SUPREME COURT OF QUEENSLAND

CITATION:	*Foley v Farquharson & Anor* [2003] QSC 021
PARTIES:	**VINCENT PATRICK FOLEY** (plaintiff) **and** **NELLIE ALDEN FARQUHARSON** (first defendant) **and** **ROBYN GERTRUDE FOLEY** (second defendant)
FILE NO:	S10520 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 January 2003
JUDGE:	Mackenzie J
ORDER:	1. that the first and second defendants be given leave under *UCPR* 135 to bring the application notwithstanding that a notice of intention to defend has not been filed. 2. that proceeding S10520 of 2002 in the Brisbane Registry of the Supreme Court of Queensland be transferred pursuant to s 5 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 to the Family Court of Australia at Brisbane. **3.** that the plaintiff pay the defendants' costs of and incidental to the application, to be assessed.
CATCHWORDS:	PROCEDURE – JURISDICTION – where there is an application for proceedings involving state matters to be transferred to the Family Court – where the applicant seeks a declaration that real property and/or the proceeds of sale are held by way of a constructive trust - where there is an application to restrain the defendant dealing with real property and/or the proceeds of sale - where there is an issue of the distribution of matrimonial property- whether the Family Court has accrued jurisdiction to hear such matters *Family Law Act* 1975 (Cth), s 79 *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth), s 5(1)

Finlayson v Finlayson & Gillam [2002] Fam CA 898, applied
Re Wakim ; *Ex parte McNally* (1999) 198 CLR 511, considered
Warby v Warby (2001) 28 Fam LR 443, applied

COUNSEL: Mr M Conrick for the plaintiff
Mr M.W. Jarrett for the defendant

SOLICITORS: Clewett Corser & Drummond for the plaintiff
Bruce Dulley and Andrew Crooke for the defendant

[1] **MACKENZIE J:** This is an application for a declaration that the first defendant holds certain real property and/or the proceeds of its sale by way of a constructive trust on behalf of the plaintiff, the first defendant and the second defendant in equal shares. There is also a claim for an injunction restraining the first defendant from dealing with one-third of the net proceeds of sale of the land other than by directing its payment to the plaintiff. An order under s 79 of the *Family Law Act* 1975 (Cth) dividing the property of the plaintiff and the second defendant or either of them, 50% to the plaintiff and 50% to the second defendant is also sought. Alternatively the applicant seeks such other order under s 79 adjusting the interests of the plaintiff and the second defendant in property of the plaintiff and the second defendant or either of them as to the court seems just and equitable.

[2] The relief sought is essentially a distribution of property of a marriage, with the additional factor that there is a claim that property held by the first defendant is subject to a constructive trust. The action has probably been started in this Court because of a concern that the Family Court may not have jurisdiction to hear and determine the application for the declaration of a constructive trust. The defendants have applied for the proceedings to be transferred to the Family Court at Brisbane pursuant to s 5(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth).

[3] There is a preliminary point that the defendants are prohibited by *UCPR* 135 from taking any step without leave before filing a notice of intention to defend. It is submitted that the application is incompetent unless such leave be granted. The plaintiff's position is that the defendants have ignored demands that they file a defence. The defendants' response is essentially that until the present application has been determined it would be wasteful to file and serve a defence which complied with the *UCPR* if the matter ultimately was to be determined under the rules of the Family Court. This unnecessary duplication was relied on as a circumstance which made it not unreasonable to fail to file a defence. If the major issue were to be determined in favour of the applicants, I would not consider the requirement that leave be granted to be an insuperable difficulty.

[4] In *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 Gummow and Hayne JJ said the following in connection with the nature of jurisdiction of a federal court:

> "[135] It must now be regarded as established that the jurisdiction of a federal court having jurisdiction in a matter arising under a law made by the parliament is not 'restricted to the determination of the

> federal claim or cause of action in the proceeding, but extend[s] beyond that to the litigious or justiciable controversy between parties of which the federal claim or cause of action forms part' …
> [138] It must be taken to follow from the Court's decision in *Philip Morris, Fencott* and *Stack,* however, that the identification of the justiciable controversy between parties is not determined only by the considerations of there being separate proceedings and different parties in the one court. And in some circumstances a single matter can proceed through more than one court. That follows from the Court's decision in *R v Murphy.* There, committal proceedings in one court and the trial of indictable offence in another court (there having been an order for committal and the presentation of an indictment) were held to be the curial process for determination of a single matter: the matter which the trial would ultimately determine.
> [139] The central task is to identify the justiciable controversy. In civil proceedings hat will ordinarily require close attention to the pleadings (if any) and to the factual basis of each claim.
> [140] In *Fencott* it was said that:
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> > "in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter".
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> The references to "impression" and "practical judgment" cannot be understood, however, as stating a test that is to be applied. Considerations of impression and practical judgment are relevant because the question of jurisdiction usually arises before evidence is adduced and often before the pleadings are complete. Necessarily, then, the question will have to be decided on limited information. But the question is not at large. What is a single controversy "depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships". There is but a single matter if different claims arise out of "common transactions and facts" or "a common substratum of facts", notwithstanding that the facts upon which the claims depend "do not wholly coincide". So, too there is but one matter where different claims are so related that the determination of one is essential to the determination of the other, as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination. Conversely, claims which are "completely disparate", "completely separate and distinct" or "distinct and unrelated" are not part of the same matter.
> [141]Often, the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter. By contrast, if the several proceedings could not have been joined in one proceeding, it is difficult to see that they could be said to constitute a single matter."

[5] In the period between the coming into operation of the cross-vesting scheme and the decision in *Re Wakim*, it was of no practical importance to determine finally the

existence of, and if so, the extent of the Family Court's accrued jurisdiction. Following *Re Wakim* the necessity to analyse the extent of its accrued jurisdiction arose again. Full Courts of the Family Court in *Warby v Warby* (2001) 28 Fam LR 443 and *Finlayson v Finlayson & Gillam* [2002] Fam CA 898 have held that accrued jurisdiction exists, in appropriate circumstances, in that court.

[6] In *Warby* the case stated asked the following question:

> "Whether in light of the decision of *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270; 24 Fam LR 699, and *In the Marriage of Smith (No 3)* (1986) 66 ALR 1; 10 Fam LR 769; (1986) FLC 91-732, the Family Court of Australia's jurisdiction in a "matrimonial cause" under s 4(1)(ca) of the Act is restricted to the determination of the family law claim or proceeding, and does not (by way of accrued jurisdiction) extend beyond to the litigious and justiciable controversy:
>
> (a) under state law; or
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> (b) pursuant to common law or at equity;
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> between a party to a marriage or former marriage and a third party of which the family law claim or cause of action forms part?".

[7] It was answered as follows:

> "No. As a matter of law, the Family Court of Australia is not restricted to the determination of a family law claim or proceeding; it may exercise accrued jurisdiction to determine the non-federal aspects of a justiciable controversy of which the family law claim or cause of action forms a part. The factual circumstances of the case will determine whether the jurisdiction arises and whether it is appropriate to exercise the jurisdiction."

[8] In *Finlayson* it was not sought by either party to deny the existence of the accrued jurisdiction. The issue relevant to the present case was the Family Court's capacity to adjudicate and make orders as to third parties. The relevant conclusion is contained in the following passage:

> "122. We think it is clear that, in an appropriate case, the Family Court has the power to make a binding declaration in relation to the rights or interests of parties in property. If it has accrued jurisdiction in proceedings between a party to a marriage and another party (because the claims in those proceedings are attached to and not severable from the claims of the parties to the marriage in proceeding of which the court is seized constituting a matrimonial cause in relation to that marriage), the Court may exercise that power to de[C], in a binding way, the rights and interests in property of the party to the marriage and the other party. Even if, contrary to what the Full Court said in the above-quoted passage from *Warby*, the power of the court to grant relief of the kind sought in the non-matrimonial proceedings is an essential pre-requisite to its having accrued jurisdiction in those proceedings (as distinct from merely

> being 'relevant to whether available accrued jurisdiction should, in the exercise of discretion, be invoked'), we would hold that such power exists in this case. That power is to be found in s.34 of the Act and in s.80(1)(k), which empowers the Court, in exercising its powers under Part VIII of the Act 'to make any other orders … which it thinks it is necessary to make to do justice' (subject only to the other parties being given leave to intervene in the s.79 proceedings).

[9] The facts of *Warby* and *Finlayson* are not identical as between themselves and not identical with those in the present case. In *Warby* the underlying issue was whether a contract between the wife's parents and the husband and wife under which the husband and wife were to purchase real property had come to an end or whether the husband and wife had an interest in the property by virtue of the contract. In *Finlayson* the wife and her father had purchased and mortgaged a property prior to the occurrence of the marriage. The wife's father had paid moneys to discharge the mortgage and there was a dispute whether there was an agreement between the wife and her father to repay him that sum or whether there was an agreement between the husband and wife and the father to make payments in discharge of the father's equity in the property.

[10] Whether the principles governing the existence of accrued jurisdiction permit a claim which would ordinarily be resolved in a State Court to be resolved under the accrued jurisdiction of the Family Court will be influenced by the facts and the legal characterisation of the particular case. It is ultimately for the Family Court to determine whether it has that jurisdiction in a matter which is before it.

[11] The claims in this Court are for a declaration of a constructive trust in relation to real property and/or the proceeds of sale of it, an injunction to restrain dealings with one-third of the proceeds of its sale and relief under s 79 of the *Family Law Act*. The proceedings are essentially for distribution of matrimonial property. The allegation is that part of such property consists of an interest in real property. Application of the principles in *Warby* and *Finlayson* suggests that such claim will attract accrued jurisdiction in the Family Court. The claim for a constructive trust is an incident in the wider claim ordinarily dealt with in the Family Court. I am satisfied that in the interests of justice both aspects of the matter should be transferred to the Family Court.

[12] The following are the orders:

1. that the first and second defendants be given leave under *UCPR* 135 to bring the application notwithstanding that a notice of intention to defend has not been filed.
2. that proceeding S10520 of 2002 in the Brisbane Registry of the Supreme Court of Queensland be transferred pursuant to s 5 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 to the Family Court of Australia at Brisbane.
3. that the plaintiff pay the defendants' costs of and incidental to the application, to be assessed.