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## HIGH COURT OF AUSTRALIA

**FOUNTAIN & ANOR v ALEXANDER & ANOR**

Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ

9 February, 23 April 1981

[1982] HCA 16; [1982] 150 CLR 615; (1982) 56 ALJR 321; (1982) 40 ALR 441; 8 Fam LR 67; [1982] FLC 77,182 (¶¶91-218)

**FAMILY LAW – MARRIAGE POWER OF COMMONWEALTH – EXTENT – CONNEXION OF RIGHTS AND DUTIES WITH MARRIAGE RELATIONSHIP – DETERMINATION OF SUIT OF PERSON NOT PARTY TO MARRIAGE – VARIATION OF CUSTODY ORDER.**

By s8(1)(a) of the *Family Law Act* 1975 (Cth) proceedings by way of a matrimonial cause shall not be instituted except under that Act. By para (f) of the definition contained in s4(1), "matrimonial cause" includes (with irrelevant exceptions) proceedings "in relation to" completed proceedings between the parties to a marriage with respect to the custody or guardianship of a child of a marriage. By the operation of s40(3), (4), and a Proclamation of 27th May 1976, the jurisdiction of the Supreme Court of (*inter alia*) New South Wales to determine proceedings under the Act was in general terminated. In 1971 the marriage of the defendants was dissolved by the Supreme Court of New South Wales, which then made an order giving the custody of a child of the marriage to the wife. The wife was then living as his wife with another man, the first plaintiff, from whom she was separated in 1975. The first plaintiff subsequently married the second plaintiff. The child had from time to time lived with his mother and also from time to time with the plaintiffs. The plaintiffs commenced proceedings against the defendants in the Supreme Court of New South Wales for orders that the child then in the care and control of the plaintiffs be declared a ward of that court, and be placed in the care and control of the plaintiffs.

**HELD: (1) (by the whole court) The Supreme Court of New South Wales had no jurisdiction to make the orders sought in the proceedings before it.**

**(2) (by Gibbs CJ, Stephen, Mason, Wilson and Brennan JJ) For proceedings to fall within the meaning of para. (f) of the definition of "matrimonial cause" in s4(1) of the *Family Law Act* 1975 it is not necessary that they should be proceedings between the parties to the marriage, the subject of the concurrent pending or completed proceedings, but a stranger may commence such proceedings in a court of competent jurisdiction.**

**(3) (by Gibbs CJ, Stephen, Mason, Wilson and Brennan JJ) Where an order for custody of a child of a marriage has been made and subsequently an order for custody is sought which will have the effect of altering the first order or readjusting the rights given by it, the further proceedings are proceedings "in relation to" the earlier proceedings within the meaning of para (f).**

**(4) (by Gibbs CJ, Stephen, Mason and Brennan JJ) The power to legislate with respect to marriage under s51(xxii) of the *Constitution* (Cth) is not restricted to the defining and enforcing of the rights of the parties to a marriage *inter se*, but extends to providing for an award of custody at the suit of a stranger to the marriage in proceedings against a party to the marriage to displace an earlier order giving custody of a child of the marriage to that party which was made in proceedings between the parties to the marriage.**

Per Mason J (Stephen J agreeing) (a) A custody order is not merely an adjudication of custody as between parties to litigation but creates a right enforceable against the world at large, including strangers to the litigation. (b) Parliament has not the power to make provision for custody of a child of a marriage between strangers to the marriage when such provision has nothing to do with the adjustment or termination of rights of parties to the marriage. Consideration by Murphy J, of the extent to which the Parliament may legislate on the custody and guardianship of children other than those of a marriage in pursuance of its authority to legislate on divorce and matrimonial causes under s51(xxii) of the *Constitution*.

Per Mason J (Stephen J agreeing) Under s64(1) of the *Family Law Act* 1975 an applicant can seek an order vesting guardianship, custody or access rights in a person other than himself, even in a stranger to the marriage.

**HELD**, further (by Gibbs CJ, Stephen and Mason JJ), that there being nothing special in the present proceedings that called for an exercise of wardship jurisdiction, the, application for an order making the child a ward did not prevent the matter from being a "matrimonial cause" within the exclusive jurisdiction of the Family Court.

**Consideration** by Gibbs CJ, Mason and Wilson JJ, of the relationship between wardship, custody and care and control of children, and the respective jurisdictions of the Family Court and the State Supreme Courts in relation to wardship.

**Per Gibbs CJ:** The words "between the parties to a marriage" in the definition of "matrimonial cause" in s4(1) of the *Family Law Act* 1975 refer to proceedings in which one party to the marriage is contending against the other.

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