

# JURISDICTION WITHOUT TEARS: A GUIDE TO THE JURISDICTION OF THE FAMILY COURT OF WESTERN AUSTRALIA

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*This article provides an introduction both to the jurisdiction of courts in general and to the jurisdiction of the Family Court of Western Australia in particular. It commences with an outline of the three basic rules that govern the jurisdiction of all courts in Australia. It then describes the particular heads of jurisdiction and powers that are possessed by the Family Court of Western Australia, and also the jurisdiction of the court of summary jurisdiction that is associated with it, the Court of Petty Sessions, 150 Terrace Road, Perth.*

## INTRODUCTION

In theory, questions of jurisdiction should be relatively easy to resolve. No arcane knowledge is involved, and no special talents that are foreign to the legal mind. In theory, all that is required to determine questions concerning the jurisdiction of courts in Australia is an awareness of three basic rules and an ability to follow the jurisdictional trail that leads from the first of them. If there is a problem associated with questions of jurisdiction it is that the jurisdictional trail sometimes becomes a maze, or that the trail seems to peter out before a satisfactory resolution of a jurisdictional problem is achieved. Any special skills associated with jurisdictional questions usually concern how to deal with problems of this kind.

This paper does not seek to resolve any of the jurisdictional problems that still surround the Family Court of Western Australia. Instead, it seeks simply to outline the fundamental information which the resolution of any

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particular jurisdictional problem necessarily involves. In particular, it presents, first, an account of the three basic rules that apply to the jurisdiction of courts in Australia, and secondly, details of the particular heads of jurisdiction that have been conferred on both the Family Court of Western Australia and the magistrates' court associated with it, formally known as the Court of Petty Sessions, 150 Terrace Road, Perth.

## THE THREE BASIC RULES CONCERNING THE JURISDICTION OF COURTS IN AUSTRALIA

There are three basic rules that apply to the jurisdiction of courts in Australia. The first derives from the fact that all courts fall into two classes: courts of general jurisdiction and courts of limited jurisdiction. Courts of general jurisdiction are presumed to have jurisdiction over all matters unless it can be established this has been limited by statute. All Supreme Courts are courts of general jurisdiction. This is so even though their jurisdiction derives from statute, for this jurisdiction is nonetheless deemed to invest these courts with general jurisdiction. Courts of limited jurisdiction, on the other hand, are presumed not to have jurisdiction on any matter unless it can be shown that this has been conferred upon the court. Both the Family Court of Australia and the Family Court of Western Australia are courts of limited jurisdiction.<sup>1</sup> So also is the Federal Court, and so too is the High Court.

The second basic rule is that all courts have certain implied powers — what until recently was commonly called “inherent jurisdiction”<sup>2</sup> — by virtue of being courts of justice. These implied powers enable courts to do what is necessary for them to perform their functions with justice and efficiency.<sup>3</sup> Implied powers have long been recognized as residing in the Family Court of Australia.<sup>4</sup> There is no doubt that they also reside in the Family Court of Western Australia.

The ambit of a court's implied powers is somewhat uncertain.<sup>5</sup> It is now well established that these powers include the power to adjourn, dismiss or

1. *In the Marriage of Vergis* (1977) 29 FLR 227, 232; *In the Marriage of Sims* (1981) 55 FLR 67, 76. See also *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185, 193, 207, 215.
2. On the proper distinction between implied powers and inherent jurisdiction, see *R v Grassby* (1989) 168 CLR 1, 16–17.
3. *Bogeta Pty Ltd v Wales* [1977] 1 NSWLR 139, 148; *Parsons v Martin* (1984) 5 FCR 235, 241; *Jackson v Sterling Industries Ltd* (1986) 12 FCR 267, 272.
4. See eg *Taylor v Taylor* (1979) 143 CLR 1, 6–7, 10, 16, 20, 22; *In the Marriage of S; Re S & P* (1982) 66 FLR 315, 323, 338.
5. On the limits of these powers, see *Simsek v MacPhee* (1982) 148 CLR 636, 640–641; *R v Ross-Jones; Ex parte Green* supra n 1.

stay proceedings,<sup>6</sup> to set aside an order that has been obtained contrary to a rule of natural justice<sup>7</sup> and to prevent an abuse of the court's process.<sup>8</sup> If there is a common element in the recognized implied powers it appears to be that these powers are procedural in nature. In any event, they do not invest a court with any substantive power that it does not otherwise possess. (Consistently with this, for example, the Family Court has held that it does not have any implied power to make a declaration as to the death of a spouse<sup>9</sup> or a declaration as to the value of property.<sup>10</sup>)

The third basic rule is subject to some uncertainty in the ambit of its application, though except in respect of the High Court (and perhaps the Family Court of Western Australia) it is now not very important in any event. This rule is that a court invested with federal jurisdiction is also invested with additional jurisdiction — commonly called “accrued jurisdiction” — to determine any non-federal aspects of a controversy involving the exercise of its federal jurisdiction. Although this accrued jurisdiction has been recognized as applying to both the High Court<sup>11</sup> and the Federal Court,<sup>12</sup> its applicability to the Family Court of Australia, and consequently to the Family Court of Western Australia, has been subject to judicial uncertainty, with some Family Court judges recognizing its existence<sup>13</sup> and others doubting it.<sup>14</sup> The only clear instance of the Family Court of Australia having exercised accrued jurisdiction was in *In the Marriage of Lye*<sup>15</sup> in 1983.

As a matter of principle, if one federal court has accrued jurisdiction there would seem no reason to deny its existence in another federal court. Some Family Court judges, however, have suggested that the limited

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6. *In the Marriage of Tansell* [1977] FLC 76 619, 76 625; *In the Marriage of Takach (No 2)* (1981) 6 Fam LR 848, 850; *In the Marriage of Emmett* [1982] FLC 77 130, 77 133; *In the Marriage of Aldred; Westpac Banking Corp (Applicant)* [1986] FLC 75 490, 75 491.
  7. *Taylor v Taylor* supra n 4.
  8. *In the Marriage of Blann* [1983] FLC 78 810, 78 185.
  9. *In the Marriage of Manning* [1977] FLC 76 573.
  10. *In the Marriage of Smith* [1979] FLC 78 356.
  11. See *R v Bevan; Ex parte Elias & Gordon* (1942) 66 CLR 452, 465.
  12. *Philip Morris Inc v Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; *Fencott v Muller* (1983) 152 CLR 570.
  13. See *In the Marriage of Af Petersens* [1981] FLC 76 657, 76 665; *In the Marriage of McKay* (1984) 73 FLR 313, 318–319; *In the Marriage of Smith* (1985) 81 FLR 251, 254–263; *In the Marriage of Ireland; Collier (3rd Pty)* [1986] FLC 75 304, 75 312–75 313.
  14. See *In the Marriage of Prince* (1984) 69 FLR 150, 155–160; *In the Marriage of McKay* supra n 13, 322–330; *In the Marriage of Smith* (1985) supra n 13, 273–279.
  15. [1983] FLC 78 210. Note, however, the critical observations on the exercise of accrued jurisdiction in this case in: *In the Marriage of Prince* supra n 14, 160; *In the Marriage of McKay* supra n 13, 322, 329; *Giammona v Giammona* (1985) 73 FLR 362, 366.

jurisdiction that is vested in the Family Court of Australia, as opposed to the broad jurisdiction that is vested in the Federal Court of Australia, indicates that the jurisdiction of the Family Court is confined to that specifically vested in it, with the result that it has no accrued jurisdiction.<sup>16</sup>

The question whether the Family Court has accrued jurisdiction was raised in the High Court case *Smith v Smith*.<sup>17</sup> Although the issue before the court in this case was resolved without any need to rely upon any accrued jurisdiction, the tenor of at least the joint judgment of Gibbs CJ and Wilson and Dawson JJ suggests that the Family Court of Australia does have accrued jurisdiction.<sup>18</sup> And if the Family Court of Australia has accrued jurisdiction, there would seem to be no reason why the Family Court of Western Australia should not also have it when exercising its federal jurisdiction.

The question of whether the Family Court of Australia has accrued jurisdiction has largely become academic following the commencement of the Jurisdiction of Courts (Cross-vesting) Acts 1987. However, in light of the limits upon the cross-vested jurisdiction of the Family Court of Western Australia (a matter that is referred to in more detail later in this article), it may be that the question of whether this State Family Court has accrued jurisdiction is of continuing importance.

## NOTE ON THE DISTINCTION BETWEEN JURISDICTION AND POWER

Before proceeding further, a distinction must be drawn between the jurisdiction of a court and its powers. The term “jurisdiction” in the present context signifies the authority of a court. Put another way, it signifies the general area over which a court may exercise power (provided that actual power on a particular matter is otherwise possessed by it). The term “power” signifies the ability of a court to make an order within the scope of its jurisdiction.<sup>19</sup>

It should be evident from this distinction that jurisdiction and power are not co-terminous. A court may have jurisdiction on a matter (eg, it may have jurisdiction in respect of property disputes) but no power to make an order within the scope of its jurisdiction (eg, an order requiring the sale of property) because this has not been particularly conferred upon it. It follows from this

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16. *In the Marriage of McKay* supra n 13, 322–329; *In the Marriage of Smith* supra n 13, 276, 277–278.

17. (1986) 161 CLR 217.

18. *Id.*, 236–237. Cf 250–251 (Mason, Brennan & Deane JJ).

19. See *In the Marriage of Ioppolo & Conti* [1987] FLC 76 428, 76 440.

that for a court to possess jurisdiction in respect of a matter does not necessarily mean that it has power to make an order in respect of it. On the other hand, for practical reasons it is generally assumed that if a court has power conferred upon it to make a particular order, it also has jurisdiction so to do.

This paper is primarily concerned with the jurisdiction of the Family Court of Western Australia and the Court of Petty Sessions. However, it also has regard to some particular powers that come within the scope of the jurisdiction of these courts.

## **THE JURISDICTION OF THE FAMILY COURT OF WESTERN AUSTRALIA**

### **1. Introduction**

The Family Court of Western Australia is a court of limited jurisdiction. Its jurisdiction is thus limited to that which has been expressly conferred on it by legislation, though it also possesses certain implied powers that enable it to perform its functions with justice and efficiency. As this court exercises both State and federal jurisdiction, its sources of jurisdiction lie in both State and federal legislation.

### **2. Federal jurisdiction of the court**

#### **(i) Introduction to the federal jurisdiction of the court**

The federal jurisdiction of the Family Court of Western Australia is invested by four Commonwealth statutes: the Marriage Act 1961, the Family Law Act 1975, the Child Support (Registration and Collection) Act 1988 and the Child Support (Assessment) Act 1989. Of these, the most important is the Family Law Act.

#### **(ii) Jurisdiction under the Family Law Act**

The jurisdiction of the Family Court of Western Australia under the Family Law Act 1975 (Cth) has two main sources, namely sections 63(1) and 41(3). The former concerns proceedings in respect of children. The latter concerns various proceedings, but particularly those which constitute “matrimonial causes” as defined in section 4(1).

#### **(a) Jurisdiction in respect of children**

Section 63(1) invests the State Family Court with general jurisdiction

in relation to matters arising under Part VII (“Children”) of the Act. Section 60G supplements this by also investing the court with jurisdiction with respect to guardianship, custody, welfare, access and child maintenance matters arising between residents of different States. (As an aside, it may be observed that section 60G simply confers jurisdiction. It does not specify what law must be applied in proceedings in respect of children between residents of different States. It is almost certainly the case that the law to be applied in such proceedings is the law of the forum, that is, the law of the jurisdiction entertaining the proceedings.<sup>20</sup>)

**(b) Jurisdiction in respect of “matrimonial causes” and other matters**

Section 41(3) invests the Family Court of Western Australia with a more wide-ranging jurisdiction, but in a rather awkward way. It provides that from the date fixed by proclamation, four sections of the Act which otherwise invest jurisdiction in the State Supreme Courts are to be read as if the references to the Supreme Court were references to the State Family Court. The four sections are 39, 46, 94 and 96. The most recently proclaimed relevant date is 5 November 1991.<sup>21</sup>

Of the four provisions referred to in section 41(3), the most important is section 39. (Section 46 concerns simply the transfer of proceedings from a court of summary jurisdiction, and sections 94 and 96 both concern appeals. Section 39, however, concerns original jurisdiction.) By section 39(5), State Supreme Courts — and thus, by virtue of section 41(3), the Family Court of Western Australia — have jurisdiction with respect to various matters, of which the most significant is “matrimonial causes” as defined in section 4(1). The other matters referred to in section 39(5) concern proceedings under section 117A for reparation for certain losses and expenses relating to children, and proceedings instituted under regulations or rules made for the purposes of sections 109 to 111B, section 123(1)(r) and section 125(1)(f) and (g). The latter broadly concern the enforcement of maintenance liabilities.

**(c) Effect of sections 63(1) and 41(3)**

The combined effect of section 63(1) (with section 60G) and section 41(3) is to give the Family Court of Western Australia jurisdiction in respect of all matters that may arise under the Family Law Act 1975 concerning

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20. See A Dickey “Applicable Law in Custody Cases involving Residents of Different States” (1990) 64 ALJ 428.

21. See Cth Govt Gazette, 4 Nov 1991 (No S300 of 1991).

children, and all "matrimonial causes" as defined in section 4(1) of the Act. The jurisdiction of the Family Court of Western Australia is in this regard much the same as that of the Family Court of Australia. The main difference between the jurisdiction of the two courts is that by virtue of section 60F(2), many of the provisions of Part VII ("Children") of the Family Law Act 1975 apply in Western Australia only to the children of a marriage and to the parties to the marriage. Elsewhere in Australia the provisions of Part VII apply to children generally and to the parents of all children.

Despite the similarity between the jurisdiction of the Family Court of Western Australia and the Family Court of Australia, the jurisdiction of these courts cannot be regarded as virtually equivalent. The Family Court of Australia has two additional heads of jurisdiction which have not been invested in the Family Court of Western Australia.

The first additional head of jurisdiction is conferred by section 31(1)(d). This gives the Commonwealth court jurisdiction with respect to "matters (other than matters referred to in any of the preceding paragraphs) with respect to which proceedings may be instituted in the Family Court under this Act or any other Act". Although the precise scope of this head of jurisdiction is currently unclear, as presently interpreted it confers jurisdiction in respect of any other proceedings for which the Family Law Act 1975 makes provision,<sup>22</sup> and any proceedings which may be instituted in the Family Court under some other Act. It may be that by virtue of this head of jurisdiction the Commonwealth court can exercise criminal jurisdiction under the Family Law Act 1975.<sup>23</sup> (In practice, however, the Family Court of Australia does not exercise any criminal jurisdiction.<sup>24</sup> Criminal jurisdiction under the Family Law Act 1975 is administered by State and Territorial criminal courts.<sup>25</sup>) The absence of any equivalent provision to section 31(1)(d) in respect of the Family Court of Western Australia means that the State Family Court has to rely upon particular jurisdiction being vested in it in order to determine any proceedings under the Family Law Act 1975 or under any other Commonwealth statute.

The second head of jurisdiction which has not been invested in the Family Court of Western Australia is jurisdiction in "associated matters".

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22. See *Re Stehbens; Ex parte Stehbens* (1982) 59 FLR 166, 172; *In the Marriage of McKay* supra n 13, 324.

23. See A Dickey "The Criminal Jurisdiction of the Family Court" (1992) 66 ALJ 599.

24. The contempt provisions of the Act do not constitute criminal law. Nor do the quasi-contempt provisions of s. 112AD: *In the Marriage of Schwarzkopff* [1992] FLC 79 282.

25. See Judiciary Act 1903 (Cth) s 68.

This is conferred upon the Family Court of Australia by section 33 of the Family Law Act. This section confers jurisdiction on the Commonwealth court in respect of matters that do not come within the scope of any jurisdiction specifically conferred upon the court by statute but which are nonetheless associated with matters that come within the scope of the court's specifically conferred jurisdiction.<sup>26</sup>

The importance of the jurisdiction conferred by section 33 has, however, been diminished by a series of High Court decisions between 1981 and 1983 in respect of the similar jurisdiction conferred upon the Federal Court by section 32(1) of the Federal Court of Australia Act 1976 (Cth). In these decisions, the High Court held that section 32(1) invests jurisdiction in the Federal Court only in respect of associated matters that arise under Commonwealth law — in other words, that arise under a Commonwealth statute which does not itself invest the court with jurisdiction.<sup>27</sup> These cases make it clear that, for constitutional reasons, section 32(1) does not invest the Federal Court with jurisdiction in associated matters which arise under State law. There is now no doubt that the same principle applies in respect of section 33 of the Family Law Act 1975.<sup>28</sup>

### (iii) Jurisdiction under the Marriage Act

The main power that is conferred upon the Family Court of Western Australia under the Marriage Act 1961 (Cth) concerns a declaration of legitimacy of a person. By section 92(1) of this Act, the State Family Court can make a declaration either that the applicant is a legitimate child of his or her parents, or that the applicant, or an ancestor or descendant of the applicant, is or was legitimated. Although the notion of legitimacy is no longer important under modern law, a declaration of legitimacy may still serve an important practical function in that it necessarily involves a declaration of paternity.

It may be observed in respect of jurisdiction under the Marriage Act 1961 that under Part II of this Act, judges of the Family Court of Western

26. See *In the Marriage of Kitchener* (1978) 34 FLR 448, 451.

27. *Philip Morris Inc v Brown Male Fashions Pty Ltd* supra n 12, 494–496 (Gibbs J), 506, 516 (Mason J, with whom Stephen J agreed), 536, 538 (Atkin J), 547 (Wilson J) (contra 477–479 (Barwick CJ), 520–522 (Murphy J)); *Fencott v Muller* supra n 12, 625 (Dawson J); *Stack v Coast Securities (No 9) Pty Ltd* supra n 12, 278 (Gibbs CJ).

28. *Smith v Smith* supra n 17, 240. See also *In the Marriage of Prince* supra n 14, 159; *In the Marriage of Gubbay* [1984] FLC 79 410, 79 412; *In the Marriage of Saba* [1984] FLC 79 669, 79 673; *Giammona v Giammona* supra n 15; *In the Marriage of Smith* supra n 13, 254–256, 271, 273.

Australia may authorize marriage by a person who is not of marriageable age,<sup>29</sup> and give consent to marriage by a minor.<sup>30</sup> These powers do not, however, concern the jurisdiction of courts for two reasons. First, the power is given to judges, and not to a court. Secondly, these powers can be exercised only after the judge has conducted an inquiry.<sup>31</sup> It has been held that this inquiry is strictly an administrative, and not a judicial, process.<sup>32</sup>

#### **(iv) Jurisdiction under the Child Support Acts**

The Child Support (Registration and Collection) Act 1988 (Cth) and the Child Support (Assessment) Act 1989 (Cth) both confer jurisdiction on the Family Court of Western Australia to hear matters arising under these Acts.<sup>33</sup> The 1989 Act provides for the administrative assessment of child support by a department of the Australian Taxation Office known as the Child Support Agency, and the 1988 Act provides for the collection of assessed child support and certain other maintenance liabilities, particularly by the automatic deduction of the amounts due from income at source. Although these two Acts are primarily concerned with the administration of the child support scheme by government departments, they confer certain powers on the State Family Court. In particular, they confer power on the court to review decisions made by administrators under these Acts,<sup>34</sup> to order a departure from the provisions of the 1989 Act relating to administrative assessment<sup>35</sup> and to order that child support be provided other than by periodical payments.<sup>36</sup>

### **3. State jurisdiction of the court**

The main source of State jurisdiction for the Family Court of Western Australia is section 27(2) of the Family Court Act 1975 (WA). This confers jurisdiction upon the court in respect of the custody, guardianship, welfare and maintenance of children, access to children, preliminary expenses and other child expenses, and the property of parties to a marriage. It should be observed that this grant of jurisdiction *prima facie* covers all children,

29. S 12, with s 5(1) (definition (b) of "judge"), and arrangements made under s 9(1).

30. Ss 16, 17, with s 5(1) (definition (b) of "judge"), and arrangements made under s 9(1).

31. See ss 12(2), 16(2).

32. *Re Hampton* (1965) 7 FLR 353, 356.

33. Child Support (Registration & Collection) Act 1988 (Cth) s 104(1); Child Support (Assessment) Act 1989 (Cth) s 99(1).

34. See Child Support (Registration & Collection) Act 1988 (Cth) Pt VII, Div 1; Child Support (Assessment) Act 1989 (Cth) ss 106, 107, 110, 132.

35. Child Support (Assessment) Act 1989 (Cth) s 117.

36. *Id.*, s 124.

including children of a marriage as well as ex-nuptial children. This means that if there is a lacuna in the State Family Court's federal jurisdiction in respect of children under the Family Law Act 1975, provisions of the Family Court Act 1975 can fill the gap.

There is only one other State Act which presently confers jurisdiction on the Family Court of Western Australia. This is the Adoption Act 1994.<sup>37</sup> However, the Family Court Act 1975 provides that if a child who is the subject of proceedings before the State Family Court appears to be a child in need of care and protection as defined by the Child Welfare Act 1947 (WA), the court has all the powers of the State's Children's Court.<sup>38</sup>

By section 81(2), in conjunction with section 27(1), of the Family Court Act 1975, the State Family Court has jurisdiction to hear appeals from decisions made under this Act by courts of summary jurisdiction.

#### 4. Cross-vested jurisdiction

The cross-vested jurisdiction of the Family Court of Western Australia is distinctive in three respects. First, this court is included within the scope of the Jurisdiction of Courts (Cross-vesting) Acts 1987 even though it is not a superior court. (The Family Court of Western Australia is simply a court of record<sup>39</sup> and not a superior court of record like the Family Court of Australia.<sup>40</sup>) Secondly, the jurisdiction of the Family Court of Western Australia and of the Supreme Court of Western Australia is cross-vested only upon the one court making an order for the transfer of proceedings to the other.<sup>41</sup> (The ordinary rule is that the jurisdiction of courts within the scope of the cross-vesting legislation is automatically vested, without any need for an order for transfer.) Thirdly, the jurisdiction of the Family Court of Australia is vested in the State Family Court also only upon an order for the transfer of proceedings from the Commonwealth to the State court.<sup>42</sup> (State superior courts can otherwise exercise the jurisdiction of the Family Court of Australia at any time.<sup>43</sup>)

Notwithstanding the foregoing limitations on the ability of the Family

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37. S 65(3).

38. S 27(3).

39. Family Court Act 1975 (WA) s 7(1) (a).

40. See Family Law Act 1975 (Cth) s 21(2).

41. Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) ss 4(6), (7).

42. Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 4(3), with ss 3(2), 5(4); Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) s 5(5), with s 3(2).

43. Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 4(1).

Court of Western Australia to exercise cross-vested jurisdiction, this State court enjoys some immediate advantages by being within the cross-vesting scheme. In particular it possesses, and can exercise without more, the jurisdiction of all Supreme Courts other than the Supreme Court of Western Australia.<sup>44</sup>

Like the Family Court of Australia, the Family Court of Western Australia does not ordinarily possess the jurisdiction of the Federal Court. However, under the Commonwealth cross-vesting legislation the Federal Court may in appropriate circumstances transfer proceedings before it to the State Family Court, and when it does so, the State Family Court can exercise the jurisdiction of the Federal Court.<sup>45</sup>

## **JURISDICTION OF THE COURT OF PETTY SESSIONS**

### **1. Introduction**

The Court of Petty Sessions, 150 Terrace Road, Perth, is, as its name implies, a court of summary jurisdiction. It is constituted by a Registrar or Deputy Registrar of the Family Court of Western Australia who is also a stipendiary magistrate. For all practical purposes this court is a part of the Family Court of Western Australia. The jurisdiction of the Court of Petty Sessions is, however, limited to that conferred upon courts of summary jurisdiction. It should be noted in this regard that registrars of the Family Court of Western Australia do not exercise any of the powers conferred upon registrars of the Family Court of Australia pursuant to section 37A ("Delegation of powers to registrars") of the Family Law Act 1975 (Cth), as this section applies only to registrars of the Commonwealth court.

### **2. Jurisdiction under the Family Law Act**

The Court of Petty Sessions is invested with jurisdiction under the Family Law Act 1975 (Cth) by section 39(6) with section 46, and by section 63(2) with sections 60G and 63D, of this Act. The particular jurisdiction that is invested in this court by these provisions is as follows.

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44. Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 4(2), with s 3(2); Jurisdiction of Courts (Cross-vesting) Act 1987 (all States & NT) s 4(4).

45. Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 4(3), with ss 3(2), 5(4); Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) s 5(5), with s 3(2).

### (i) Proceedings for principal relief

The Court of Petty Sessions has jurisdiction to hear undefended proceedings for dissolution of marriage.<sup>46</sup> It is interesting to observe that no other court of summary jurisdiction presently has this power except those in the Australian Capital Territory.<sup>47</sup>

The Court of Petty Sessions has no power to hear proceedings for any other form of principal matrimonial relief, whether defended or undefended. It accordingly cannot hear proceedings for nullity of marriage, or for a declaration as to the validity of a marriage or of the dissolution or nullity of a marriage.<sup>48</sup>

### (ii) Proceedings under Part VII (“Children”)

The Court of Petty Sessions is invested with jurisdiction in relation to almost all matters arising under Part VII (“Children”) of the Family Law Act 1975 by section 63(2) of this Act. The sole exception is proceedings under section 60AA for leave for a parent, or for a spouse or de facto spouse of a parent, to commence proceedings for the adoption of the parent’s own child. By section 60G, the Court of Petty Sessions is also invested with additional jurisdiction with respect to guardianship, custody, welfare, access and child maintenance matters arising between residents of different States.

By section 63D(1), if proceedings for guardianship, custody or access are instituted in a court of summary jurisdiction and these proceedings are defended, the court cannot continue to hear the proceedings without the consent of all the parties. If this consent is not forthcoming, the court must transfer the proceedings to the Family Court or, in Western Australia, to the State Family Court.

Section 63D(1) is noteworthy for two reasons, one distinctive to Western Australia. The first is that the terms of section 63D(1) appear to allow a court of summary jurisdiction, and thus the Court of Petty Sessions, to hear and determine proceedings in relation to the welfare of a child without the consent of the parties. As the term “welfare” here signifies matters which fall within the traditional *parens patriae* jurisdiction of the Supreme Courts,<sup>49</sup> the jurisdiction that courts of summary jurisdiction can exercise without the

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46. Ss 39(6)(a), 46(2A).

47. Family Law Act 1975 (Cth) s 44A; Family Law Regulations, reg 10A.

48. S 39(6)(a).

49. *Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218, 256, 257, 258, 294, 317–318 (contra 286).

consent of the parties is very wide. The omission of a reference to “welfare” in section 63D(1) is almost certainly the result of a drafting error.

The second reason why section 63D(1) is noteworthy is that by the terms of this section a court of summary jurisdiction is restrained from hearing defended proceedings without the consent of the parties only where proceedings are instituted in a court of this kind. In Western Australia, most proceedings heard by the Court of Petty Sessions are instituted in the State Family Court and are then transferred to the Court of Petty Sessions. This appears to mean that in virtually all proceedings in relation to children, the Court of Petty Sessions can exercise full jurisdiction, even to the extent of making final orders, whether the parties consent to this or not.

### **(iii) Proceedings constituting a “matrimonial cause”**

Subject to limitations in respect of defended property proceedings, a court of summary jurisdiction, and thus the Court of Petty Sessions, has power to entertain all proceedings which constitute a “matrimonial cause” as defined in section 4(1).<sup>50</sup> It can accordingly entertain any proceedings for spousal maintenance and matrimonial injunctions.

A court of summary jurisdiction has power to hear defended proceedings in relation to property with a gross value of up to \$20,000 without restriction.<sup>51</sup> If, however, the proceedings are instituted in a court of summary jurisdiction and the value of the property is higher than \$20,000, the court can hear and determine the proceedings only with the consent of all the parties.<sup>52</sup> Otherwise, in Western Australia the court must transfer the proceedings to the Family Court of Western Australia.<sup>53</sup> The clear implication of this is that if property proceedings are not instituted in, but are simply transferred to, the Court of Petty Sessions or any other court of summary jurisdiction, this court can determine the proceedings regardless of the value of the property.

### **(iv) Jurisdiction under other Commonwealth legislation**

The Court of Petty Sessions has the same original jurisdiction under the Child Support (Registration and Collection) Act 1988 (Cth) and Child Support (Assessment) Act 1989 (Cth) as the Family Court of Western Australia.<sup>54</sup>

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50. S 39(6)(a).

51. Ss 39(6)(a), 46(1), (1AB).

52. S 46(1)(a).

53. S 46(1)(b).

54. Child Support (Registration & Collection) Act 1988 (Cth) s 104(2); Child Support

Magistrates of the Court of Petty Sessions have power under the Marriage Act 1961 (Cth) to authorize marriage by a person who is not of marriageable age<sup>55</sup> and to give consent for marriage by a minor.<sup>56</sup>

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(Assessment) Act 1989 (Cth) s 99(2).

55. S 12(1), with s 5(1) (definition of "magistrate").

56. S 16(1), with s 5(1) (definition of "magistrate").