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SUPREME COURT OF NEW SOUTH WALES

HUDSON v BAILEY

Needham J

2, 18 March 1976 — [1976] 1 NSWLR 80; [1976] FLC 75,071 (¶90-006)

FAMILY LAW – APPLICATION FOR CUSTODY OF CHILD – MOTHER DECEASED – 'CHILD OF A MARRIAGE' – WHETHER CUSTODY APPLICATION WAS A MATRIMONIAL CAUSE: *FAMILY LAW ACT* 1975, S61(4).

Application concerning child of deceased mother. Argued that to be a child of a marriage within the definition of matrimonial cause in the *Family Law Act* means a child of an existing marriage so that a custody application in respect of a child of a deceased mother was not a matrimonial cause.

HELD: Such a construction would be inconsistent with s61 *Family Law Act*.

NEEDHAM J: This question depends for its answer purely on the construction of the *Family Law Act*. It seems to me that s61(4) contains the refutation of the plaintiff's submissions; that subsection provides:—

> 'On the death of the party to a marriage in whose favour a custody order has been made in respect of a child of the marriage, the other party to the marriage is entitled to the custody of the child only if the court so orders on application by that other party and, upon such an application, any other person who had the care and control of the child at the time of the application is entitled to be a party to the proceedings.'

The sub-section plainly envisages that proceedings for custody of a child can be instituted and determined under the Act even though one of the parties to the marriage is dead. I see no reason why the expression 'child of a marriage' in paragraph (c) (iii) of the definition of 'matrimonial cause' should receive a construction inconsistent with that provision.
