FAMILY COURT AMENDMENT BILL 2001

Consideration in Detail

Resumed from 23 October.

Clause 29: Section 5 amended -

Debate was adjourned after Mrs Edwardes had moved the following amendment -

> Page 40, line 1 to page 104, line 20 - To delete "de facto" wherever it appears and substitute "domestic".

Mrs EDWARDES: There was some discussion about what the amendment was likely to mean; that is, whether it could coexist with the other definitions in the Family Court Act regarding de facto relationships, and whether a different interpretation could be applied that related to the ordinary understanding of the word "domestic". The member for South Perth indicated that the term "domestic" might imply relationships other than the type being anticipated, whereby two parties have joint property and financial interests. Members wanted to think about that overnight. There is no issue relating to coexistence with other definitions. We already have four definitions - three in the Bill and one in the Administration Act. The three definitions in the Bill relate to what is a de facto relationship and the criteria that must be met for property declarations, and the Administration Act also contains criteria that must be met. Therefore, there are in existence other definitions that are separated from the original definition. We are attempting to change only the terminology. Some might ask, "What is in a word?" However, this Bill is not about relationships but about dealing with the injustice and inequities that have arisen over the distribution of property upon the separation of two parties who are not legally married. We have already indicated that we do not believe the Family Court is the appropriate body in which this should be carried out. The Family Court was set up purely to deal with marriages - the separation of people within marriages, the dissolution of marriages and the children of marriages. The Family Court process attempts to get married parties around the table, and to provide counselling and mediation in an endeavour to get them back together or, if that cannot be the case, to at least work for the benefit of the children by ensuring those two people have a solid understanding of their rights and responsibilities. The Family Court was not set up to deal with contractual matters. We are not dealing with relationships. The Attorney General has indicated that relationships around the world are varied and different. That is true. That is why there will be so much uncertainty about this Bill.

It will not give the clarification that people need, if they need to know whether they have a right or an interest in property and whether they contributed directly or indirectly. It will not meet the need of certainty for the reasons I listed yesterday. The purpose of changing the term "de facto" to "domestic" is to take the distribution of property interests between those two parties out of the relationship issue. The children of de factos have long been recognised by our Family Court, and rightly so, because one of our strong interests in this Parliament is the protection of children and also the protection of marriage. De facto relationships have been written into this legislation in a way that in some instances overrides the status of marriage, and in other instances potentially brings marriage down to the status of a de facto relationship. We do not believe that that is appropriate. Using the word "domestic" brings in another form of word distinguishing it from all those other areas. This is about bringing the issue down to dealing with property interests and not dealing with the matters that are ordinarily the function and jurisdiction of the Family Court.

Getting back to what I was saying yesterday, the Family Court is an inappropriate body to deal with the distribution of property interests between two parties who have a financial interest between them. It does not deal with the necessary mischief where two people have contributed and only one party receives a benefit. This is an attempt to distinguish this issue from all those other relationships that are covered by the Family Court.

Mr McGINTY: In closing the debate last night I listed five reasons why I did not think it was appropriate to change the definition of a de facto to one of a domestic relationship. Having reflected on it overnight, I have heard nothing to change the point of view I expressed in closing last night. Therefore, we will oppose this series of amendments.

Amendment put and negatived.

Mrs EDWARDES: I move -

> Page 40, after line 19 - To insert the following -
>
> > **"spouse"** means a person to whom a person is legally married;

I hope the Government will take this definition on board. This amendment relates to a following amendment that is an absolute. The following amendment refers to notification to the court of the fact that there is in existence a spouse, because at the moment a de facto can take an action under this legislation and the spouse -

the person who is legally married to the other party - does not need to be notified. "Any other party" who may have an interest is just a throwaway line. "Any other party" is not sufficient for that person who is legally a spouse and has a right to be heard in the court on any matters dealing with property interests in which that person has an interest. I will be moving an amendment that that spouse must be notified of any proceedings in which he or she does have an interest, and then "any other party" can be added. The spouse is paramount, we believe, and was being totally ignored in relation to any proceedings under this Act, and that is totally unacceptable. "Spouse" as a definition simply identifies whom we are talking about.

Mr McGINTY: Part 3 of the proposed Act, which is what we are dealing with, commencing with clause 29 of this Bill, does not contain any reference to a spouse. Therefore, to insert a definition of a spouse is unnecessary. It is unfortunate that the amendments must run in the order in which they are listed, because this will become important only if a subsequent amendment that the member for Kingsley has given notice of is carried, and that relates to notice being given to third parties, or in this case to the spouse, as a result of these proceedings. Our tentative view, without having enjoyed the benefit of the whole of the debate on the question of giving notice to spouses, is this: we already have provision in order 9, rule 2(5)(b)(viii), for giving notice to persons who are not parties to the proceedings.

Mrs Edwardes: I know; but that is what I am saying. You are relegating the spouse to being just any other person. That is not acceptable.

Mr McGINTY: The problem we have is that there is no need for this amendment to succeed unless the amendment from the member for Kingsley, contained on page 12 of the Notice Paper, which is to insert a section 205ZAA - Notification, succeeds. This is essentially a procedural question, and I will certainly be interested in listening to the full debate as to why that should appear in the Act rather than in the orders of the court. This amendment unfortunately comes up first. It really should come up subsequently, because it is unnecessary unless the later amendment to be put by the member for Kingsley is carried.

Mrs Edwardes: Unless you give us advance notice that you will accept the amendment.

Mr McGINTY: The tentative view I have is that this is a matter appropriately prescribed in the orders of the court or the rules, rather than in the Act itself, and it is currently provided for in the orders and the rules. It is a question of whether that should be changed in this context, when it is not in any other context. I know this is not satisfactory, but I would prefer to revisit this question if the amendment becomes necessary. At the moment, my view is that it is not necessary, but should the member's notification issue, about which I must say I have considerable sympathy, succeeds, and if we can figure out a way to address that and the definition of "spouse" then becomes important, I am happy to ensure that that is inserted. At this stage I do not want to insert it in case the member's amendment is carried. That is the dilemma I have.

Dr CONSTABLE: I am very supportive of the sentiments expressed by the member for Kingsley about her amendment that is to come. I wonder, for information only, if the later amendment were accepted, whether the definition of "spouse" could then be inserted at that point with that amendment. Would that be possible?

Mr McGINTY: I think that could be done. Let me put it this way: we will not be left without a definition of "spouse" if it is necessary to have one. Technically, how we get to that point I am not sure, but I am sure it can be done by one means or another.

Mrs EDWARDES: Obviously, as we have done many times in this House, the Bill can be recommitted, so I am sure there is a way to do that. I accept what the Attorney is saying. I do not accept what I believe might be his intention when he says that he believes the rules currently apply. The rules do not necessarily refer to spouse, obviously because they are more of a general rather than specific nature. We are saying that the role of the spouse has been diminished in the Bill that has been brought forward. Yesterday, the Attorney General referred to the victim when he was talking about multiple relationships. The person who is the real victim in this case might be the spouse. To then indicate that the spouse might be just anybody else who has an interest diminishes that fundamental aspect. For example, a person might have been married for 30 years, and her husband has been philandering for a couple of years. He might have taken up with one or two other partners, and his wife is waiting for him to stop philandering and come back. They have not divorced and there has been no property settlement whatsoever. As the Attorney General would be aware, under the Act a person does not need to apply for a decree absolute. There is no time limit, so a person need not apply. At some point the person may, but he or she may not. There will be real victims, if the Attorney General wishes to use that word; yet the Attorney General has ignored them in this legislation. He is ignoring their fundamental role in all of these amendments. He is bringing forward these amendments in an endeavour to address injustices and inequities, but he is downgrading marriage and the role of the legally married spouse. If he wants to give some indication that that is not his intention, and that he is supportive of marriage and of the spouse who has been left behind, a section dealing with notices to spouses should be made a significant aspect of his commitment not only to marriage but

also to the fact that the spouse is fundamental, even paramount, to all of the amendments that are being put forward.

Mr McGINTY: As I have indicated, I have considerable sympathy with the notion that is involved in this issue. If the marriage has broken down irretrievably -

[Quorum formed.]

Mr McGINTY: As I have indicated, this is a matter about which I have concerns, particularly when looking at the operation of the Administration Act as well. I will use the case to which the member for Kingsley referred; that is, the philandering husband and his former wife, who is still legally married to him and who might be at home hoping and waiting for his return - why she would escapes me, but people do that. Those people should not be penalised, because this legislation is about providing a legal remedy to people who have a legitimate interest in property. I am not quite sure how to proceed on this. I have asked my advisers to look at ways in which that issue can be accommodated; that is, a person who is still legally married and who would be regarded as having an interest in the property. I do not know whether it is possible to either revisit this or to leave this provision for consideration later. It is not this provision; this is consequential. It goes more to the amendment suggested by the member, which is on page 12 of the Notice Paper. I suggest that we go to a vote on this clause, and we will pick it up in whatever amendment is necessary, if one is appropriate and can be done. I have asked people to look at it favourably and to look at the interests of the spouse in the context in which I have just described. Is it possible, on the basis of that undertaking, to move on? I hope that later today we will be in a better position to advise the member on that.

Mrs EDWARDES: I accept the Attorney General's undertaking that we will be able to revisit this. We can always recommit the Bill if we need the definition of "spouse". As such, I accept his undertaking.

Amendment put and negatived.

Clause put and passed.

New clause 30 -

Mr McGINTY: I move -

Page 40, after line 29 - To insert the following new clause -

30. Section 8 amended

Section 8 is amended by inserting -

(a) after "5" -

" , 5A "; and

(b) after "10" -

" , 10A "

This is simply a consequential amendment to reflect the numbering of the clauses.

New clause put and passed.

Clause 30 put and passed.

Clause 31: Section 36 amended -

Mrs EDWARDES: I move -

Page 41, line 24 - To insert after "maintenance" the following -

but only in those cases where one of the parties is married or there is a non adult child of the domestic partnership

This is a fundamental aspect of the Bill. When dealing with property interests between two parties who are not legally married, the only way they should have access to the Family Court - we do not believe that is the appropriate jurisdiction - is when one of the parties is married. That would be appropriate because that party would have the property interests determined in the Family Court. It would also be appropriate in cases that involved a non-adult child of the partnership. That means that the Family Court would be used for the purposes and the functions for which it was created. It would not deal with the distribution of property interests between persons who are not married or who do not have children out of their relationship. This amendment appropriately distinguishes that clearly.

If the Attorney General were to accept this amendment, he could do what we suggested yesterday and come back with another piece of legislation that deals purely with the distribution of property rights in a civil court among persons who have a financial interest between them. That would address the inequities and injustices. As we said yesterday, that would be the appropriate approach to the issue. Every other State deals with these matters through the civil court. It is just a matter of convenience for the Government to use the Family Court because it already makes determinations in those areas for married couples. The Family Court was not established to deal with matters outside marriage. By giving it this extra jurisdiction, a new jurisdiction for the Family Court would be created as a matter of convenience and process. It would give significance to relationships that the Family Court was not designed or established to deal with.

The amendment I propose effectively achieves the separation of those matters that should and should not be before the Family Court. The amendment would leave it up to the Government to introduce a separate piece of legislation to deal with those other matters separately.

Mr PENDAL: I support the member for Kingsley. Yesterday, in my contribution to the second reading debate I made it clear that I have no difficulty endorsing the notion that people in de facto relationships, or for that matter any other form of relationship, have the right and the capacity to protect their rights, including their property rights. I also made it clear that this is not the place to do that. It is not in any way inconsistent to say that one supports the rights of de facto couples and those of same-sex couples and at the same time to express the view that those rights be afforded and protected in parallel but separate pieces of legislation. Had that been done, that would have removed much of the angst from the principles in this Bill. I do not know whether the Government ever considered going down that path. I am interested to know whether it or the ministerial committee ever went down that path. If it did not, I am interested to know why not.

Also, in my contribution to the second reading debate I was uncharitable enough to say that I had many suspicions about what I thought was the surreptitious way in which de facto relationships were being put on the same status as marriage. In a surreptitious way, we danced around the issue. I never thought that I would have my suspicions confirmed as quickly as they have been. I know that we cannot refer to the uncorrected *Hansard*, so I will refer instead to my memory, which, despite 54 years and its failure in other important matters, still has a good recollection of what was said during the proceedings here about 12 hours ago last night. In the course of a comment by the Attorney General about de facto marriages, I interjected and said, "De facto relationship?" The Attorney General said, "Yes." I pointed out that that was not what he said; he had said "de facto marriages". He went on to say, "In deference to the member for South Perth." I should have been quick enough off the mark to have said that it was not in deference to me at all, but in deference to what the law and what his own Bill says. Anyone can make a slip of the tongue. If one were hung for that, I would have been hung many times in my political life. However, the importance of that political verbal trip was to let the real agenda come to the surface. That is why I think the member for Kingsley is right.

In summary, it is possible to do two things to the general agreement of the wider community. I do not know of too many members who would want to deny the property rights of de facto couples. That group constitutes 12 per cent of the population. Nor do I know of too many members who would want to deny two males or females who live together in an intimate relationship the chance to have their property rights protected. One can say that without endorsing their lifestyle. It seems to be a reasonable proposition that people want and should have those rights to property protected. However, the bone of contention keeps coming down to this issue: why must we do it under the law that, at least in the case of the Family Court Act, deals specifically with marriage? That is the difficulty I have, and for that reason I intend to support the member for Kingsley.

Mr McGINTY: In response to the member for South Perth, the Family Court Act is an unfortunate piece of legislation in one sense because it does not deal with marriage; it deals with failed marriages. The court process picks up the pieces from that failure. If it were something that dealt with the creation of marriage or the upside while the marriage existed, that would be wonderful. However, it does not deal with that; it deals with an unfortunate human failure, the consequences of which we see every day of the week. This legislation will provide people access to the courts to determine the results of the failure of their relationship, whether it be a marriage or a de facto relationship. Having said that, to the best of my knowledge the ministerial committee that deals with gay and lesbian issues did not turn its mind to this issue. The Government had announced that this legislation would deal with matters relating to the breakdown of relationships, and the committee went on to deal with other matters knowing that the Government would address the issue independently. I did not sit on that committee, but I have read its report.

The Family Court would provide a legal mechanism to deal with the breakdown of de facto relationships. Historically, the Family Court has dealt with de facto relationship in cases of exnuptial children just as it deals with child maintenance, children and property from failed marriages. The proposed legislation would just add to the court's role the settlement of property from a de facto relationship on a comparable basis to the way it deals

with the property of people who are married. The proposed legislation would provide that the courts deal with de facto couples in the same way that the current legislation already deals with children of a de facto relationship and children of a marriage. It is just dealing with another incident of a breakdown in a relationship, which is the reason that I believe it would be appropriately dealt with in the Family Court Act rather than in the civil jurisdiction of another court.

Mr Pendal: What would have been the position had we not decided in 1976 to go our own way and create the state Family Court? Now, 30 years later, we are confronted with what you are trying to achieve. What mechanism would you have used had we not had the Family Court Act, which is all we have; we do not have a family law Act?

Mr McGINTY: One of two options.

Mr Pendal: To refer power?

Mr McGINTY: That is the first option, in which case the Commonwealth would then enact in the Family Law Act and give jurisdiction to the Family Court much in the same way in which we are doing it now.

Mr Pendal: Let us suppose that we did not want to refer power, because you said last night that you were tending towards making 99 per cent of it non-uniform. What mechanism would you then have used - a separate statute to confer a status on de facto and other relationships?

Mr McGINTY: I would prefer separate legislation that would give jurisdiction to most probably the Supreme Court and possibly the District Court. I believe the practice in most of the other States has been to bestow it on the Supreme Court.

Mr Pendal: Would it not have to be by way of a vehicle called, for example, the "Other Relationships Act" or something of that kind?

Mr McGINTY: Yes, something of that nature.

Mr Pendal: If that is the only option that would have then confronted you, it appears that the member for Kingsley's argument is almost unassailable.

Mr McGINTY: We have two options. In those circumstances my preference would be to refer power for the matter to be dealt with in the specialist tribunal that deals with breakdowns in relationships, if agreed to by the Parliament. If that option were unavailable, I would vest jurisdiction in one of the civil courts; however, that option is less than optimal. I do not have time to address the question raised by the member for Kingsley in the eight seconds I have left, unless she would like to briefly re-address it to me.

Mrs Edwardes: I would like to hear the Attorney's response.

Mr McGINTY: The amendment moved by the member for Kingsley has two problems: first, as the member would be aware, the Commonwealth has constitutional power in marriages. The insertion of a provision in the legislation that refers to marriage would run foul of the constitutional limitation on the legislative power of this Parliament.

Mrs Edwardes: I think you are taking licence.

Mr McGINTY: That is my advice. By seeking to put a condition on an order for maintenance that somebody be married -

Mrs Edwardes: No, it is a new line relating to the whole of that subclause in respect of property and maintenance.

Mr McGINTY: Yes; however, the Commonwealth has exercised the power to legislate on property and maintenance of married people. To the extent that the State would be seen to be legislating to bestow a right on a married person -

Mrs Edwardes: No, this relates to part 5A. You are dealing with de facto relationships and, in the light of that, the only time that these subclauses can be taken to the Family Court for maintenance and property distribution orders is when one of the parties is married and/or one of the parties has a non-adult child. You are therefore dealing with your section of de facto relationships, not with marriage. I am not breaching the Constitution.

Mr McGINTY: I suspect the member might be breaching the Constitution. Is the member seeking to extend the benefit of spousal maintenance to somebody who has been legally married, and remains legally married, but is now in a de facto relationship? That is a consequence of this amendment.

Mrs Edwardes: No, I am not changing people's rights. I am saying that the only way they will be able to exercise a right in the jurisdiction of the Family Court is, first, when one of the parties is married, because the

Family Court deals with marriages; and, secondly, when that couple has a non-adult child, because the Family Court deals with exnuptial children of de facto couples. The only way in which they will be able to exercise any of the rights under the provisions of this clause is the same way in which they already come before the Family Court when one of the parties is married or when they have an exnuptial child.

Mr McGINTY: I will deal with that matter in two parts. I note in the amendment that the disjunctive "or" is used, not the conjunctive "and". The first part relates to when only one of the parties is married - I presume not to the person against whom the order is sought.

Mrs Edwardes: It does not matter. If a person has an interest in property and that person is married, whether to a former partner or to a married partner in a de facto relationship, that person would have a right to go to the Family Court. It would therefore make sense that a de facto partner seeking orders for property or maintenance be given access through the Family Court because one partner would already have the right to go to that court.

Mr McGINTY: Is this essentially a way of giving notice to a former married partner?

Mrs Edwardes: No, they would have jurisdiction only to exercise the rights in the two instances that you are giving them with this Bill. They do not have the right to exercise the jurisdiction of this Bill unless one of the parties is married or the couple has children. That married party could be the spouse of the marriage or the other party in the de facto relationship who is married.

Mr McGINTY: I will deal with children in a moment. Is the member saying that the partners in a de facto relationship who have never been married should not have jurisdiction?

Mrs Edwardes: No jurisdiction in the Family Court.

Mr McGINTY: We cannot agree with that, obviously, as it undermines the whole thrust of this legislation.

The member dealt in the amendment with another issue of a non-adult child of a domestic partnership. As this matter needs more exploration, I ask the member whether there is any significance in the term "domestic partnership"? I can understand the term "domestic relationship" because that would have arisen out of the amendment moved last night by the member. Does "domestic partnership" introduce yet another notion into the equation or does it refer to a de facto relationship?

Mrs EDWARDES: Given the fact that the global amendment was not adopted last night, the wording should be changed. If the Attorney could indicate that he would accept that amendment, we could make the appropriate changes. That term was used in anticipation of the previous amendment being passed.

I shall go through this amendment clearly. We indicated yesterday that we would support separate legislation dealing with the property rights of de facto couples, including same-sex couples, going to another court. We suggested yesterday that the Attorney split the Bill. Effectively, my amendment would split the Bill to remove de facto couples who do not have children under the age of 18 and couples where one of the parties is not married. Those people would have no jurisdiction to go to the court to exercise the rights that the Attorney is now giving them in this legislation. That comes back to the fundamental basis of our argument yesterday. We should be dealing with property rights and interests, not relationships, yet the Attorney said to the member for South Perth that he favoured the Family Court because the Bill deals with a relationship and the Family Court deals with relationships that have dissolved.

I suggest that the Family Court was primarily established to deal with matters that arise out of marriages. Those matters include separation and dissolution; children; and a counselling service. The Family Court provides a very good counselling service, to the extent that in some instances, the breakdown of a relationship does not necessarily result in a dissolution. However, nowhere does the Family Court Act state that the Family Court will deal with any other partnership. The reason the Attorney General is dealing with the property interests of two parties, to which both of those parties have contributed, whether it be directly or indirectly, is because of the inequities that exist in the Supreme Court and the complex area of law that arises from resulting trusts. The Attorney has indicated that if there were no Family Court in Western Australia, he would choose the Supreme Court. I suggest that depending upon the amount of the estate, several other options are also available. The Attorney could give equity jurisdiction to the District Court. The Local Court already exercises a small equity division. What the Attorney is attempting to do is address the relationship. The Attorney wants to give the parties to a de facto relationship a status that is equal to, and in some cases above, marriage. That is the fundamental point of the debate on this side of the Parliament.

We all agree that inequities exist and need to be addressed. However, we do not accept the way in which the Attorney is seeking to use the Family Court as a convenient way of addressing those inequities. If the Attorney were to give another court the jurisdiction to deal with the distribution of property, the body of precedent that has been created through the Family Court would obviously be looked at by that other court, although that court

would not be bound by that precedent, because of the separate jurisdiction. The Attorney should be looking at the distribution of property between two parties who are not married. However, at the end of the day the Attorney is seeking to create a new status that is equal to marriage. We do not accept the way the Attorney is seeking to deal with this matter.

Mr McGINTY: The consequence of the amendment moved by the member for Kingsley is that when it comes to distributing the property of a person who lives in a de facto relationship, a different set of rules will be applied depending upon whether that person has previously been married and whether that person has dissolved that previous marriage. The member for Kingsley is seeking to confine this legislation to a de facto relationship in which one of the parties is still legally married. I cannot see the benefit of doing that.

Mrs Edwardes: Because that party already has a right before the court.

Mr McGINTY: Not in respect of the de facto relationship.

Mrs Edwardes: No, but if there was already a right before the court with regard to the marriage, it would be inconsistent to deal with the same property in two separate courts. The distribution of property should be dealt with in the same court.

Mr McGINTY: The Government has made it clear that our policy intention is that the Family Court will deal with matters of property and spousal maintenance for de facto couples. That is not conditional upon whether they have previously lived in a marriage relationship or whether there is a non-adult child of the relationship. The question of the rights of the children is already provided for extensively in this legislation, the Family Court Act and the child support arrangements.

Mrs Edwardes: But not property distribution. The amendment provides that if the partners to a de facto relationship have a child from that relationship, they will have a right to property distribution before the Family Court. They now have that right only before the Supreme Court.

Mr McGINTY: Yes, but it is in favour of the adults because they have a child, not in favour of the child. We disagree with the amendment. That is it in a nutshell.

Mrs Edwardes: I am still trying to convince you!

Mr McGINTY: The amendment flies in the face of the policy intent of this legislation, and we are, therefore, not in a position to support it. The amendment will dramatically limit the scope of the legislation and produce inequities, because it will mean that the Bill will apply only to a person who was formerly in a marriage relationship. In addition, by providing that as a necessary precondition to invoking the jurisdiction of the Family Court there must be a child of the relationship, it will deny that jurisdiction to those people who live a bona fide domestic - sorry, bona fide de facto - relationship who want the benefits of this legislation.

Mrs Edwardes: I like the word “domestic”!

Mr McGINTY: That was another slip, not unlike the one I graciously gave the member for South Perth yesterday. We oppose this amendment.

Amendment put and negatived.

Mr McGINTY: I move -

Page 41, after line 25 – To insert the following -

(2) After section 36(7) the following subsection is inserted -

“

(8) Non-federal jurisdiction conferred on the Court is exclusive of any other court except as provided under section 39 or where an appeal lies to the Supreme Court.

”.

The purpose of this amendment is to do the exact opposite of what the member for Kingsley was just arguing; that is, to ensure and place beyond doubt that the Family Court has jurisdiction over financial agreements, maintenance and property matters, to the exclusion of the equitable jurisdiction of the Supreme Court.

Mrs EDWARDES: We obviously do not support the amendment, for the reason that we have indicated previously. If the original jurisdiction is in the Family Court, why has the appeal been left to the Supreme Court? Why is the appeal not to two, or more, judges of the Family Court? I have no doubt that the Chief Judge

of the Family Court has already indicated that he is not sure how the court will be able to deal with the increased number of applications that will come to the Family Court by virtue of these amendments.

Mr McGINTY: The member for South Perth may be interested in this, given the philosophical discussion that has taken place about the referral of powers and the importance of state legislation. The model that we are adopting has a number of benefits, but it also has two drawbacks. The first is that superannuation is a matter of commonwealth power, and the Commonwealth has legislated extensively in respect of superannuation; therefore, we cannot insert in state law a provision that will enable the state Family Court to effect a distribution of superannuation entitlements, because we would run into section 109 problems. There are some exceptions and qualifications to that, but, as a general proposition, we cannot follow the federal model of providing in the state legislation for superannuation to be distributed in the event of the breakdown of a relationship.

Mr Pendal: If the Family Court is already exercising commonwealth jurisdiction with regard to family law, why is it difficult for the state Family Court to deal also with superannuation matters, which admittedly is a commonwealth issue?

Mr McGINTY: The Commonwealth has legislated to provide for a superannuation entitlement to be taken into account by the Family Court in dealing with marriages, and will provide for a distribution of shares in that superannuation. The ability to divide up a superannuation entitlement in marriages is a fairly recent initiative, and will come into effect in about 12 months. One of the reasons put to me and the Attorneys General of the other States by Hon Daryl Williams for a reference of powers is that it will enable a comparable provision for the division of superannuation to be enacted in respect of de facto relationships. It is a significant drawback for what the Government is proposing here that the States currently cannot enact a law to divide superannuation between de facto couples on the same or a comparable basis as a marriage. It is nonetheless a matter that will have to be proceeded with. I would have thought that the Commonwealth, even without a reference of power over de facto property, could enact a law, using its superannuation or financial power in the Constitution, to give a court jurisdiction to effect a distribution of superannuation in non-marriage relationships. I have raised this matter with the federal Attorney General, and it is on the agenda for discussion between the Attorneys General, at the meetings of the Standing Committee of Attorneys General. That is the first drawback, as I see it. Superannuation is an element of growing importance in most people's accumulated wealth. The main element used to be the house, and perhaps the car, but now it includes superannuation.

The second drawback is that it would make a lot of sense to be able to have appeals from decisions of the Family Court here in Western Australia to the Full Court of the Family Court. That is how they are dealt with everywhere else throughout the country. As members will be aware, the High Court decision re Wakim held that a state jurisdiction cannot be vested in a federal court. In other words, a federal court cannot hear an appeal from a state court. That is a constitutional problem that the Government has tried to address in other areas, dealing with corporations, by a referral of power. Suffice it to say for now that the power to hear appeals from a state court cannot be given to the Full Court of the Family Court. Therefore, the Government will need to look at whether an appeal can be made internally with the Family Court. The problem there is that the Family Court has only five judges, operating in a very small environment, so an appeal from the decision of one judge to two or three others creates an unsatisfactory situation. A bigger pool of judges is needed. The only way an appeal can really be made at present is to the Supreme Court, which is unsatisfactory.

Mr PENDAL: I am a little confused. I understand that jurisdictions across Australia are frequently cross-vested. I also thought that the Family Court of Western Australia Act of 1976 was the classic cross-vesting of jurisdictions, because the Commonwealth effectively transferred its capacity to deal with family law in Western Australia to a state court. If that is accurate - and to my mind it must be, otherwise the past 25 years would have been a nonsense - I cannot understand why there is a problem with what the Attorney General referred to as the first drawback, which is superannuation. One of the things I have never considered before is where the jurisdiction over superannuation lies. It is clearly a commonwealth matter, so I have learnt that much. If the Commonwealth can cross-vest its family law jurisdiction to Western Australia's court, why can it not cross-vest its jurisdiction over superannuation?

Mr McGINTY: Cross-vesting was extensive, but High Court decisions in the past two years have struck down almost every cross-vesting scheme. That has created the very problem I am now referring to. From a decade ago, the idea of cross-vesting was seen as the solution to the sharing of constitutional power between the Commonwealth and the States.

Mr Pendal: Whatever else it has done in recent years - I recall a couple of those decisions - the High Court cannot have struck down the cross-vesting of family law in Western Australia, otherwise there would have been no Family Court here. It would have been struck down as unconstitutional. The fact that the Family Court is still intact causes me to puzzle about why this cannot be extended into the field of superannuation.

Mr McGINTY: In Western Australia the Family Court is both a commonwealth and a state court. In that sense, it is not cross-vested. Cross-vesting usually refers to a situation in which a state body asks a commonwealth body to exercise its powers, or vice-versa. It is clearly a federal body exercising state powers. That is what has been struck down. In the Family Court of Western Australia the judges have a federal commission, which makes them federal judges, and they also have a state commission. They exercise federal power in regard to marriages, and state power in regard to exnuptial children. It is not really a cross-vesting scheme; rather, it is both Parliaments legislating to grant double jurisdiction, which places it in a unique situation. The member for South Perth referred to it in the discussions last night. I was beginning to have doubts about the wisdom of that structure, which was set up here in 1975, mainly because of the lag in implementing changes on exnuptial children. When the legislation was changed at the commonwealth level, it would be rubber-stamped at the state level, but 12 to 18 months later, which caused some hardship along the way. In the light of recent High Court decisions striking down the cross-vesting schemes, and the desire of the Government to legislate on de facto relationships, Western Australia now has a model that no other State can follow, but the two drawbacks are the area of appeals and that of superannuation. These points are the downside of the arrangement the Government is now proposing, which is otherwise something the other States would love to be able to do - that is, give jurisdiction over de facto property to the federal Family Court. If there is a reference of powers to the Commonwealth by the other States, they will be able to follow the model that the Government is looking at here, which is to give to the court - which has expertise in family law matters, the division of property on the breakdown of relationships, and the circumstances of children - power in respect of de factos as well as married people. I believe this is the desirable way to go.

Mr PENDAL: The Attorney General has clarified a number of matters. The High Court has struck down cross-vesting both federal-state and state-federal, but has kept intact what we have informally called dual jurisdiction. If dual jurisdiction is still in force because judges exercise dual jurisdictional roles - federal for family law, state for exnuptial children - the High Court has been able to see its way clear for the Western Australian Family Court to have dual jurisdictions. Why is it difficult for the Western Australian Family Court to exercise jurisdiction in federal superannuation law? That is the point I cannot follow. I cannot see the differentiation between federal family law and federal superannuation law, when the same instrument that gave the court dual jurisdiction in family law, could be used to exercise federal superannuation law in Western Australia. Why is there a problem?

Mr McGINTY: To exercise federal superannuation power, if I might loosely describe it as that, the Commonwealth could legislate to bestow jurisdiction on both the Family Court of Australia and the Family Court of Western Australia to deal with superannuation matters of people who are not married. I think there would be the power to do that, but there would be some exceptions. For example, our parliamentary superannuation scheme is obviously subject to state legislation and not commonwealth legislation. Putting those few exceptions to the general proposition to one side, prior to the most recent amendments giving it the power to divide superannuation, the Family Court has had the power to generally take into account superannuation, and it has done that. It has never had the power to say that someone has $100 000 in his superannuation account and it will divide it 50-50 or whatever is the appropriate formula. In my view, and I might be wrong in this - I have certainly raised the matter with some of the commonwealth people and the federal Attorney General - the Commonwealth has the capacity to give the Family Court the power to make that provision. It is not a power that would exist independently of commonwealth legislation to bestow that power on the court. The Commonwealth has not done that other than for married people.

Mr Pendal: Perhaps the Commonwealth is dragging the chain on that, because it seems a pretty obvious thing for it to do.

Mr McGINTY: It does.

Mrs EDWARDES: If superannuation is part of the property, people will still have to go to the Supreme Court if they wish to have it distributed. Superannuation has been part of some of the cases that the Attorney and I have referred to as matters in which there have been inequities and the like. Obviously it would depend on the value of the superannuation. Because the Family Court has not been able to deal with the distribution of superannuation, as a result of the Bill, if the parties wish to have a distribution of superannuation, they will have to go to both courts. On behalf of the legal profession, may I suggest that at some time the Attorney General might like to revisit the matter?

Mr McGINTY: As I have indicated, there is a general power to take into account a person's property and wealth when making a distribution in the Family Court. For the next 12 months, that will be the basis upon which the Family Court will need to operate. It would have to say that if a person has superannuation, he can keep the superannuation and the wife will get the house, or something of that nature. That does not involve a division of the superannuation. That express power will come into effect in approximately 12 months time. People could

not go to the Supreme Court about it, because the Supreme Court does not have the jurisdiction to deal with it, unless someone were seeking to establish that a constructive or resulting trust was in existence. The impact of this amendment would be to exclude the Supreme Court from exercising that jurisdiction. In other words, someone would need to go to the Family Court. A person could currently argue that superannuation be taken into account but could not argue that there be a division of that identified superannuation component. At this stage that is beyond the court's power. However, as the member for South Perth has said, hopefully whoever is in power after 10 November would see it as a sensible amendment. I have detected when discussing this matter with the federal Attorney General that although it is attended by enormous constitutional complications, it is recognised as a sensible thing to attempt to do.

Mr Pendal: I will speak to Daryl Williams after 10 November, if the Attorney General would like me to.

Mr McGINTY: If the member for South Perth could, I am sure he would be more persuasive than I would be.

Mrs EDWARDES: Is the Attorney General suggesting that by virtue of this amendment a person who currently has a right under the equity jurisdiction of the Supreme Court, will no longer have that right? Supposing that superannuation is the only property in the partnership and that the partners have not purchased such things as cars and houses. Supposing the intention was that when they retired the superannuation would be split between them and they would have a jolly good time. They will now be prevented from going to the Supreme Court and accessing the superannuation as part of the property that had been gathered during their time together.

Mr McGINTY: The Supreme Court would have no power to issue an order exercising its jurisdiction in equity to make a division of superannuation. If that were the only asset, there would be significant trouble in going to the Supreme Court at the moment. The effect of this amendment will be to do two things. One will be to extinguish the Supreme Court's jurisdiction based in equity for matters arising out of the break-up of a relationship. That power will be vested exclusively in the Family Court. At present the Family Court is able to take the superannuation entitlement into account but not divide it. It might take it into account if there were two assets, such as a house and superannuation. It might say to the de facto male that he can get the superannuation and the de facto female can get the house, but it cannot divide the superannuation.

Mrs Edwardes: What the Attorney is really doing is all of a sudden taking away an opportunity that people currently have.

Mr McGINTY: No.

Mrs Edwardes: If superannuation were the only asset, at the moment people have the ability to go to the Supreme Court over it.

Mr McGINTY: I do not think they have. That is the point I was making.

Mrs Edwardes: The example I gave was where the intention of the other party was to have half.

Mr McGINTY: If people were seeking a division of the superannuation, I think they would find a lack of power in the court.

Mrs Edwardes: I do not think so.

Mr McGINTY: That is the advice I have received.

Mrs EDWARDES: The Attorney might like to seek legal advice, but that is not to cast aspersions on his adviser for whom I have very high regard. The Attorney might like to seek advice from people who generally practice in that area of the law. The Attorney might then move a further amendment to his amendment, excluding superannuation. If it were the only asset, and people have the ability to have that dealt with before the Supreme Court, this amendment will stop them from going there, which might create an inequity that had not been realised before.

Mr McGINTY: I am happy to seek further advice on the matter. I will add it to the earlier matter of notice of proceedings to legal spouses as a matter on which I will undertake to get back to the member.

Amendment put and passed.

Mr SWEETMAN: In the Bill the words "property" and "maintenance" are linked together often, particularly in the second reading speech. I do not have a problem understanding the definition of "property" in the Bill. However, "maintenance" seems to have a whole range of definitions. There is maintenance of the preservation of assets, maintenance of the various outgoings associated with whatever property or asset is involved in the dispute, maintenance provisions for the non-income earning person in the relationship and then maintenance of child support. Could the Attorney give me a definition of "maintenance"?

Mr McGINTY: This is not about child support or child maintenance, to use the old language. That is already covered in existing legislation. This is about what, in the case of a marriage, is referred to as spousal

maintenance. I guess in the de facto context it means partner maintenance. I am told that whereas in years gone by spousal maintenance was a significant component of a divorce settlement, these days the approach of the court is to say that the relationship must be brought to an end, other than in exceptionally needy cases, so that spousal maintenance, or partner maintenance in this context, will arise only when there is a demonstrated need and a capacity to pay. Therefore, we are talking about people who are better off, and they are the only ones who will be affected by this. I say that in a general sense. Generally speaking, in a property settlement, the court endeavours to take into account the need for spousal maintenance. Therefore, a bit more of the property might be given to someone, rather than there being an ongoing obligation to pay weekly or monthly payments to a person's former partner or former spouse. That maintenance component is generally incorporated in the property settlement.

Generally speaking, a person might have an obligation to pay maintenance to his spouse or partner until such time as the property settlement order is made, and that is generally the end of the matter. The exceptions to that might be when a person's partner suffers a significant handicap or disability, or when there is an ongoing obligation to children. However, one must then satisfy both those components of a demonstrated need beyond the ordinary, and also the other partner must have the financial capacity to pay. In most cases, the relationship breaks down, the property is divided, and that is the end of the requirement to make those payments on an ongoing basis. Generally speaking, that is how the system operates. When this provision refers to maintenance, it means what would be, in a minority of cases, a payment made to the former spouse. Arising out of those circumstances, generally it will last only until the property division arising out of the divorce is ordered by the court. However, in exceptional cases, it might continue beyond that. That is the sense in which it is meant in this provision.

Clause, as amended, put and passed.

Clauses 32 and 33 put and passed.

Clause 34: Section 43A inserted -

Mrs EDWARDES: This clause inserts a new section 43A, which deals with transfer of proceedings from a court of summary jurisdiction in other cases. If proceedings are instituted in a court of summary jurisdiction in relation to property of a total value exceeding $20 000, the proceedings must be transferred. I understand that outside the metropolitan area, summary jurisdiction is limited to $20 000. If the amount is in excess of that, the proceedings must be brought back to the Family Court. Can I have clarification of what that proposed new section does? Is my understanding correct? Is $20 000 the current limit of courts of summary jurisdiction, in any event, under the Family Court Act?

Mr McGINTY: That is a tricky one.

The SPEAKER: No doubt the Attorney General has solved it.

Mr McGINTY: I am told that the reason for this is that in the city there are dedicated magistrates associated with the Family Court, and they have jurisdiction to deal with property matters involving up to $300 000. In the country, where magistrates exercise the ordinary jurisdiction, the limit is set at $20 000, given that they do not deal constantly with matters of this nature. That is the reason that the amount is set at that level.

Mrs Edwardes: I thank the Attorney General for his comments.

Clause put and passed.

New clause 35 -

Mr McGINTY: At the bottom of page 9 and over onto page 10 of the Notice Paper is an amendment that seeks to insert a new clause that amends section 46. I move -

Page 44, after line 30 - To insert the following new clause -

35. Section 46 amended

(1) Section 46 is amended by deleting "Before" and inserting instead -

" (1) Subject to subsection (2), before ".

(2) At the end of section 46 the following subsection is inserted -

"

(2) In addition to the orders referred to in subsection (1), a court of summary jurisdiction prescribed for the purposes of section 43(1)(b) may -

(a) make such interim orders under Part 5A Division 2; or

(b) make such interim orders, or grant such injunctions, under section 235A,

as it considers necessary.

The purpose of this amendment is to ensure that a court of summary jurisdiction has the power to make interim orders or to grant injunctions in respect of property. For instance, it will ensure that there is the power to restrain the sale of property that might become the subject of a distribution. It was thought that this power was not expressed in the way in which the legislation was originally drafted.

New clause put and passed.

Clauses 35 to 44 put and passed.

Clause 45: Part 5A inserted -

Mrs EDWARDES: This is an exceptionally large clause. I wonder if we could take it bit by bit, because obviously some parts of it will involve extensive debate, particularly when we reach the definition section. In the first instance, the definition of child of a de facto relationship includes a biological child of both the de facto partners born before the commencement of the de facto relationship. We have talked about the fact that exnuptial children have been provided for under the Family Court Act for some time. Paragraph (b) states -

> a child adopted since the commencement of the de facto relationship by the de facto partners or by either of them with the consent of the other;

As the definition of de facto relationships includes same-sex relationships, the issue is how that provision is likely to operate. I take it that our current laws do not permit adoption by same-sex couples. I do not know where else that occurs. Therefore, if there is a legal adoption elsewhere by a same-sex couple, the child is automatically covered. Is the care, and the like, of that child automatically covered in any event? How is the care and protection of that child dealt with now? Paragraph (c) in the definition of a child of a de facto relationship refers to a child of a de facto partner whose de facto partner is presumed or proved to be the other parent of the child, and is consistent with the definition of a child of married partners.

The SPEAKER: Members can deal with this lengthy clause however they wish, but I will put only one question for the entire clause.

Mr McGINTY: The definition of a child in this Bill is in all substantial respects the same as the definition of a child for the purposes of a marriage as contained in the federal Family Law Act, except we are obviously relating it to a de facto relationship rather than a marriage. The definition here follows the same form. It seeks to include a child who might have been born before the relationship became a de facto one. It would place beyond any doubt the matter of a child who is adopted by the de facto partners, or by either with the consent of the other, or a child presumed to be a child of that partnership, by the operation of law. It follows the definition of a child for the purposes of marriage. Its relevance is in the maintenance and property provisions that come in later.

If there were no same-sex couples with an adopted child this section would have no impact. It is cast in wording that would pick that up should that become part of our law, which is what the Government has proposed.

Mrs Edwardes: Is it permitted elsewhere in Australia?

Mr McGINTY: I do not know the answer to that. It is not currently permitted in Western Australia. I am advised that I am incorrect in what I have said, and it is not currently prohibited. However, as a matter of practice the belief is that it has never happened.

Mrs Edwardes: I do not think your advice is right that the Adoption Act provides for the adoption of a child by same-sex couples.

Mr McGINTY: That was my belief.

Mrs Edwardes: I know that the Family Court does not restrict the custody and guardianship of a child for a same-sex couple when there is a connection to one of the parties. I was not aware that the adoption law provides or permits adoptions by same-sex couples in Western Australia.

Mr McGINTY: My first information was right, and the member's view is correct as well. I am told that, under the Adoption Act, same-sex couples in Western Australia cannot jointly apply to be prospective adoptive partners, as couples must be lawfully married or cohabiting in a heterosexual relation for at least three years before they can adopt. That relates to what is referred to as stranger adoption. This will come into effect only if an adoption is allowed - I presume anywhere in Australia.

Mrs Edwardes: Or anywhere in the world where there is legal adoption.

Mr McGINTY: Perhaps, yes. I am not sure of the extent to which that is allowed elsewhere.

Mrs EDWARDES: Mr Speaker, I seek your guidance. The Opposition has a number of amendments on the Notice Paper on this clause. Obviously the most convenient way to go through the Bill is page by page. Can I go back to any of the previous pages once an amendment has been moved and passed or rejected?

The SPEAKER: The amendments will be dealt with in the order they appear. The clause is still debateable after the amendments have been moved; the capacity to debate any part of the clause is not removed if we have considered earlier amendments. The only time we cannot go back is when we pass an amendment after an earlier amendment has been made. We cannot go back to the amendments, but we can go back and debate the clause.

Mrs EDWARDES: Can we move amendments and pass or reject them and still debate clause 45 at any point?

The SPEAKER: That is correct.

Mrs EDWARDES: I raise the matter of the definition of a financial agreement and the concerns of the legal profession that were raised originally by the Family Law Council of Australia when it looked at what was proposed. Its advice, particularly on insurance, is that it would open the legal profession to litigation, and obviously no-one would put themselves into that situation. For example, let us consider a man who had an expensive piece of property before the commencement of the relationship and wanted to enter into an agreement to deal with the distribution of property in the event that that relationship did not continue. A couple of matters will now arise in that circumstance. First, if he wishes to do that now, no lawyer is likely to give advice and/or draft such an agreement. Second, because the laws will in future prescribe financial agreements, and the Government proposes an amendment affecting former financial agreements, any financial agreement entered into prior to the legislation coming into effect could be set aside by the court. Therefore, any previous agreement is no longer hard and fast and is open to the court to set aside. That will create a real problem for people who thought they had an agreement on the distribution of their property. There will be an impasse until the problem is sorted out. De facto couples who have avoided their rights and responsibility up to date in the distribution of property because of the current law, and who know this legislation is coming up and decide to enter into a financial agreement so they can determine for themselves how they wish property to be distributed, will not now be able to do that. Therefore, the timing of the proclamation of this section of the Bill will create a problem, and might delay the introduction of this legislation.

Mr McGINTY: The member is right. The Family Law Council, while originally supporting this provision, then changed tack and indicated that the obligation being imposed on lawyers was too great and therefore recommended that its members not participate in the drafting of financial agreements. That matter is being discussed by the Commonwealth and the Family Law Council. I am led to believe that legislative changes at a commonwealth level might be made to the financial agreements as they apply in respect of marriages.

Debate interrupted, pursuant to standing orders.