BOOK REVIEWS

Family Law in Australia by H. A. FINLAY, B.A. (Lond.), LL.B. (Tas.), PH.D. (Mon.); Barrister-at-Law; Associate Professor of Law, Monash University. (Butterworths, 1979, 2nd Edition), pp. i-xxxii, 1-365. Cloth, recommended retail price $27.00 (ISBN: 0 409 35450 3); Paperback, recommended retail price $21.50 (ISBN: 0 409 35451 1).

Although officially this book is the 2nd edition of Finlay and Bissett Johnson's Family Law in Australia, it bears very little resemblance to that book, first published in 1972. As the author explains in his preface, the changes in the law since 1972 have been so profound and dramatic that an entirely new text was called for.

The new edition reflects not only in content but also in approach the changed philosophy of the Family Law Act 1975. Whereas the previous law was formalistic, laying stress on findings of matrimonial fault and legal definitions thereof, the new Act represents the modern, more flexible and interdisciplinary approach towards issues of custody and property. The new edition consequently lays a greater emphasis on the sociological and psychological aspects of the family.

The new edition centres on the Family Law Act 1975. The question of its constitutional validity, its ambit, its substantive provisions and the operation of the Family Court are at the core of the book. But, as the author points out, not all matters relating to the family are covered by the Act. There is in the first place the embarrassing gap caused by the decision of the High Court in *Russell* v. *Russell*[1] which still leaves an area for the operation of State legislation based on the Married Women's Property Act. There is also the area of adoption which in the more modern view must be seen as custodial rather than as a substitution for the natural parent/child relationship. The former is of declining importance in view of the fact that sooner or later proceedings for dissolution will be instituted giving the Family Court jurisdiction, although some State judges are fighting a valiant rearguard action to retain jurisdiction in such matters. The latter is a more serious gap to which Professor Finlay devotes a separate chapter.

Finally, there is the growing tendency of parties to establish family relationships without marriage. These can take the form of the stable factual union which is a marriage all but in name, or it can take the form of a sole parent/child relationship, usually the mother. Should the law deal with this situation by assimilating it to a marriage, or should it give the parties a flexibility in arranging their own marital conditions which married couples lack? Professor Finlay deals with this dilemma in Chapter 9 entitled "Families without Marriage" in a challenging and most interesting way. I venture to predict that this Chapter will be a growing one in future editions.

The new edition is written in a very readable style. It will be

[1] (1976) 134 C.L.R. 495.

intelligible not only to the lawyer but also to the intelligent layman. Having said this, there are a number of areas of disagreement and criticism which this reviewer would like to list, using the paragraph system adopted by Butterworths throughout the new edition.

In paragraph 144 the author states that the Family Court's jurisdiction in the Territories extends to matters that are otherwise closed to the Commonwealth, such as adoption. It is true, of course, that section 31(1)(c) declares that the Family Court has jurisdiction in matters arising under the law of a Territory concerning adoption *etc.*, but such jurisdiction cannot be exercised except by Proclamation made under section 40. To date, no such Proclamation has been made, although the question of investing the Family Court in the Australian Capital Territory with a wider territorial jurisdiction was referred to a committee chaired by Ellis J. by the Attorney-General on 8 December 1978. In the Northern Territory the Family Court has only been able to exercise jurisdiction in matters arising under the Family Law Act since 1 March 1979.

In paragraph 149 the author applauds the provision for dual commissions in the Family Court of Western Australia and the Family Court of Australia. Again, it has to be pointed out that no such commissions have as yet been issued and are unlikely to be issued whilst there are differences in conditions of tenure and remuneration. This is, of course, acknowledged by the author later on in the book in paragraphs 245 and 811.

Chapter 2 deals with the constitutional limits of Australian Family Law. As the author so rightly points out, the division of constitutional power is one of the great deficiencies of the Australian system. This deficiency has been accentuated by the decision of the High Court in *Russell* v. *Russell.* Yet this reviewer feels that too much has been read into the judgment of Mason J. in *Russell* v. *Russell.* As Stephen J. pointed out in *Dowal* v. *Murray*,[2] Mason J. in that case used the standard of "proceedings between the parties to a marriage" as an appropriate way of "reading down" the Act, not as an absolute standard of validity. The constitutional nexus with the marriage power can be supplied in other ways.

This is particularly relevant in relation to property matters. It may be that Professor Finlay is right in asserting in paragraph 208 that the Commonwealth Parliament does not have power to legislate with respect to the property rights of spouses and children *per se.* But this does not mean that the Commonwealth cannot reach such matters at all, or only in relation to "matrimonial causes". The deficiency of section 79 as originally enacted was that it dealt with the property of the parties whenever and however acquired. But property acquired for the purposes of the marriage or during the marriage could be dealt with under the marriage power. It might also be possible to sustain legislation which permitted provision to be made out of the property of

[2] (1979) 22 A.L.R. 577, 587; 4 Fam. L.R. 641, 649.

the parties for the sustenance of a party to the marriage: see the remarks of Murphy J. in *R.* v. *Ross-Jones, ex parte Beaumont.*[3]

In paragraph 227 the learned author refers to paragraph (f) of the definition of "matrimonial cause" by stating that paragraph (f) must be taken to apply only to proceedings between parties to a marriage. This may be a bit misleading. In a derivative sense Professor Finlay is no doubt correct: in the ultimate, proceedings under paragraph (f) must "relate to" proceedings under one of the other headings which are proceedings between the parties to a marriage. But the proceedings themselves need not be between parties to a marriage: they can involve an intervener under section 92, a third party to be enjoined under section 114(3) or a third party having factual care and control under section 61(4): see *In the Marriage of Robertson.*[4] A third party may also take the initiative by instituting a proceeding under paragraph (f) for the custody of a child of a marriage which has been the subject of a previous order or proceedings between the parties to a marriage: see section 61(4) as amended by Act No. 23 of 1979, and *Dowal* v. *Murray*[5] and the decision of the Full Court in *In the Marriage of E. (No. 2).*[6]

In Chapter 3 the author deals with marriage and its formation. The only criticism I have to offer of this fascinating Chapter is the author's failure to discuss the alleged requirements of the presence of an episcopally ordained priest in the celebration of a common law marriage. It is true that this requirement is historically dubious, but it was imposed by the House of Lords in *R.* v. *Millis*[7] and followed in Australia in *Hodgson* v. *Stawell*[8] and *R.* v. *Byrne.*[9] To show that it is not a mere historical curiosity one need only refer to the decision of Norris J. in *Kuklycz* v. *Kuklycz*[10] denying recognition to a marriage performed by an officer of the German Army in occupation of the Ukraine.

The author relies on *Tweney* v. *Tweney*[11] in paragraph 344 as illustrating the alleged presumption of validity raised by evidence of the celebration of a marriage extending to a presumption that any previous marriage of one of the parties has been validly dissolved. But this presumption has been given little weight in more recent cases such as *Chard* v. *Chard*[12] and *Walker* v. *Walker*[13] which require more discussion in this context than a passing reference in a footnote. Indeed, Watson J. in *In the Marriage of Watson and Kirby*[14] decried the use of "artificial rules as to presumptions and onus of proof" in matters

[3] (1979) 23 A.L.R. 179, 191; 4 Fam. L.R. 598, 608.
[4] (1977) 28 F.L.R. 129.
[5] (1979) 22 A.L.R. 577, 588; 4 Fam. L.R. 641, 651 *per* Jacobs J.
[6] (1979) 26 A.L.R. 376; 5 Fam. L.R. 244.
[7] (1843) 10 Cl. & Fin. 534; 8 E.R. 844.
[8] (1854) 1 V.L.T. 51.
[9] (1867) 6 S.C.R. (N.S.W.) 302.
[10] [1972] V.R. 50.
[11] [1946] P. 180.
[12] [1956] P. 259.
[13] (1969) 13 F.L.R. 490.
[14] (1977) 29 F.L.R. 301, 307.

involving questions of status: see paragraphs 515C and 515D in which the author cites that case in another context.

In Chapter 4 dealing with the legal consequences of marriage there is an interesting discussion of family planning showing that the law can extend to areas previously thought to be well beyond its reach. But the author, in praising South Australia in paragraph 423 for its abortion laws, is unfair to the common law position in New South Wales and Victoria which is in effect much more liberal than the South Australian legislation.

Following the decision by Sir George Baker P. in *Paton* v. *British Pregnancy Advisory Service Trustees*,[15] it may now be possible to state more positively in paragraphs 467 and 468 that there is no right to be born which is protected by the law.

Chapter 5 deals with applications for principal relief. It is pleasing to note that the author's misgivings about the decision by Lindenmayer J. in *In the Marriage of Manning*[16] were shared by the Full Court.[17] The position argued for by the author in paragraph 515D is now law.

I do not, however, share the author's enthusiasm for the decision of Frederico J. in *In the Marriage of Deniz*,[18] referred to in paragraph 524. That decision seems to open up the type of considerations raised in annulments before the Roman Rota about mental reservations on consummation or the procreation of children. Subsequently, in *In the Marriage of Suria*,[19] Frederico J. held that a marriage entered into in the knowledge of both parties that its primary purpose was to allow the husband to enter Australia was valid. I do not think that the validity of a marriage should be based on such considerations. Since the law of nullity and dissolution have come so close together in consequences, policy would seem to indicate that fraud, duress and mistake should be narrowly defined and the parties in situations such as *Deniz* and *Suria* referred to their remedies under section 48. Indeed, the argument could be raised whether there is any need to provide for annulment of marriage on the ground of lack of consent.

One problem to which the author does not refer at all is the annulment of a "marriage" between persons of the same sex. As the author points out following *Corbett* v. *Corbett*[20] such a relationship does not come within the definition of "marriage" at all. But what then is the appropriate relief to be granted to a party whose partner turns out to be of dubious sex? Unlike its English counterpart, the Marriage Act does not provide that this is a ground for annulment. Nor would a declaration under section 113 be appropriate if the relationship is not even of the nature of a marriage. In *In the Marriage of O'Shea*, unreported, 20 April 1979, Bell J made the decree of nullity in such a

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[15] [1979] Q.B. 276.
[16] (1977) 29 F.L.R. 418.
[17] (1978) 32 F.L.R. 481.
[18] (1977) 31 F.L.R. 114.
[19] (1977) 29 F.L.R. 308.
[20] [1971] P. 83.

situation on the ground of mistake of identity of the other party, because the applicant thought the "husband" was a male. Of course, if the relationship was a "void marriage" the homosexual partner could claim rights of maintenance and property settlement. The better view, it is submitted, is that such a relationship, like polygamous relationships at common law, is not a "marriage" at all and as such outside the scope of the Family Law Act.

In paragraph 557 the learned author takes issue with the views expressed by this reviewer on the effect of section 48(3). Professor Finlay takes the view that "if the court of its own perception upon the evidence comes to a feeling of satisfaction of the likelihood of cohabitation being resumed, it must refuse a decree" under section 48(3). This view has now been supported by the Full Court in *Bates* v. *Sawyer*.[21] The contrary view, which was supported by Watson J. in *In the Marriage of Todd (No. 2)*,[22] was that the party resisting the making of the decree should establish the existence of a bilateral intention on the part of both spouses to resume living together. In any event, as the author points out, cases where section 48(3) can be successfully invoked are exceedingly rare. Even if a reasonable chance of reconciliation is established, the proper approach is to adjourn and refer to counselling rather than an outright refusal of the decree and dismissal of the application.

In paragraph 563 the learned author deals with the confusing situation which has arisen in relation to section 14(6), the two year marriage. To complicate the disagreement between Fogarty J. in *Nuell* and Barblett J. in *Birch*, one must now also add the third view of Connor J. in *In the Marriage of Philippe*,[23] which is even more stringent than that of Barblett J. It is disappointing that the learned author does not give us any guidance as to which view is correct. This reviewer has expressed the view elsewhere that the approach by Fogarty J. in *Nuell* is the more realistic and suspects that in the large number of unreported instances in which section 14(6)(b) is invoked, *Nuell* is the precedent in fact followed, at least in the Family Court of Australia. This reviewer has also submitted elsewhere that section 14(6) is a useless provision which ought to be removed from the Act. If anything, public policy should encourage the early dissolution of marriages hastily entered into.

Chapter 6 deals with the legal position of children. The author deals with the question to what extent State jurisdiction still applies to children. There is no doubt that ex-nuptial and step-children fall outside the scope of the Family Law Act, except to the limited extent set out in section 5(2). It is also clear that litigation concerning a child of a marriage between persons who are not parties to the marriage does not come within paragraph (c)(ii) of the definition of "matrimonial cause". However, if there have been previous proceedings between parties to a marriage concerning that child, proceedings involving third parties will

[21] (1977) 30 F.L.R. 554.
[22] (1976) 25 F.L.R. 260, 263.
[23] (1977) 34 F.L.R. 436.

come within paragraph (f) of the definition of "matrimonial cause": *Dowal* v. *Murray*.[24] If the proceedings are no longer pending, it is not yet clear whether the proceedings by a third party can be instituted by way of intervention under section 92: *In the Marriage of Waters*[25] or by way of proceedings under section 64(3) as suggested by Strauss J. in *In the Marriage of E. (No. 2)*.[26]

The question then arises whether there is any State jurisdiction left in relation to the guardianship and custody of children of a marriage, even if third parties are the applicants or respondents. The learned author in paragraphs 633-638 assumes that such jurisdiction continues, at least until proceedings are brought in the Family Court. Unfortunately, he does not refer to the decision of Powell J. in *Meyer* v. *Meyer*,[27] the report of which may not have been available to him in time, in which his Honour at page 236 held that the Family Law Act covers the field of guardianship and custody of children of a marriage, and consequently deprived the State courts of jurisdiction to make such a child a ward of court. As to whether that statement should be cut down: see the remarks of Waddell J. in *Cook* v. *Cook*.[28]

In paragraph 643 the learned author tries to reconcile paragraphs (a) and (b) of section 64(1) by saying: "Although both of these provisions are given equal status in the section, the wishes of the child, if in conflict with what the court perceives to be most conducive to his welfare, must give way if the child's welfare is to be paramount". Such an interpretation, it is submitted, would reduce paragraph (b) to meaninglessness. The only logical interpretation, it would seem, is to treat each provision as independent of the other and to give the wishes of a child over 14 paramountcy over his or her welfare except in the case of "special circumstances". Or to turn the proposition around, the mere fact that the court disagrees with the child as to what his or her welfare requires, are not "special circumstances".

In paragraph 647 the learned author quite rightly points out that the mere fact that a party has committed adultery is not sufficient to deprive that party of custody. But it is ironic to cite *In the Marriage of Lonard (No. 2)*[29] for that proposition. For in that case Hogan J. did deprive a mother of the custody of a child because she was living in a de facto relationship because "the court should not give its official sanction as representative of the community to conduct which, in my view, still does not conform to the concepts of conventional morality". This certainly amounts to drawing an adverse inference from the mere fact of such an association and it would seem that the battle fought by Professor Finlay, with which this reviewer happens to agree, is not yet totally won. In this connexion there is no discussion of the problem of

[24] (1979) 22 A.L.R. 577; 4 Fam. L.R. 641.
[25] (1978) 32 F.L.R. 492.
[26] (1979) 26 A.L.R. 376, 415; 5 Fam. L.R. 244, 278.
[27] (1978) 4 Fam. L.R. 233.
[28] (1978) 4 Fam. L.R. 482, 486.
[29] (1977) 30 F.L.R. 529.

the homosexual parent which has been raised in a considerable line of cases: *In the Marriage of Spry.*[30]

Another battle yet to be won is the elimination of religious influences in the choice of custodian. In paragraph 646 the learned author on the basis of decisions such as *Evers* v. *Evers*[31] and *Wellington* v. *Wellington*[32] noted a trend more tolerant towards the "exclusive sects" than in the past. Since then, however, the Family Court has twice denied custody to otherwise unimpeachable parents because they belonged to "exclusive sects": *In the Marriage of Plows;*[33] *In the Marriage of Paisio*[34] and see the decision of Toose J. in *Kennard* v. *Kennard.*[35]

In view of the decision by the Full Court in *In the Marriage of Palmer and Chapman,*[36] it is no longer correct to state, as does the author in paragraph 667, that a mother cannot unilaterally change the name of a child. Prima facie a custodian can subject to the right of the court to intervene.

Chapter 7 deals with maintenance and property. Paragraph 720, like the decisions to which the author refers, leaves the reader undecided whether non-financial misconduct is still relevant in such matters. He neglects to point out that in *Issom* v. *Issom*[37] a deserting wife in need of support and not supported by her paramour was denied maintenance on what would appear to be primarily moral considerations. The Full Court in *Soblusky*[38] cited *Issom* with apparent approval as an example of a rare case where non-financial misconduct might be relevant. It is therefore a bit more than a bare and slender speculative possibility.

A more substantial criticism of Chapter 7 is the somewhat disappointing discussion of section 79. This section is of crucial importance in the administration of the Act, yet the learned author devotes only 5 pages of his book to it. There is no discussion of the problems caused by superannuation schemes and discretionary trusts, or of the question whether there is a presumption that half is equity: *Potthoff,*[39] or the vexed question of the date of valuation: separation or date of hearing? There is also the question of whether a wife who works in the home can be said to make a contribution to her husband's business assets. In discussing the priority between State and Federal proceedings in paragraphs 7122-7124, it would have been of interest to have read the author's comments on the decision of the South Australian Full Court in *Tansell* v. *Tansell.*[40]

Chapter 8 deals with the courts which administer the Family Law

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[30] (1977) 30 F.L.R. 537.
[31] (1972) 19 F.L.R. 296.
[32] (1976) 1 Fam. L.N. No. 30.
[33] (1979) 4 Fam. L.R. 764.
[34] (1978) 4 Fam. L.R. 689.
[35] (1979) 34 F.L.R. Pt 2 iv.
[36] (1978) 34 F.L.R. 405.
[37] [1977] F.L.C. 76, 283.
[38] (1976) 28 F.L.R. 81.
[39] (1978) 30 F.L.R. 571.
[40] (1977) 19 S.A.S.R. 165.

Act. The material in paragraph 885 has now been overtaken by the amendments in Act No. 23 of 1979 which make it clear that an appeal under section 96 is by way of re-hearing. It would still be interesting to know whether the Full Court in *Sutton (No. 2)* was right. Asche S.J. did not think so, and his arguments were impressive.

Chapter 9 is a most interesting chapter on families without marriage. It includes a discussion of polygamous marriages even though they are by virtue of section 6 "marriages" if validly celebrated outside Australia. Having been involved in the furore surrounding that section in 1975, I can state that the fear was not so much that the section would permit the celebration of such marriages in Australia, but that it would permit Australian tourists to marry polygamously abroad and return with their multiple brides. Apart from the difficulty involved in conversion to Islam which the budding polygamist would have to undertake in order to marry validly according to that religion, there is also the law of bigamy which would apply to persons domiciled in Australia. If the first polygamous marriage is valid according to Australian law, the second will be bigamous except to persons who by their personal laws are permitted to contract polygamous marriages. Hence the Australian polygamist will not only have to convert, he must also emigrate.

Finally, Chapter 10 deals with adoption. This is mainly a matter of statute law and procedure. With a few notable exceptions, the adoption process has been remarkably non-litigious. It should be noted, however, that the nature of adoption is changing. The old ideal of assimilating the child to a natural child which was carried to the length of hiding its parentage and not disclosing to the child that it was adopted, is now being abandoned. Access to the natural parent is increasingly permitted and even encouraged. In that case, the process is more closely akin to custody.

These comments is no way detract from the valuable work Professor Finlay has done. Despite some criticism and disagreement, I find his book most valuable. It is also very readable and I commend it whole-heartedly not only as a student textbook but also as a text for the intelligent layman who wishes to know more of our Family Law.

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