster ante at footnote 51. Mr. Justice Hogan of the Family Court, before his appointment as a judge, described the fictional allegation of concern about marriage stability as a device to justify a consent lump sum maintenance order to thus avoid inter-spousal gift duty. (Conference on the *Family Law Act*, at Macquarie University, February, 1976).

54 Definition (b) of matrimonial cause in s. 4 of the *Family Law Act*.

55 In *Casias v. Wallace* (1971) 17 F.L.R. 490, an unrecognized New Mexican divorce decree provided the court with jurisdiction to make a custody order under the 1959 Matrimonial Causes Act.

56 See H. H. Foster, 'Common Law Divorce', (1961) 46 *Minnesota L.R.*; M. Rheinstein, 'The Law of Divorce and the Problem of Marriage Stability', (1956) 9 *Vand. L.R.* 633; M. Rheinstein, *Marriage Stability Divorce and the Law* (1972) G. O. W. Mueller, 'Inquiry into the State of a Divorceless Society', (1957) 18 *U. Pitt. L.R.* 545.

promises to cohabit which would probably amount to a formerly recognised common law marriage.<sup>57</sup>

The parties to such a *de facto* marriage could subsequently approach the Family Court for a declaration of nullity for defects or absence of the formalities of marriage.<sup>58</sup> In relation to ancillary custody and financial orders under the *Family Law Act*, both s. 60 and s. 71 state that "marriage" includes a void marriage'. Thus, having obtained a nullity decree, the *de facto* couple could logically seek ancillary orders under the *Family Law Act* for the alteration of property interests (and even maintenance and custody orders for their illegitimate children).<sup>59</sup>

Although this argument is a convenient and logical one for a person seeking a centralised family jurisdiction, it remains to be seen whether it will be judicially accepted. It is submitted that a judicial restriction based upon the bona fides of the applicant is likely to develop to control these devices.<sup>59a</sup>

#### (11) Injunctions

Injunctions and analogous orders can be granted under ss. 85 and 114 of the *Family Law Act*.

S. 85 provides inter alia that '[i]n proceedings under this Part, the court may set aside or restrain the making of an instrument or disposition . . . which is made or proposed to be made to defeat an existing or anticipated order in those proceedings for costs, maintenance or the declaration or alteration of any interests in property . . .'

S. 85 does not clearly raise the question of overlap of constitutional powers because, by its express words, orders affecting property can only be made after proceedings under Part VIII (i.e. proceedings for property and/or maintenance orders) have been commenced. Additionally it is arguably a necessary or 'essential' incident of an effective maintenance power that tactics of evasion be controlled.<sup>60</sup>

More difficult questions arise under s. 114 of the Act. S. 114 in both subsections (1) and (3) literally appears to allow orders or injunctions which affect property despite the absence of an application for principal relief.

57 For discussions on the recognition of common law marriages see J. H. Baker, *An Introduction to English Legal History* (1971) P. 255; Toose, Watson and Benjafield, *Australian Divorce Law and Practice* 1968 Para 103; L. Cherniack and C. Fien; 'Common Law Marriages in Manitoba' (1974) 6 *Man. L.J.* 85 at 101-113; A. Hilton, 'The Validity of "Common Law" Marriages' (1973) 19 *McGill L.J.* 577; H. H. Foster, 'Common Law Divorce' (1961) 46 *Minnesota L.R.* 43.

58 *Marriage Act* 1961-1976 (Com.) s. 23; *Family Law Act* 1975-6 (Com.) s. 51.

59 See *Family Law Act* ss. 5 (4), 61, 71; *Ungar v. Ungar* (No. 2) (1968) 11 Fed. L.R. 301 (Allen J.); *Willmore v. Willmore* (1968) 11 Fed. L.R. 204 (Begg J); *Corbett v. Corbett* (No. 2) [1971] P. 110 (ancillary relief granted in nullity cases).

59a Some judges may label such devices as 'frivolous or vexatious' proceedings under s. 118.

60 *In the marriage of Davis* (1976) 11 A.L.R. 445; F.L.C. 90-062. *In the marriage of McCarney* (1977) F.L.C. 90-200 and see the text above footnotes 75-77.

S. 114 provides *inter alia* —

(1) In proceedings of the kind referred to in paragraph (e) of the definition of 'matrimonial cause' in sub-section 4 (1), the court may make such order or grant such injunction as it thinks proper with respect to the matter to which the proceedings relate, including an injunction for the personal protection of a party to the marriage or of a child of the marriage or for the protection of the marital relationship or *in relation to the property of a party to the marriage or relating to the use or occupancy of the matrimonial home.*

(3) A court exercising jurisdiction under this Act in proceedings other than proceedings to which sub-section (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court thinks appropriate.

It would be most inconvenient if orders made under s. 114 (1) or (3) in the absence of an application for principal relief were held to be unconstitutional. Injunctions are useful to preserve the status quo and to prevent squandering or concealment of assets before a detailed hearing concerning finances can be arranged.

Although of course convenience does not necessarily dictate constitutionality some Family Court judges since the High Court decision in *Russell* have in limited circumstances upheld the validity of injunctions affecting property made against a party to the marriage despite the absence of an application for principal relief.<sup>61</sup> These judgments have indeed been influenced by the fear that a restricted injunction power relating to property would encourage bread-winning spouses to conceal or squander assets during their twelve-month period of immunity.<sup>62</sup>

It was suggested under the repealed 1959 Matrimonial Causes Act (Com.) that an injunction affecting property would probably be unconstitutional if granted at a time when principal relief although contemplated had not actually been commenced.<sup>63</sup> This proposition did not cause hardship in many cases as a petitioner could seek principal relief instantly on the grounds of adultery or cruelty under the 1959 Act. Today in many cases, at the moment of marriage breakdown when the

61 *In the Marriage of Davis*, *ibid*; *In the Marriage of Mazein* (1976) 10 A.L.R. 540; F.L.C. 90-053 (obiter of Pawley J.); *In the Marriage of Mills* (1976) 11 A.L.R. 569; F.L.C. 90-079 (obiter of Demack J.); *In the Marriage of Farr* (1976) F.L.C. 90-133 (Murray J.); *In the Marriage of Thompson* (1976) F.L.C. 90-115 (Murray J.); *In the Marriage of McCarney* (1976) F.L.C. 90-015 (Gun J.); on appeal (1977) F.L.C. 90-200 (Full Court of Family Court). See also the discussion of 'Injunctions' in C.C.H. *Australian Family Law and Practice* para 46-200 especially at para 46-330.

62 See especially *In the Marriage of McCarney* (1976) F.L.C. 90-105 (Gun J.); and on appeal (1977) F.L.C. 90-200 where the Full Court of the Family Court concluded, 'We sympathise with the learned trial Judge and share his fears that the law as it now stands will create considerable difficulties and that it may in some cases result in injustice'.

63 *Croumbie-Brown v. Croumbie-Brown* (1968) 12 F.L.R. 406; *Green v. Green* (1962) 4 F.L.R. 300; *Sanders v. Sanders* (1967) 116 C.L.R. 366 at 372.

injunction is most wanted, the applicant must wait twelve months before principal relief is available.<sup>64</sup>

Since *Russell's* case three propositions have been suggested at first instance<sup>65</sup> to justify an injunction under s. 114 (1) or (3) which affects property despite the absence of an application for principal relief.

Firstly, it has been suggested that an application for a s. 114 (1) injunction is itself a matrimonial cause almost regardless of its object.<sup>66</sup> This proposition emerges from one of the definitions of 'matrimonial cause' set out in the *Family Law Act*, together with the terms of s. 114 (1). Whereas an injunction or order made under s. 114 (3) must be made incidentally to some other proceedings under the Act, an independent injunction or order seems to be available under s. 114 (1).

S. 114 (1) provides that '(i) in proceedings of the kind referred to in paragraph (e) of the definition of "matrimonial cause" in s.s. 4 (1), the court may make such an order or grant such injunction as it thinks proper with respect to the matter to which the proceedings relate, . . . including an injunction . . . in relation to the property of a party to the marriage or relating to the use or occupancy of the matrimonial home'.

S. 4 (1) in the definition of 'matrimonial cause', paragraph (e) provides that 'matrimonial cause' means proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship. It appears that this definition begs the constitutional question — what circumstances arising out of the marital relationship are sufficient to give the court jurisdiction to award an injunction as an independent matrimonial cause? One answer is that the purchase, use and occupation of a home is a very basic and common circumstance arising out of the marital relationship.<sup>67</sup> Thus the injunction power does at least apply to the incidents of use and ownership of the matrimonial home. What other circumstances qualify for regulation by injunction? In the light of the present attitude of the High Court reflected in *Russell's* case, one would expect that injunctions under s. 114 (1), although amounting to matrimonial causes themselves, will be restricted to the regulation of that vague bundle of rights and circumstances arising from the very act of marriage.<sup>68</sup>

A second argument in favour of a broad injunction power in relation to property despite the absence of an application for principal relief was suggested *In the Marriage of McCarney* by Gun J. as follows:—

64 Subject to judicial interpretations concerning what amounts to living separate and apart for 12 months. See ante footnotes 36-41.

65 e.g. See *In the Marriage of McCarney* (1976) F.L.C. 90-105 (Gun J.); *In the Marriage of Thompson* (1976) F.L.C. 90-115 (Murray J.); *In the Marriage of Farr* (1976) F.L.C. 90-133 (Murray J.).

66 Ibid *McCarney's* case. Support can perhaps be found for this view by isolating certain general statements made by the High Court in *Sanders v. Sanders* (1967) 116 C.L.R. 366 at 372 and in *Antonarkis v. Delly* (1976) 10 A.L.R. 251 at 255-6.

67 Ibid *McCarney*.

68 See the discussion of 'matrimonial property' footnotes 82-90, being one of the incidents of the marital relationship at

The powers of the Court under sec. 4 (1) (e) and 114 (1) do not give the Court power to make orders relating to property which it would not have under sec. 79. These sections, however, in my opinion, do give the Court power to preserve rights created by the marital relationship until such time as they can be properly considered by the Court. I would include in such rights the rights created by sec. 79.<sup>69</sup>

In order to rebut this argument one can only repeat that no doubt preservation of all assets owned by the married persons until a suitable hearing date would be a very useful power, but after *Russell's* case, convenience is scarcely equated with constitutional validity. Also, under s. 79, neither party to the marriage has any property 'rights' to preserve by injunction as s. 79 only grants the court power to make just and equitable alterations to property interests.<sup>70</sup>

Thirdly, it has been suggested that the court can make orders under s. 114 (1) which merely 'affect' property rights rather than 'alter' them.<sup>71</sup> This distinction is allegedly important because s. 79 expressly confers a power to 'alter' property interests and it is the s. 79 power which must be exercised incidentally to an application for principal relief.<sup>72</sup> However, it is difficult to discern a real distinction between 'altering' and 'affecting' property interests even on the basis of the judicial statement that 'it is a question of degree in every case as to when a proprietary interest becomes so affected as to be altered . . .'<sup>73</sup> But more importantly, even if the distinction can be properly made, the power to affect property interests can still only be exercised where the court has jurisdiction over a matrimonial cause. Thus the old question arises yet again — what circumstances, rights and duties arise out of the marital relationship and thereby are subject to regulation by order or injunction?<sup>74</sup>

Apart from these cases at first instance, the Full Court of the Family Court has stated two further propositions which, alternatively or cumulatively, justify injunctions which affect property despite the absence of an application for principal relief.<sup>75</sup>

Firstly, the court can in effect alter property interests under s. 114 (3) by granting an 'injunction in relation to the use and occupation of the matrimonial home as part of its powers in proceedings for maintenance

69 *McCarney* (Gun J.) at footnote 53 but now overruled by the Full Court of the Family Court on appeal — *In the marriage of McCarney* (1977) F.L.C. 90-200.

70 *McCarney*, *ibid*; (Full Court of Family Court).

71 e.g. *In the Marriage of Farr* (1976) F.L.C. 90-133 (Murray J.).

72 See *Russell v. Russell*; *Farrelly v. Farrelly*, footnote 5, and s. 4 (1) (ca) definition of matrimonial cause; *In the marriage of Farr* *ibid*.

73 *In the Marriage of Farr* (Murray J.) *ibid*.

74 Paragraph (e) of the definition of 'matrimonial cause' in section 4 (1).

75 *In the Marriage of Davis*, footnote 61. *In the Marriage of McCarney* (1977) F.L.C. 90-200.

or custody, where use and occupation is an essential element of maintenance or custody'.<sup>76</sup>

It is not clear when use and occupation are 'essential'. Certainly there are many situations where use and occupation orders are 'helpful' and 'convenient' for effective maintenance or custody orders.<sup>77</sup>

Presumably the word 'essential' refers to the court's *power* to make such an order rather than its *discretion* concerning whether to exercise that power. The court's discretion is governed by the express provision in s. 114 (3) that an order affecting property can be made where it is 'just and convenient' to do so. Probably the word 'essential' has an element of wish fulfilment in it to create the necessary jurisdictional nexus between the valid maintenance or custody order and the suspect (though helpful) property order.

Once the court concludes that it has power to grant an injunction, it has a discretion under s. 114 (1) to make such an order where it is 'proper' and under s. 114 (3) where it is 'just and convenient'.<sup>78</sup>

In exercising this discretion, however, the court should not readily extend the terms of the injunction so as to interfere with the rights of one party under state legislation such as the married women's property legislation.<sup>79</sup>

Secondly, the Family Court can make a use and occupation order (and logically perhaps even more extensive property orders) at a pre-principal relief stage where the order only affects 'matrimonial property'.<sup>80</sup>

This is based on the proposition that the acquisition of matrimonial property is one of the normal incidents that arise from the marital relationship. The concept of matrimonial property is not defined in the judgment of the Full Court of the Family Court, but rather is described by way of example as 'property acquired during or in contemplation of the marriage for the benefit of the parties to the marriage'.<sup>81</sup>

76 *Davis* *ibid.* See also *In the Marriage of Mazein* [1976] 10 A.L.R. 540; F.L.C. 90-053 where Pawley J. said that a pre-principal relief injunction relating to occupation of property can be granted where it is 'primarily' a matter involving maintenance; and *In the Marriage of D'Agostino* (1976) F.L.C. 90-130 (McCall J.) where the use and occupation order was incidental to a custody order and additionally related to matrimonial property; and *In the Marriage of McCarney* (1977) F.L.C. 90-200 (Full Court of the Family Court) — property orders are possible where they are 'vital' to the welfare of children). Presumably the federal power under section 85 of the *Family Law Act* to make orders affecting property prior to the institution of proceedings for principal relief rests on a similar argument.

77 e.g. *D'Agostino* *ibid.*

78 On the meaning of 'proper' see *National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175 (House of Lords) especially Lord Wilberforce at 1244-1245; *In the Marriage of Davis*, footnote 61. Note the difficulty of proving a sufficient degree of probability that assets will be concealed or squandered before a s. 114 injunction will be granted — e.g. *In the Marriage of Thompson* (1976) F.L.C. 90-115 (Murray J.).

79 *McCarney* (Full Court of the Family Court) — ante footnote 57.

80 *Davis*, *McCarney* ante footnote 63.

81 *Ibid.* Also *In the Marriage of D'Agostino* (1976) F.L.C. 90-130 (McCall J.).



In a similar fashion, the English Court of Appeal has described 'family assets' as 'things acquired by one or other or both parties with the intention that they should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole'.<sup>82</sup>

The inadequacy of each description does not reflect upon either the Full Court of the Family Court or the English Court of Appeal as law reform commissions in many jurisdictions have struggled with definitions of 'family assets' or 'matrimonial property' or 'community property'.<sup>83</sup>

In *Russell's* case, members of the High Court took notice of this distinction between matrimonial and non-matrimonial property. For example, Barwick C.J. said, 'I have already referred to the attempt to create a jurisdiction with respect to property in which neither party has any right by virtue of marriage but only for example by virtue of contract or inheritance'.<sup>84</sup>

Additionally the Full Court of the Family Court while interpreting *Russell's* case concluded, 'Mason J.'s judgment implies that the marriage power may support wider powers than those now conferred by s. 78 and 79 to deal with the property of parties to a marriage'.<sup>85</sup>

The constant repetition of this vague phrase 'family assets' or 'matrimonial property' cannot be overlooked for much longer in Australia. These phrases have been used predominantly where property is being divided at the time of dissolution.<sup>86</sup> Both legislature and judiciary have carefully avoided any comprehensive consideration of what is a 'family asset'. When this phrase is taken seriously, it will open the Pandora's box of a matrimonial property regime in Australia.

If by judicial or legislative creativity in Australia, property ownership becomes affected by the very fact of marriage, then logically under the marriage power<sup>87</sup> the federal government could legislate freely concern-

82 *Wachtel v. Wachtel* [1973] 1 All E.R. 829 at 836. See also criticism of the term 'family assets' by members of the House of Lords in *Pettitt v. Pettitt* [1969] 2 All E.R. 385, e.g. at 402, 409, 410.

83 e.g. Canada — Law Reform Commission *Family Property* Working Paper, 1975; *Report on Financial Provision in Matrimonial Proceedings*, (London H.M.S.O. 1969 Law Comm. No. 25); Ontario Law Reform Commission *Report on Family Law Part IV, Family Property Law* (1974); Law Reform Commission of Saskatchewan, Working Paper on *Division of Matrimonial Property* (1974); Powell, 'Community Property — A Critique of its Regulation of Intra-Family Relations', (1936), 11 *Washington L.R.* 10; *Matrimonial Property Law*, (ed. W. Friedmann 1955); O. Kahn-Freund (1970), 33 *M.L.R.* 601; (1971) 35 *M.L.R.* 403; (1952) 15 *M.L.R.* 133; (1953) 16 *M.L.R.* 34 and 148.

— Do family assets include shares, insurance, superannuation, family inheritances, lottery wins, compensation for accidents, pre-marriage assets, assets purchased with pre-marriage savings etc.?

84 1976 50 A.L.J.R. 594 at 601.

85 *In the Marriage of Davis* (1976) F.L.C. 90-062 at 75, 308.

86 *Wachtel v. Wachtel* [1973] 1 All E.R. 829 (C.A.) 'family assets'; *In the Marriage of Willett* (1976) F.L.C. 90-022 (S.C. of W.A.) 'family fund' with a deduction for pre-marriage assets; *In the Marriage of Puls* (1976) F.L.C. 90-036.

87 Section 51 (xxi) of the Constitution.

ing such matrimonial property. This is hinted at by Barwick C.J. in *Russell's* case when he says '... a system of communal property between spouses might possibly be erected as a consequence of the act of marriage — I have no need to decide nor to concede that such a course is possible... But, in the [Family Law] Act, it is sought to create such a jurisdiction as to property in which no interest is derived from the act of marriage'.<sup>88</sup>

#### (12) Maintenance Agreements

The Family Court has specific jurisdiction over the registration and enforcement of maintenance agreements which are defined as 'matrimonial causes'.<sup>89</sup>

Where a maintenance agreement is registered under the *Family Law Act*<sup>90</sup> the court is given jurisdiction to enforce any clauses of that agreement relating to property. Thus it appears that by agreement, a married couple can in effect confer jurisdiction over at least the enforcement of a property order despite the absence of an application for principal relief.<sup>91</sup>

The relevant provisions of the Act are as follows:— a 'maintenance agreement' is defined as 'an agreement in writing made... between the parties to a marriage, being an agreement that makes provision with respect to financial matters...'<sup>92</sup>; and 'financial matters' include matters with respect to the property of the parties to a marriage,<sup>93</sup> such a maintenance agreement can be registered or deemed to be registered in the court;<sup>94</sup> a registered maintenance agreement can be enforced as if it were an order of that court;<sup>95</sup> and enforcement powers include the power to 'order that any necessary deed or instrument be executed'<sup>96</sup> or a power to order sale.<sup>97</sup>

The availability of a property component in s. 86 maintenance agreements leads to a further possible avenue for property orders in the absence of an application for principal relief. Reference has already been made to s. 88 which provides that where a maintenance agreement (including its property clauses) has been registered in the court, it may be enforced as if it were an order of that court. There is authority for the proposition that property orders made under the *Family Law Act*

88 (1976) 50 A.L.J.R. 594 at 600; See also obiter comments in the *Marriage Act* case (1962) 107 C.L.R. 529 at 560-61 (Taylor J.).

89 See the definition of 'matrimonial cause' in s. 4 (1) (d) and (f) of the *Family Law Act*.

90 Under s. 86 or 87 *ibid*.

91 *In the Marriage of Macsok* [1976] F.L.C. 90-046 (Watson J.).

92 From s. 4 of the *Family Law Act*.

93 *Ibid*.

94 Sections 86 and 87 *ibid*. A s. 87 agreement once approved by the court is deemed to be registered — s. 87 (7).

95 *Ibid*. s. 88.

96 *Ibid*. s. 80 (g).

97 Cumulatively found in s. 81 and s. 80 (k) per Asche J. *In the Marriage of McDougall* (1976) F.L.C. 90-076.

can be varied.<sup>98</sup> Thus the question that arises is whether the property clauses contained in a s. 86 maintenance agreement entered into prior to an application for principal relief can be varied as if they were orders of the court?<sup>99</sup> Although this question must await an appellate court decision there does not seem to be any persuasive reason of statutory or constitutional interpretation to prevent orders from varying property clauses in maintenance agreements.

### (13) Lump Sum Maintenance Orders

One device used in Canadian courts to overcome analogous constitutional problems is the lump sum maintenance order which can alternatively be satisfied by division of property. This kind of order at least provides a means whereby the court administering the Canadian *Divorce Act*<sup>100</sup> can make a division of property order.

In Canada, the Federal Parliament has constitutional power to legislate in relation to 'marriage and divorce'<sup>101</sup> and the provincial legislatures have specific power to legislate in relation to 'property and civil rights'.<sup>102</sup> These heads of powers have been interpreted so that federal legislation cannot confer jurisdiction to make division-of-property orders at any time even when ancillary to a divorce petition.<sup>103</sup> However, judges hearing divorce petitions pursuant to the Canadian *Divorce Act*<sup>104</sup> commonly avoid the constitutional problem in the following manner. At the hearing evidence is given concerning alleged property ownership. This is obviously relevant in relation to possible maintenance orders.<sup>105</sup> At the request of counsel for the petitioner the judge finally makes a lump sum maintenance order which however the respondent can satisfy by the alternative method of transferring specified property to the petitioner — say for example his interest in the matrimonial home.

There are several reported examples of these kinds of orders in the Canadian cases. For example:

There will be a lump sum settlement of \$3,000 which may be satisfied by the respondent conveying to the petitioner a one-fifth interest in the property the petitioner to pay the costs of transfer.<sup>106</sup>

98 *In the Marriage of King* (1976) F.L.C. 90-113 (McCall J.); but see *In the Marriage of McDonald* (1976) F.L.C. 90-047 where the Full Court of the Family Court leaves the question open.

99 Variation is not normally possible in relation to an approved s. 87 maintenance agreement (s. 87 (3)) subject to stated exceptions (s. 87 (6), (9)).

100 R.S.C. 1970, C.D.-8, first enacted in 1968.

101 s. 91 (26) of the *British North America Act*, 30 & 31 Vict., c. 3 (1867).

102 *Ibid.* s. 92 (13).

103 See Report of the Special Joint Committee of the Senate and House of Commons on Divorce, June 1967, pp. 59-60; *Olynyk v. Olynyk* (1932) 1 W.W.R. 825; *Switzer v. Switzer* (1969) 1 R.F.L. 262, 70 W.W.R. 161, 7 D.L.R. (3d) 638 (Alta C.A.); *Morrison v. Morrison* (1971) 4 R.F.L. 399; contra D. J. MacDougall, 'The Constitution and Ancillary Relief under the Divorce Act' (1969) Vol. 27, Part 5, *The Advocate*, 260.

104 R.S.C. 1970 C.D.-8.

105 Compare s. 75 (2) (b) of the *Australian Family Law Act* 1975.

106 *Burkard v. Burkard* (1973) 10 R.F.L. 33 at 36 (Manitoba Q.B. — Matas J.).

... the respondent spouse shall make a lump sum settlement on the petitioner of \$10,000 and judgment will go for that amount accordingly, provided that this judgment may be satisfied insofar as the lump sum is concerned by the conveyance by the respondent spouse to the petitioner of all of his right, title and interest in the matrimonial home known municipally as 1817 Truscott Drive, Clarkson, Ontario.<sup>107</sup>

An order in this alternative form may not have the desired effect of compelling a husband to transfer the matrimonial home or other specified property to his wife as he may choose to pay the lump sum. Perhaps the desired alternative can be encouraged by ordering a high enough lump sum payment to make the alternative property transfer blatantly more attractive to the respondent.<sup>108</sup>

As long as the order is made in this alternative form it is classified as a maintenance order and therefore within the constitutional power of the federal government.

#### (14) *Enforcement of Maintenance Orders*

Prior to proceedings for principal relief, a maintenance order can be made and secured by charge over a specific item of the payor's property<sup>109</sup> even though courts are reluctant to so secure maintenance payments unless clear evidence of the payor's irresponsible nature is produced.<sup>110</sup> Similarly, enforcement procedures for any maintenance order can be taken by requesting that an officer of the court seize the personal property of the defaulting payor.<sup>111</sup>

Thus indirectly the *Family Law Act* again enables orders which affect the ownership of property and presumably such a power would be constitutionally valid as a necessary incident of the maintenance power when exercised prior to proceedings for principal relief.

#### *Conclusion*

This list of fourteen possible methods of obtaining orders relating to property in the absence of an application for principal relief in the Family Court will not concern the majority of applicants in family disputes. Most applicants can wait until the principal relief hearing and then obtain property orders under s. 79. However, the list will remain relevant for the purposes of practice and reform where one party in a marriage dispute either urgently wants a property order or wants a property order and does not intend to seek principal relief.

107 Per Keith J. in *Schulte v. Schulte* (1972) 6 R.F.L. 164 at 170 (Ont. S.C.). See also *Lawson v. Lawson* (1973) 9 R.F.L. 294 at 296 (Ontario S.C. — Keith J.); *Omelance v. Omelance and Bissinger* (No. 2) (1972) 6 R.F.L. 196 (B.C.S.C. — Kirke-Smith J.); *Chadderton v. Chadderton* (1973) 8 R.F.L. 374 at 377 (Arnup J.).

108 The writer observed hearings in Winnipeg in the Manitoba Court of Queen's Bench in 1973 where several orders appeared to be made on this basis.

109 s. 80 (d), (i) and (k); s. 84 of the *Family Law Act*.

110 e.g. *In the Marriage of Thompson* (1976) F.L.C. 90-115 (security denied); *In the Marriage of Alexander* (1977) F.L.C. 90-257 (security for wife's future costs ordered).

111 ss. 105-106, regulation 135 (seizure of personal property) and 136 (sequestration of estate) under the *Family Law Act*.