

*Australian Family Property Law* by I. J. Hardingham and M. A. Neave. (The Law Book Co. Ltd, Sydney, 1984.)

Hardingham and Neave have undertaken the first comprehensive account of property law as it applies to families in Australia. Despite the Australian emphasis ample reference is made to English materials. The notion of 'family' adopted in the text extends beyond the family constituted by marriage to that associated with de facto relationships. Occasional reference is made where apt to the law as it applies to homosexual cohabitants.

The book contains much extremely valuable material presented in the care and analytical but eminently readable style which is common to both Hardingham and Neave. Many topics in the text are not to be found collected in any other writings. Complex areas are presented with clarity and in their totality. The authors have gone to a great deal of trouble in several places to present resumés of the state of the law following upon discussion of particularly difficult topics. These 'lists' of propositions are an extremely useful point of departure for practitioners faced with practical problems, as well as a welcome distillation of problem areas for other legal readers. It is only to be regretted that there is some serious loss of access to the wealth of information contained in the text due to the circumstance that the index is decidedly second-rate. Another matter for regret to the academic reader and to the student is that the mass of literature referred to in the footnotes has not been presented in a bibliography.

The text opens with an historical account of the respective rights of married persons until the enactment in England of the married women's property legislation late last century. These Acts were adopted by the Australian colonies and dominated the property rights of married people until federal laws in the middle of this century took up the position when principal relief was to be sought. Though the enactment of the Family Law Act in 1975 perturbed the situation somewhat in relation to state law, the real challenge to the hegemony of the state laws prior to principal relief came with the enactment of s. 4(1)(ca)(i) of the Family Law Act in the Family Law Amendment Act of 1983. Section 4(1)(ca)(i) designated as a new matrimonial cause (and thus under s. 8 to be exclusively determined under the Act) proceedings in relation to the property of the parties 'arising out of the marital relationship'. The authors throughout the text maintain the thesis that because, in their view, most litigation between husband and wife may be said to 'arise out of the marital relationship' the effect of the amendment is to cause the married women's property legislation to be superceded by the Family Law Act.<sup>1</sup>

It is submitted that this view seriously overestimates the purport and the effect of s. 4(1)(ca)(i). It is quite generally accepted that the limited aim of the new provision was to enable Family Law Act proceedings to be initiated at the point of time of marriage breakdown rather than obliging the parties to wait until principal relief could be applied for. It was never the intention to extend federal property jurisdiction to the situation of ongoing marriages and consistently with the very restricted aim of the amendment, s. 79 of the Family Law Act, the principal source of the Court's power to adjust the property rights of spouses, was left unaltered. Section 79 still contemplates that the parties to a marriage which has irretrievably broken down may come to Court on essentially one occasion so that their property may be divided between them.<sup>2</sup> Section 78, the declaration power, similarly remained unaltered by the 1983 amendments. That section was held repeatedly to have no independent role apart from enabling the Court to declare the parties interests in property under the general law preliminary to making an order under s. 79.<sup>3</sup> Moreover while it may be true in a purely statistical sense that most litigation between husband and wife is associated with problems within the marriage, it by no means follows that all such litigation arises out of the marital relationship. Disputes may arise in the same way as between unmarried persons involving title to specific items of property. Moreover, the real motive behind the need to resolve matters of property as between

<sup>1</sup> *E.g.* [316] [402] [1802] [1805]

<sup>2</sup> S. 79A was amended so as to enlarge the powers of the Court in relation to variation of property orders but essentially the scheme of the Act remains to allow the parties one only order for distribution of their property.

<sup>3</sup> *Good and Good* (1982) F.L.C. 91-249, *Ramsey and Ramsey* (1983) F.L.C. 91-323.

married persons may not in fact involve any marital breakdown but may rather be aimed at closing out a third party such as a mortgagee or other creditor or the trustee in bankruptcy. It would be difficult to regard such litigation as arising out of the marital relationship. Indeed, there is a serious omission in the failure to take account of such authorities as the High Court decision in *Perlman v. Perlman*<sup>4</sup> where it has been held that the notion of proceedings 'arising out of the marital relationship' is to be construed rather narrowly so that even where the marriage has irretrievably broken down litigation that follows need not arise out of the marital relationship. The tendency to read s. 4(1)(ca)(i) strictly has moreover been affirmed on a number of occasions since publication of the book.<sup>5</sup>

In the result the authors have, in this reviewer's submission, underestimated the tenacity of state jurisdiction. Even in the context of s. 4(1)(ca)(ii), which deems property proceedings 'in relation to principal relief proceedings' to be a matrimonial cause, the authors give little space to that body of case law which even after divorce insists that the nexus may be absent between the property proceedings in question and the principal relief proceedings which have taken place.<sup>6</sup> In particular, the judgments in the High Court in *Perlman* throw significant doubt on the authors' conclusion, at [1805], that 'nearly all matrimonial property disputes which go to Court involve proceedings arising out of marital relationship or can be said to relate to proceedings for principal relief.'

This writer's disagreement with the views held by the authors on the survival of state jurisdiction may not, of course, be shared by other commentators. No reviewer, however, could fail to agree that the text contains a great deal of very valuable material which often is unavailable in any other source. There is an excellent account, for example, of the manner in which legal relations within a family fall to be regulated by the law of contracts (Chapter 5). The topical issue of public policy with its changing application to cohabitation contracts is deservedly accorded ample space.<sup>7</sup> A criticism which may, however, be offered here is that the discussion of the cases relating to public policy which may cause the vitiation of an agreement by husband and wife seems to stop at 1938.<sup>8</sup> An up-to-date account of the law would need to take cognisance of the fact that parties to a marriage may at any time under s. 86 of the Family Law Act enter into and enforce agreements of which the prospect of separation is an essential aspect, so that it can no longer be said that the only valid agreement is 'a contract made when the parties have decided to separate'.<sup>9</sup> Chapter 6 contains an admirable analysis of the complex principals relating to the law of trusts as it has been applied to cohabitants. This is a highly organised and extremely readable account of the multiplicity of approaches which are present in the case law as well as the various factors on which will depend the outcome of a dispute in a given jurisdiction. Resulting trusts, for example, are considered not only in relation to the English position but within Australia on a state by state basis. Lawyers who find themselves treading in this legal quagmire will find the account in Hardingham and Neave comprehensive and lucid.<sup>10</sup> Since the time of publishing the High Court has handed down its decision in *Claverly v. Green*<sup>11</sup> wherein the Court defined the notion of contribution to purchase price.

Both the English and Australian positions in relation to constructive trusts are comprehensively detailed, case by case. The law is then extracted from this mass of precedents in a series of propositions constituting one of the valuable 'lists' to which this reviewer has already referred. In the list is a series of tentative propositions which represent the authors' understanding of the state of law.

The constructive trust is contrasted in Chapter 7 with the equity of acquiescence. Special attention is devoted to some recent English decisions which may lead to the latter becoming in the future a

<sup>4</sup> (1984) F.L.C. 91-500. The case is referred to on unrelated aspects. See also *Smith and Smith* (1984) F.L.C. 91-525.

<sup>5</sup> *Re Ross-Jones J.: Marinovich and Marinovich: Ex Parte Green* (1984) F.L.C. 91-555. *B and B* (1985) F.L.C. 91-610.

<sup>6</sup> *Grist v. Grist* (1979) F.L.C. 90-683, *Wingate and Towns* (1979) F.L.C. 90-624. *Perlman v. Perlman* (1984) F.L.C. 91-500.

<sup>7</sup> [517] to [527]

<sup>8</sup> [526] to [527]

<sup>9</sup> At [527]

<sup>10</sup> [609]ff.

<sup>11</sup> (1984) F.L.C. 91-565. Proceedings at first instance are noted at [626].

more important method of recognising property rights. Discussion such as that in Chapter 7 of proprietary estoppel and equitable liens are particularly valuable given the dearth of published material setting these topics in the context of the principles of family law.

Specific problems which recur in family litigation are considered in Chapter 8. This is organised into discrete topics such as wedding presents, gifts between the parties, housekeeping savings, bank accounts, life insurance and co-ownership of land. Practitioners will find this format extremely helpful. One might, however, question the decision to mingle Family Court precedents with general law authorities in the discussion, as in the former case the Court's wide discretion tends to detract from any habit to analyse precisely general legal principals. Moreover the problems arising out of co-ownership deserved considerably more space than the authors chose to devote, particularly in the light of important recent decisions on the topic both at state law and under the Family Law Act.

Chapter 9 is devoted to a consideration of the difficult matter of enforceability of equitable interests against third parties. This is a welcome account of a complex topic which has received little attention so far in academic writings.

A potpourri of topics are collected in Chapter 10 under the title of non-proprietory solutions to disputes. This chapter contains a good deal of important material including the occupancy rights of *de factos*, the assertion of contractual rights against third parties and a review of the law relating to *quantum meruit* as a means of establishing rights and obligations. The authors also go into some esoteric aspects of the law such as the Court's ability to override property rights in the interest of the welfare of children.

In Part 3 of the text the authors review the discretionary jurisdiction to vary property rights as between married parties under state law. This reviewer has already expressed disagreement with the essential proposition that provisions such as s. 161 the Marriage Act 1958 (Vic.) are 'of historical interest only',<sup>12</sup> and that they affect only 'a small residual category' of disputes between husband and wife.<sup>13</sup> It is further submitted that in relation to s. 161 the authors' confidence is unwarranted in the view that the joint tenancy in the matrimonial home created by s. 161 is merely an adjudicatory right, which is effective only after an order has been made. Section 161(4)(b) specifically states that the parties are presumed 'to hold or to *have held*' the home as joint tenants. There is accordingly some uncertainty concerning the nature of the right conferred by s. 161. This point is hardly an insignificant one as on it turns the right to a half share of the unregistered spouse where the title to the home is registered only in the name of the other party.

A further instance where the authors have underestimated the tenacity of state jurisdiction is in relation to the survival of the testators' family maintenance jurisdiction. Section 79(8) was inserted into the Family Law Act in 1983 so as to enable proceedings commenced under the Act during the lives of the parties to a marriage to be continued after one of them dies. The authors, in keeping with their view of the state married womens' property legislation conclude that 'where property division proceedings under the Family Law Act are pending at the time of the death of one of the parties, State testator's family maintenance jurisdiction is excluded as between the surviving party and the estate of the deceased party.'<sup>14</sup> Since publication, however, the Full Court of the Family Court has in *Smith and Smith*<sup>15</sup> decided that testators' family maintenance jurisdiction is not ousted by the 1983 amendments of the Family Law Act.

The maintenance and property provisions of the Family Law Act are subject to an extremely comprehensive review in Part 4 of the book. The discretionary jurisdiction (s. 79) is analysed under some forty-one different exhaustive headings. There is a nice analysis of the impact of the High Court decision in *Mallett v. Mallett*<sup>16</sup> and such difficult aspects as the new s. 85A have been canvassed exhaustively. Unfortunately here, as in other places, the text has befallen the fate common to family law writings and, on the matter of third parties, has become out of date since the High Court's decision in *Re Ross-Jones J: ex parte Green*<sup>17</sup> which restricts the Family Court's ability to make interim orders against third parties.

<sup>12</sup> [895] to [899] re bank account money and [8102] to [8109] re fraud, undue influence and unconscionability.

<sup>13</sup> At page 263.

<sup>14</sup> *Ibid.*

<sup>15</sup> At [1122].

<sup>16</sup> (1984) F.L.C. 91-525.

<sup>17</sup> (1984) F.L.C. 91-507.

Similarly, the very useful discussion of superannuation, at [1388] ff., predates the animated debate within the Full Court of the Family Court early in 1985, so that, while it was true at the time of publishing that the Court had 'warned against the general use of mathematically-formulated shares of unvested superannuation entitlements',<sup>18</sup> the Full Court has since declared itself in *Prestwich* and *Prestwich*<sup>19</sup> and *G* and *G*<sup>20</sup> anxious to embrace such an approach. The debate seems to have now shifted to finding the most acceptable formula, on the basis that some certainty would seem superior to the traditional vagueness previously favoured in the decisions.

The time for bringing proceedings is considered in Chapter 14. The principal area of uncertainty here surrounds the introduction in 1983 of s. 4(1)(ca)(i) to fill the hiatus in property jurisdiction between separation and the availability of principal relief proceedings. This reviewer disagrees with the learned authors in a number of respects. First it is submitted that they too readily conclude that s. 4(1)(ca)(i) is 'open to the legislator'<sup>21</sup> (i.e. valid). The contrary view that property legislation can be referred only to the matrimonial causes power in the constitution has prevailed since the High Court decided *Lansell v. Lansell*<sup>22</sup> in 1964. It was affirmed in *Russell v. Russell*,<sup>23</sup> and while the Full Court of the Family Court has been prepared to ground a property jurisdiction in the marriage power in *Miller* and *Miller*<sup>24</sup> only two judges of the High Court have seen fit to do so.<sup>25</sup> Section 4(1)(ca)(i) can serve little useful purpose unless it can be referred to the marriage power as it is accepted that the matrimonial causes power functions only in association with principal relief proceedings. Secondly, even were the validity of s. 4(1)(ca)(i) to be upheld by the High Court, it does not follow that the section confers powers on the Family Court as broad as the learned authors assume. They regard the concept of a jurisdiction in matters 'arising out of the marital relationship' as 'broad and vague'.<sup>26</sup> This commentator has already expressed surprised that no reference was made in this regard to the High Court's decision in *Perlman v. Perlman* as the Court there was inclined to read rather strictly the notion of proceedings 'arising out of the marital relationship'.

The recently enlarged jurisdiction of the Family Court to make property orders on the death of a party to a marriage is a potentially vast topic which is accorded rather scant space. Some analysis of the interrelationship between an established state jurisdiction and the new federal provisions would have been welcome. The Court will need, for example, to review its previous attitude of unconcern for the beneficiaries of a spouse's estate<sup>27</sup> now that it is put in the position of determining proceedings to which one party is the legal personal representative of a party to the marriage.

A very good analysis of the law relating to maintenance agreements in Chapter 19 is followed by an excellent and thorough account of the law of maintenance. The final chapter reviews enforcement mechanisms in respect of property and maintenance orders under the Family Law Act. Unfortunately, only perfunctory reference is made to the very substantial body of case law forming the law of contempt.

This reviewer has expressed disagreement with some of the views expressed in *Australian Family Property Law*. Debates between academics are by no means unusual, however, and at the end of the day it must be said that Hardingham and Neave have prepared an erudite and truly admirable work which is the most comprehensive account of Australian family property law yet attempted. Family law has, especially in the last decade, been characterized by rapid change. As that tendency does not seem to be abating, we await a second edition of *Australian Family Property Law* with interest.

DOROTHY KOVACS\*

<sup>18</sup> (1984) F.L.C. 91-555.

<sup>19</sup> At [1398].

<sup>20</sup> (1984) F.L.C. 91-569.

<sup>21</sup> (1984) F.L.C. 91-582.

<sup>22</sup> [1404].

<sup>23</sup> (1964) 110 C.L.R. 353.

<sup>24</sup> (1976) F.L.C. 90-039.

<sup>25</sup> (1983) F.L.C. 91-328.

<sup>26</sup> Mason & Murphy JJ. *GAZZO v. Comptroller of Stamps* (Vic.) (1981) F.L.C. 91-101.

<sup>27</sup> [1406].

<sup>28</sup> [1408] and [1409].

<sup>29</sup> *Lawrie and Lawrie* (1981) F.L.C. 91-102.

\* Senior Lecturer in Law, Monash University.