

Accrued Jurisdiction in the Family Court of Australia

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What is accrued jurisdiction?

- The Family Court in **Warby** has given parties to matrimonial causes and third parties the ability to attach to a Family Law Act claim, non-federal claims which are non-severable from the Family Law Act claim, provided both claims arise out of a common substratum of facts. See **Warby v Warby(2002) FLC 93-091**
- Accrued or pendant jurisdiction was promoted by the High Court in the decision of **Phillip Morris v Adam P Brown (1981) 148 CLR 457**, to lessen the inconvenience of split proceedings, that is, proceedings which must be divided between a Federal Court and a State Court: See **Lane's Commentaries on the Constitution** 2nd Edn @ 509;
- ‘where a court which can exercise jurisdiction has its jurisdiction attracted in relation to a “matter”, that jurisdiction is not limited to matters incidental to that aspect of the matter which has in the first place attracted federal jurisdiction, it extends to the resolution of the whole matter, with authority to make such remedial orders as are necessary or convenient for or in consequence of that resolution’: see **Phillip Morris** per Barwick CJ @ 475;

- The result is that the court exercising federal jurisdiction, e.g. the Family Court, may enforce rights which derive from a non-federal source. But note that the exercise is discretionary, not mandatory, though it has been held to be obligatory to exercise the federal jurisdiction which has been attracted in relation to a “matter”; see **Phillip Morris @ 475**; and see **Bishop v Bishop(2003) FCA 240 @ paras 27-30**;

What is a “matter”?

- Is a justiciable controversy which must either be constituted by or must include a claim arising under the federal law but may also include another cause of action arising under another law, provided it is attached to and not severable from the former claim: see **Phillip Morris @ 512** per Mason J; and **Fencott v Muller(1983) 152 CLR 570; ALJR @ 321**; see also **Carter and Ors and Egg Pulping (1942) 66 CLR 557 @ 579**;
- It may appear that the resolution of the attached claim is essential to a determination of the federal question, or the attached claim and the federal claim so depend on common transactions and facts that they arise out of a common substratum of facts: see **Phillip Morris @512-513** for further discussion by Mason J;
- Brief history of the jurisdiction in the Family Court: **Mackay (1984) FLC 91-577** and **Smith No 2(1985) 91-604**.

When will the accrued jurisdiction be exercised?

- Jurisdiction to determine a matter in the Family court arises under S31(1) of the **Family Law Act 1975**; see **Warby @** pp 88,779-780; and see **Prince No 3(1986) FLC 91-732, @** 75,331-332:

“jurisdiction will be exercised in the Family Court when the pendant or accrued claim arises as a non-severable part of a matrimonial cause under S 31(1): See s31(1) (a)-(d); “A matter within (S 31(1) (a) of the Act) must satisfy two criteria; it must arise under the Family Law Act and it must be a matter in respect of which a matrimonial cause was instituted under that ActThe matter does not arise under the Family Law Act, because....the Family Law Act has nothing to say about claims made by surviving spouse against the estate of a deceased spouse....”

- The Family Court may exercise jurisdiction to determine the non-federal aspects of a justiciable controversy of which the family law claim or cause of action forms part: see **Warby @** 88,790;
- The Court will have regard to a number of criteria in determining whether to exercise accrued jurisdiction, but this is not an exhaustive definition:
 - (i) what the parties have done;
 - (ii) the relationship between and amongst themselves;
 - (iii) the laws which attach rights and liabilities to their conduct and relationships;

- (iv) whether the claims are part of a single justiciable controversy and in determining that question whether the claims are ‘attached’ and not ‘severable’ or ‘disparate’;
 - (v) whether the claims are non-severable from the matrimonial cause and arise out of a common substratum of facts. See **Warby** @88,792-3;
 - (vi) whether the court has power to grant appropriate remedies in respect of the ‘attached’ claims;
- High Court has held that “in the end, it is a matter of impression and practical judgment whether a non-federal claim and a federal claim joined in the same proceeding are within the scope of one controversy and thus within the ambit of a “matter””: see also **Fencott and Muller**@332 and **Re Wakim; Ex Parte McNally(1989) 163 ALR 270** per Gummow J and Hayne J @ 311, paras 135; 139-140; In **Bishop**, the court held @36 that the trial judge had not considered items 1,2, 3 and 6 of the test to decide whether to exercise jurisdiction, and that:

‘there could be no doubt that the financial affairs of the husband and the wife are and have been intimately interwoven into the financial affairs of the parties sought to be joined. It is impossible to determine the issues as to the parties’ financial affairs without unravelling them.’

- See facts of **Warby @ 88,764; Bishop (2003) FCA 240** and **C,C & C(2000) FLC 93-076; and Finlayson v Gillam(2002) FCA 898;**
- Where jurisdiction declined: see;
 - An application by the Husband to accrue a personal injuries claim for damages in respect of an incident which occurred on the date of separation together with a property order under S79 was held, first, not to be a claim for property within S 4(1)(ca) of “matrimonial cause”; and secondly that the court did not have jurisdiction as the claims were not based on common transactions and facts by virtue of the fact that the assault claim required considerations of facts and elements foreign to the substantial federal claim: **Saba v Saba (1984) FLC 91-579;**
 - A mortgagee, General Credits Australia Ltd, instituted an application to intervene in S 79 proceedings between a Husband and Wife seeking that, inter alia, the court exercise its accrued jurisdiction to determine the issue between it and the husband in the context of S 79 proceedings. It was held that the dispute between the Husband and the appellant was largely unconnected with the controversy between the parties to the former marriage: **Prince v Prince (1984) FLC 91-501;**
 - In a case in which the Husband claimed damages against the Wife for breach of trust arising from what the Husband alleged was the sale of one of their properties by the Wife at an undervalue, the Husband’s claim, which was a claim in equity under State law, was held to be a claim which was severable from a claim arising under the Family Law Act: **Gubbay v Gubbay (1984) FLC 91-545;**
 - The Family Court has no jurisdiction to accrue an application to approve a release under S 31 of the *Family Provision Act 1982 (NSW)*, which was incorporated in the terms of a maintenance agreement under S 87 of the Act: **Smith v Smith (No 3) (1986) FLC 91-732 ;**
 - The Husband’s intended claim against the Wife and the Wife’s son of a prior marriage that the Family Court determine the respective interests of the Husband, the Wife and the Wife’s son in a transport business which the

Husband made financial contributions towards during the marriage, could be accrued with S 79 proceedings; **Ireland v Ireland(1986) FLC 91-731;**

- A claim by the Wife for damages against the Husband's solicitors in which she alleged that the Husband's solicitors had been complicit in the disposal of a significant asset of the Husband and the Wife at a time when property proceedings between them were pending, was held not to be part of one justiciable controversy or non-severable from her claim for relief under S 79 of the Act: **Lawson v Lawson (1999)FLC 92-874;**
- In a case in which the Husband and the Wife had been in a partnership as medical practitioners, the Wife applied to the Family Court for declarations that: (a) the partnership existed; (b) that the partnership had been determined: and for orders, inter alia, (c) that an Official Liquidator should be appointed as receiver of the partnership, the High Court held that the Family Court had no jurisdiction to appoint a receiver of a partnership to deal with the partnership property, and no power with respect to the law of partnership: **Re Ross Jones; Ex Parte Beaumont (1979) FLC 90-606;**

What is meant by a substratum of facts?

- The High Court equates a dependence of the federal and non-federal claims upon common transactions and facts to indicate that they arise out of a common substratum of facts: see **Phillip Morris @512** and **Fencott @ 331;**

Types of Orders which can be made

- The capacity of the Family Court to grant certain remedies would appear to be limited in light of Warby; see **Warby @ 88,783**;
- “ the accrued jurisdiction carries with it the authority to make such remedial orders as are necessary for or in consequence of that resolution”: see **Fencott @329-330** and **Warby @88,783**;
- But the Family Court appears to have placed some limitations upon itself: it has held that the lack of power to grant an appropriate remedy is not a relevant factor once the proper factual test is satisfied, but the inability to grant an appropriate remedy is relevant to whether the available accrued jurisdiction should, in the exercise of its discretion, be invoked: see **Warby @ 88,791**;
- See also S80 Family Law Act which is given an expansive interpretation in **Davidson v Davidson (1994) FLC 92-469**; and s34 FLA; per Warby @88,791; and also see **DJL v Central Authority (2000) ALJR 706 @712**, which held that the Family Court is not a common law court: and Strauss J and Fogarty J in **Mackay(1984) FLC 91-573**, The Family Court has no general equitable jurisdiction, no general power to make declarations and grant equitable remedies: but see S 87(11) FLA ;
- The significance of this is that whilst the nature of the powers of a court may sometimes provide a clue as to the extent of its jurisdiction, the High Court has held that the fact that a court has wide powers when exercising jurisdiction does not mean that its jurisdiction is wide. For example, the court in **Re Ross Jones:Ex Parte Beaumont (1979) FLC90-606 @ 78,103** held that whilst S 80 and S 81 of the *Family Law Act* confer broad powers on the court, they do not

expand the jurisdiction of the court or throw any light on the extent of its jurisdiction; see also **Perlman v Perlman (1984) FLC91-500**;

- However, it clearly held that it could make the orders sought by the Husband in *Warby* as against the Wife's father. For example, declarations and orders made pursuant to common law and the laws of equity;
- The Family Court has power to make a binding declaration in relation to the rights and interest of parties in property: see **Finlayson @** paras 119,129 and 122;

The Discretion: The Two Stage approach: Discussion on Bishop's case

By HH Justice Carter

By whom can the jurisdiction be exercised?

- The Federal Courts, including a judge of the Family Court;

Joining Third parties

- Once a third party is properly notified, it cannot thwart the making of orders that affect it by declining to participate in the proceeding. The court is empowered to act as it would in any other undefended proceeding before it: see *Warby @88,775*; also see **Bishop @** para 33:

“ We think that some caution and a very careful examination of the facts needs to be exercised before applying the general notion that if a court has

jurisdiction, it ought to exercise it when dealing with claims involving third parties in family law cases... if the facts support the exercise of the jurisdiction of accured jurisdiction the court ought not to shy away from it...”

And at para 38:

*‘In cases where **all** that is sought is the joinder of the parties, particularly when there is no opposition, a judge hearing an application for joinder should be very slow to refuse it.’*

- See Family Law Rules 2004 Reg 6.03 and Reg 11.10; if amendment is to be made post first court date, the Registrar will set a further procedural hearing: Reg 11.03